

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON D.C.

FRAPORT AG FRANKFURT AIRPORT SERVICES WORLDWIDE

Applicant

v.

REPUBLIC OF THE PHILIPPINES

Respondent

(ICSID Case No. ARB/03/25)

(Annulment Proceeding)

DECISION ON THE APPLICATION FOR ANNULMENT OF FRAPORT AG
FRANKFURT AIRPORT SERVICES WORLDWIDE

Members of the *ad hoc* Committee

Judge Peter Tomka (President)
Judge Dominique Hascher
Professor Campbell McLachlan QC

Secretary of the Committee

Ms. Eloïse Obadia

Representing the Applicant:

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Representing the Respondent:

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Former Solicitor General
Mr. Alberto Agra, (until June 2010)
Former Solicitor General
Mr. Jose Anselmo I. Cadiz
Solicitor General (from August 2010)
and
Justice Florentino P. Feliciano (Ret.)
Sycip Salazar Hernandez & Gatmaitan
and
Ms. Carolyn Lamm
Ms. Abby Cohen Smutny, and
Ms. Andrea Menaker
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Washington, D.C.

Date of Dispatch to the Parties: 23 December 2010

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I. PROCEDURAL HISTORY

1. On 6 December 2007, Fraport AG Frankfurt Airport Services Worldwide (“*Fraport*”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“*ICSID*” or “*the Centre*”) an application in writing requesting the annulment of the Award, dated 16 August 2007 in the arbitration proceeding between Fraport and the Republic of the Philippines (“*the Philippines*” or “*the Respondent*”), (ICSID Case No. ARB/03/25). The Award was rendered by the Arbitral Tribunal composed of Mr. L. Yves Fortier, C.C., Q.C. (a national of Canada), Dr. Bernardo M. Cremades (a national of Spain), and Professor W. Michael Reisman (a national of the United States).

2. The Application was submitted within the time period provided for in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (“*the ICSID Convention*”). In its application, Fraport seeks annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention, specifically claiming that:

1. the Tribunal had manifestly exceeded its powers (Article 52(1)(b));
2. there had been a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and
3. the Award had failed to state the reasons on which it was based (Article 52(1)(e)).

3. The Acting Secretary-General of ICSID registered the Application on 8 January 2008 and on the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted the Notice of Registration to the parties. A copy of the Application had been sent to the Philippines on 6 December 2007, when the ICSID Secretariat acknowledged receipt of the Application.

4. By letter of 14 April 2008, in accordance with Rule 52(2) of the Arbitration Rules, the parties were notified by the Acting Secretary-General of ICSID that an *ad hoc*

Committee (“*the Committee*”) had been constituted, composed of Judge Dominique Hascher (a national of France), Professor Campbell McLachlan Q.C. (a national of New Zealand), and Judge Peter Tomka (a national of the Slovak Republic), and that the annulment proceeding was deemed to have begun on that date. The parties were also notified that Ms. Eloïse Obadia, Senior Counsel, ICSID, would serve as Secretary of the Committee. By letter of 18 April 2008, the parties were notified that the Members of the Committee had designated Judge Peter Tomka as President of the Committee.

5. The first session of the Committee was held, with the agreement of the parties, in the Peace Palace at The Hague on 11 June 2008. Several issues of procedure were discussed, agreed upon and decided. The agreements and decisions were recorded in the Minutes.

6. On 9 July 2008, the Respondent submitted to the Committee an application for an order disqualifying one of the Applicant’s counsel. After providing the parties and the counsel in question with the opportunity to submit their comments and replies on the request and after having deliberated, the Committee issued, on 18 September 2008, the Decision on Application for Disqualification of Counsel. The Committee dismissed the application and reserved all questions concerning the costs and expenses of the Committee and of the parties in connection with that application for subsequent determination, together with the Application for Annulment.

7. In accordance with the agreed schedule, the Applicant filed its Memorial on 25 September 2008, and the Respondent filed its Counter-Memorial on 15 January 2009. In the second round of the written procedure, the Applicant filed its Reply on 15 April 2009, and the Respondent filed its Rejoinder on 15 July 2009.

8. On 2 April 2009, Fraport filed an Urgent Request to the Committee for an order of protection in connection with the initiation by the Philippines’ Department of Justice of criminal prosecution of “Fraport’s Philippine arbitration counsel.” The Committee, after having provided opportunity to the parties to submit their observations and comments, issued, on 3 June 2009, its Decision on the above request. The Committee decided that

“[u]nder the circumstances as they ha[d] been presented to it, the Applicant ha[d] not satisfied the Committee that the requested relief [was] justified. Its request [was] therefore dismissed.” The Committee further decided that “[a]ll questions concerning the costs and expenses of the Committee and of the parties, in connection with this Request [were] reserved for subsequent determination, together with the Application for Annulment.”

9. As agreed, a three-day hearing was held at the seat of the Centre in Washington D.C. on 24, 25 and 26 August 2009, at which counsel for both parties presented their arguments and submissions, and responded to questions from the Members of the Committee. Present at the hearing were:

1. The Members of the Committee: Judge Peter Tomka, Judge Dominique Hascher, Professor Campbell McLachlan, Q.C., and the Secretary of the Committee Ms. Eloïse Obadia;
2. Fraport’s representatives: Mr. Peter Henkel, Ms. Aletta von Massenbach and Ms. Dörte Ochs of Fraport AG Frankfurt Airport Services Worldwide; Dr. Sabine Konrad of K&L Gates LLP; Mr. Eric Schwartz of King & Spalding LLP; Mr. Michael D. Nolan, Mr. Edward Baldwin, Mrs. Elitza Popova-Talty and Mr. Frederic Sourgens of Milbank, Tweed, Hadley & McCloy, LLP; Ms. Lesley Benn of Shulman, Rogers, Gandal, Pordy & Ecker, PA; Mr. Cesar P. Manalaysay and Mr. Edgardo G. Balois of Siguion Reyna Montecillo and Ongsiako.
3. The representatives of the Republic of the Philippines: Mr. Alfonso Cusi, Former General Manager, Manila International Airport Authority; Ms. Gloria Victoria Yap-Taruc and Ms. Ellaine Rose A. Sanchez-Corro, Assistant Solicitors General, Office of the Solicitor General of the Republic of the Philippines; Justice Florentino P. Feliciano (Ret.) of Sycip Salazar Hernandez & Gatmaitan; Ms. Carolyn B. Lamm, Ms. Abby Cohen Smutny, Ms. Andrea Menaker, Ms. Anne D. Smith, Mr. Stephen Ostrowski, Mr. Hansel Pham, Mr. Rahim Mooloo, Mr. Amr Abbas, and Ms. Erin Vaccaro of White & Case, LLP.

10. On 15 October 2009, the parties submitted their statements of costs.

11. On 3 August 2010, the Respondent informed the Committee that the Arbitral Tribunal of the International Chamber of Commerce rendered an Award, dated 22 July 2010, in *Philippine International Air Terminals Co., Inc. v. Government of the Republic of the Philippines* (“ICC Award”), and sought the Committee’s leave to submit that Award for the Committee’s consideration. The Applicant, in its letter of 5 August 2010, took issue with certain statements in the Respondent’s request, concluding that “if the *ad hoc* Committee wishes to include the ICC award in the record, Fraport requests an opportunity briefly to comment on the award and in particular its reliance upon Philippine legal materials not in the record of this [annulment] proceeding.” The Committee subsequently invited the parties, on 13 August 2010, to elaborate in writing why the Award of 22 July 2010 would be relevant for the annulment proceeding, as well as to provide the legal basis for admitting this Award into the annulment record. Both parties availed themselves of this opportunity and filed within the prescribed time limits their submissions, the Philippines on 23 August 2010, and Fraport on 31 August 2010. The Committee duly considered their submissions at its meeting on 6 September 2010 and informed them, through a letter from its Secretary, dated 7 September 2010, of the following decision:

“The Committee has decided not to admit the ICC Award into the annulment record in view of the limited nature of the annulment proceeding. The function of the Committee is to review the conduct of the Arbitral Tribunal which rendered the challenged decision and the decision itself. As the ICC Award had not been in front of the ICSID Arbitral Tribunal in the *Fraport v. The Philippines* case, being non-existent at that moment, it could not have been taken into account by the ICSID Tribunal. The Committee is of the view that its task is to review the Award rendered by the ICSID Tribunal only in light of the original arbitration evidentiary record.”

12. The Committee declared the proceeding closed on 22 October 2010, pursuant to Arbitration Rules 53 and 38(1).

13. During the course of the proceedings, the Members of the Committee deliberated by various means of communication, including meetings in Washington on 27 August 2009, at The Hague on 3 November 2009, in Washington on 11 April 2010, in

Paris on 28 June 2010, and in The Hague on 6 September 2010, and have taken into account all pleadings and documents before them.

II. THE DISPUTE

14. The dispute has arisen out of an investment made by Fraport, which is a German company, in a Philippine company, Philippine International Air Terminals Co., Inc., later known as PIATCO.

15. In 1997, the Philippine government conferred upon PIATCO the concession rights for the construction and operation of an international passenger terminal at Manila's principal airport, known as "Ninoy Aquino International Airport Passenger Terminal III" ("*Terminal 3*"). The Concession Agreement was entered into on 12 July 1997 between PIATCO and the Philippine government, represented by its Secretary of Transportation and Communication.¹

16. In 1998, the terms of the Concession Agreement were renegotiated in order to allow PIATCO to obtain financing from certain interested lenders. The Amended and Restated Concession Agreement ("*ARCA*") was signed by PIATCO and the Secretary of the Department of Transportation and Communication on 26 November 1998.² Three supplements to the ARCA were executed between 1999 and 2001, the first on 27 August 1999, the second on 4 September 2000, and the third one on 22 June 2001.³

17. Fraport's investment started in 1999 when, on 6 July, it entered into four agreements (the "*1999 Share Purchase Agreements and Share Subscription Agreements*") whereby it acquired direct and indirect interest in PIATCO as follows: 25% of PIATCO, 40% of PAGS Terminals, Inc. ("*PTI*") and 40% of PAGS Terminal Holding, Inc. ("*PTH*"); PTI further acquired 11% of PIATCO.⁴

¹ Award, para. 98.

² *Ibid.*, para. 102.

³ *Ibid.*, paras. 111-113.

⁴ *Ibid.*, para. 124.

18. The construction of Terminal 3 commenced on 15 June 2000 to be completed in 30 months, by late 2002. As the project under construction required further financial resources and PIATCO's other shareholders were either unable or unwilling to invest additional money into the Terminal 3 project, Fraport accordingly decided to increase its shareholdings pursuant to two agreements dated 5 May 2000 (the "2000 Share Purchase Agreements") and thus it acquired an additional 5% of PIATCO, and PTI acquired another 24% of PIATCO.⁵

19. In 2001, Fraport acquired a 40% stake in PAGS, thus having an additional 9.04% indirect interest in PIATCO. The Award notes that, as of that point, Fraport had acquired 61.44% direct and indirect ownership of PIATCO.⁶

20. In late 2001 and throughout 2002 PIATCO/Fraport's representatives were involved in numerous negotiations on the two further supplements to the ARCA. The Fourth Supplement was proposed by PIATCO in order to accommodate the conditions set by the Senior Lenders for a drawdown of the loans,⁷ the Fifth Supplement was sought by the Philippine government which required, *inter alia*, that PIATCO surrender the exclusivity of Terminal 3 for international passenger operations at Ninoy Aquino International Airport ("NAIA").⁸ The Government representative asserted in a communication to PIATCO that the concession agreement required changes which the Government proposed in the draft Fifth Supplement "to address infirmities which [PIATCO's] concession has sustained."⁹

21. Despite the numerous meetings and exchanges between the parties, no agreement was reached on the proposed Fourth and Fifth Supplement to ARCA. In September 2002, the government considered its options. While the Cabinet Review Committee was still recommending negotiations with PIATCO, the Presidential Advisor

⁵ *Ibid.*, paras. 127, 129 and 130.

⁶ *Ibid.*, para. 131; *see also* para. 11 of the Award.

⁷ *Ibid.*, paras. 132 and 134.

⁸ *Ibid.*, para. 158.

⁹ *Ibid.*, para. 166.

on Strategic Projects, who held a Cabinet rank, wrote to the President of the Philippines advising “that the Government proceed with obtaining a declaration of nullity” of the concession agreement.¹⁰

22. In the same period, PIATCO’s concession agreement and the circumstances surrounding its conclusion were the subject of the Philippines’ Senate investigation. In her testimony before the Senate Blue Ribbon Committee in August and September 2002, the Presidential Advisor on Strategic Projects opined for the first time, as the Arbitral Tribunal noted, that the concession contracts, which she had been busy renegotiating, should be declared null and void.¹¹ In her memorandum submitted to the Committee, she expressly stated that there would be severe negative financial consequences for both the Government and Philippine Airlines if the Concession Agreement was performed and its invalidation and nullification not obtained. As she explained, “the financial and operational issues of NAIA Terminals 1, 2 and 3 and the proposed international cargo terminal must be rationalized.”¹² The Report, issued by the Senate Committee on 10 December 2002, concluded that: (1) the PIATCO contracts were intrinsically void because the required six signatures of the Members of the Investment Coordination Committee of the Philippine National Economic Development Authority were not obtained; (2) the contracts were also void because there were substantial deviations from the Bid Documents; (3) the contracts contained onerous and disadvantageous provisions contrary to public policy and to the Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes (“*BOT Law*”); (4) the payment for buying favors from the government was condemned; (5) the contract provides for a direct government guarantee which is prohibited by the BOT Law; and (6) the condition of the terminal facility raised serious security concerns.¹³

¹⁰ *Ibid.*, paras. 178-180.

¹¹ *Ibid.*, paras. 183 and 184.

¹² *Ibid.*, para. 186.

¹³ *Ibid.*, para. 189.

23. At the end of November 2002, the President of the Philippines declared that her Government would not honor the Terminal 3 contracts as “the Solicitor General and the Justice Department have determined that all five agreements covering the NAIA, most of which were contracted in the previous administration, are null and void.”¹⁴ The Arbitral Tribunal did not fail to note that the Memorandum of Department of Justice of 28 November 2002, to which the President of the Philippines referred in her statement, was “strikingly different from the Department of Justice’s prior written advice to the President on 21 May 2002 that had identified several provisions of ARCA which ‘may be possible subjects of renegotiation’ but neither stated that the ARCA was null and void nor questioned the validity of the original Concession Agreement.”¹⁵ The Arbitral Tribunal also noted that the 28 November 2002 memorandum was diametrically different from “Contract Review No. 434,” dated 30 September 2002, in which the Office of the Government’s Corporate Counsel concluded that the concession agreements were valid, and added that “[r]ecords attest to the fact that the negotiation, drafting, execution and signing of the Concession Agreement were strictly in accordance with” the BOT Law and its Implementing Rules and Regulations.¹⁶

24. Fraport continued in its efforts to find a solution. In that period the Supreme Court of the Philippines had been considering, since September 2002, several petitions for prohibition against PIATCO and others. The Supreme Court, in its decision of 5 May 2003, determined that serious violations of Philippines law and public policy, in respect of several issues raised by the petitioners, had taken place, and concluded that the concession agreements in the Terminal 3 projects were null and void *ab initio*. It also concluded that PairCargo was not a qualified bidder and therefore the award of the Terminal 3 concession contract to PairCargo was null and void.¹⁷

¹⁴ *Ibid.*, para. 190.

¹⁵ *Ibid.*, para. 194.

¹⁶ *Ibid.*, para. 195.

¹⁷ *Ibid.*, para. 217.

25. On 17 September 2003, Fraport initiated arbitral proceedings against the Philippines by submitting its Request for Arbitration to ICSID, pursuant to arbitration provisions contained in the “Agreement between the Federal Republic of Germany and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, dated 18 April 1997 and in force since 2 February 2000 (the “*BIT*” or “*Treaty*”).

26. While international arbitral proceedings were in progress, the Republic of the Philippines, in December 2004, took possession of Terminal 3 and instituted domestic court expropriation proceedings, also in December 2004.

III. THE ARBITRAL AWARD

27. In the arbitral proceedings, which developed, as the Tribunal itself noted, “in some respects, in a most unusual manner,”¹⁸ the Respondent challenged the Tribunal’s jurisdiction *ratione materiae*, arguing that the Claimant’s investment did not enjoy protection afforded by the BIT. The Respondent argued that the Claimant made its investment in violation of the laws of the Philippines, in particular the Philippine Constitution and Commonwealth Act No. 108, entitled “An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges,” (the so-called Anti-Dummy Law (the “*ADL*”).¹⁹ In the view of the Respondent, the Claimant’s investment fell outside of the BIT’s expressly limited scope because it was not made in compliance with Philippine law.²⁰ The Tribunal understood the Respondent to be arguing that “the Claimant’s investment was not ‘accepted’ in accordance with the laws of the Philippines, in the words of Article 1(1) of the BIT.”²¹

28. The Claimant argued that its investment was an investment within the meaning of the term, as defined in Article 1(1) of the BIT, and, therefore, that the Tribunal had

¹⁸ *Ibid.*, para. 1

¹⁹ *Ibid.*, para. 290.

²⁰ *Ibid.*, para. 285.

²¹ *Ibid.*

jurisdiction to decide the case. The Claimant emphasized that the Respondent knew the details of PIATCO's shareholding structure and never charged Fraport with any violation of its ADL or nationality laws.²²

29. The Tribunal, at the outset of its analysis, observed that "it is possible that an economic transaction that might qualify *factually* and *financially* as an investment... falls, nonetheless, outside the jurisdiction of the Tribunal established under the pertinent BIT, because *legally* it is not an 'investment' within the meaning of the BIT."²³ Then it proceeded to consider the factual allegations regarding the Claimant's investment as it related to the laws of the Philippines, in particular the ADL. It came to the conclusion that, while "Fraport's equity investment in terms of the statutorily limited percentage in the Terminal 3 project was lawful under Philippine law," its "controlling and managing the investment was not."²⁴ The Tribunal was "persuaded from Fraport's own internal and contemporaneous documents that it was consistently aware that the way it was structuring its investment in the Philippines was in violation of the ADL and accordingly sought to keep these arrangements secret."²⁵ Having then observed that "[w]hile this factual record is troubling, it does not *eo ipso* mean that the Tribunal is without jurisdiction *ratione materiae* to hear the substance of the claim,"²⁶ it proceeded to the determination of its jurisdiction in accordance "with applicable legal standards."²⁷ The Tribunal identified as the legal standards applicable to its jurisdiction Articles 1(1) and 2(1) of the BIT,²⁸ the

²² *Ibid.*, paras. 293, 295.

²³ *Ibid.*, para. 306 (emphasis in the original).

²⁴ *Ibid.*, para. 323.

²⁵ *Ibid.*, para. 332.

²⁶ *Ibid.*, para. 333.

²⁷ *Ibid.*

²⁸ *Ibid.*, para. 335. Article 1(1) of the BIT, in its relevant part, reads as follows: "[t]he term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State." Article 2(1) reads as follows: "Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1, paragraph 1[...]."

Protocol to the BIT (ad Article 2)²⁹ and the Philippines' Instrument of Ratification³⁰ of the BIT. The Tribunal stressed that “[b]ecause the exchange of instruments of ratification puts a treaty into effect in accordance with its terms, the second preambular paragraph...is particularly important in regard to the issue at bar.”³¹

30. The Tribunal considered that the above-mentioned “provisions [were] manifestly limitations *ratione materiae*,” noting that “their interpretation [was] not simple.”³² Then having considered the FAG-PAIRCARGO-PAGS-PTI Shareholders' Agreement of 6 July 1999, it concluded that it “translates *per se* into managerial control over a modern corporation”³³ by Fraport, with managerial control being in violation of the ADL.³⁴ In the view of the Tribunal, “Fraport knowingly and intentionally circumvented the ADL by means of secret shareholder agreements.” Therefore, in its view, Fraport “cannot claim to have made an investment ‘in accordance with law.’”³⁵ The Tribunal concluded that “[b]ecause there is no ‘investment in accordance with law,’ the Tribunal lacks jurisdiction *ratione materiae*.”³⁶ The Tribunal thus, by a majority vote, decided:

- “ 1. *To accept the objection to the jurisdiction of the International Centre for Settlement of Investment Disputes raised by the Republic of the Philippines;*
2. *To declare that the Centre does not have jurisdiction to hear this dispute and that this Arbitral Tribunal is not competent to resolve it;*
3. *To dismiss the claim of Fraport AG Frankfurt Airport Services Worldwide; and*
4. *To order that each party shall bear in full its own legal costs and that the payment of the fees and expenses of the members of the Arbitral Tribunal and*

²⁹ *Ibid.*, para. 336. The provision ad Article 2 reads as follows: “As provided for in the Constitution of the Republic of the Philippines, foreign investors are not allowed to own land in the territory of the Republic of the Philippines. However, investors are allowed to own up to 40% of the equity of a company which can then acquire ownership of land.”

³⁰ *Ibid.*, para. 337.

³¹ *Ibid.*, para. 338. The second paragraph of the Philippines Instrument of Ratification reads as follows: “Whereas, the Agreement provides that the investment shall be in the areas allowed by and in accordance with the Constitutions, laws and regulations of each of the Contracting Parties.”

³² *Ibid.*, para. 339.

³³ *Ibid.*, para. 350.

³⁴ *Ibid.*, para. 351.

³⁵ *Ibid.*, para. 401.

³⁶ *Ibid.*

of the administrative fees for the use of the Centre shall be paid in equal share by each party.”³⁷

31. Arbitrator Bernardo Cremades attached to the Award a twenty-four page, single-spaced dissenting opinion. He strongly disputed the finding of the majority that there was a breach of the ADL. Even if a violation had occurred it would not have, in his view, stripped Fraport’s investment of all BIT protection. Fraport’s shareholdings in a Philippine corporation are still a kind of asset accepted in accordance with the laws and regulations of the Philippines and therefore, in his view, the Tribunal would not have been deprived of its jurisdiction even if the ADL was breached. He relied on the Philippine Supreme Court decision in *Agan v. PIATCO* which found that the grant of the Terminal 3 Concession to PIATCO in 1997 was null and void. That decision, in his view, is now *res judicata* in Philippine Law. He pointed out that the Tribunal is bound to apply Philippine Law in its interpretation of the ADL and that it manifestly exceeds its powers if it does not do so. He further added that the Tribunal is not bound by a decision of a Philippine court – even the Supreme Court – but the Tribunal’s decision on Philippine Law must be premised on Philippine law itself. He considered that it is *res judicata* in Philippine law that the Terminal 3 Concession is null and void *ex tunc* and not *ex nunc*, and that this must be accepted by the Arbitral Tribunal. In his view, the Tribunal should have respected the consequences of the Supreme Court decision. On this basis, he concluded, it is impossible for PIATCO, or FRAPORT, to be guilty of any breach of the ADL. Finally, he addressed the issue of illegality and jurisdiction, which he considered to be a matter of principle. In his view, the legality of the investor’s conduct is an issue for the merits. The inquiry at the jurisdictional phase required by the phrase “*in accordance with the laws and regulations of the Host State*” is limited to determining whether the type of asset is legal in domestic law. He was of the view that the proper interpretation of Article 1(1) of the Philippines-Germany BIT in accordance with the Vienna Convention produces exactly this result. He concluded that the decision of the majority is not only contrary to the terms of

³⁷ *Ibid.*, para. 406.

Article 1(1) of the Philippine-Germany BIT, but that it is also fundamentally wrong in its approach to illegality as a matter of principle.

IV. THE GROUNDS FOR ANNULMENT RELIED UPON BY FRAPORT

32. As noted above (paragraph 2), the Applicant in its request to the Committee for the annulment of the Award relies on three separate grounds provided for in Article 52 of the ICSID Convention; namely that the Tribunal has manifestly exceeded its powers (Article 52(1)(b)), that there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d)), and that the award has failed to state the reasons on which it is based (Article 51(1)(e)). The Committee will in turn consider whether any of these grounds has been established to its satisfaction in the course of this proceeding, and if so whether it should annul the award. Article 52(3) provides that “the Committee shall have the authority to annul the award or any part thereof.”

A. Manifest Excess of Power (Article 52(1)(b) of the ICSID Convention)

a) Introduction

33. The first ground upon which the Applicant relies in its Application for the annulment of the Award is that which is set forth in Article 52(1)(b) of the ICSID Convention. Article 52(1)(b) reads as follows:

“Either party may request annulment of the award by an application in writing addressed to the Secretary-General [of the ICSID] on...the following ground[]:

...

(b) that the Tribunal has manifestly exceeded its powers;”

34. As stated earlier (see paragraph 30 above), the Arbitral Tribunal decided that “the Centre does not have jurisdiction to hear this dispute and that this Arbitral Tribunal is not competent to resolve it.”

35. The Applicant argues that the Tribunal manifestly exceeded its powers when it declined to exercise jurisdiction which, according to Fraport, it possessed under the ICSID Convention and the German-Philippine BIT. The Committee will deal below with the arguments advanced by the parties regarding this alleged excess of powers by the Tribunal.

36. The Committee notes, at the outset, that it is well established in the practice of the application of Article 52(1)(b) by various *ad hoc* Committees that a failure to exercise jurisdiction where such jurisdiction does exist constitutes an excess of powers. The *ad hoc* Committee in *Vivendi I*, in an oft-cited passage, explained, in the following terms, that a failure to exercise jurisdiction could constitute an excess of powers:

“It is settled that an ICSID Tribunal commits an excess of powers not only if it exercises jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise jurisdiction is capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee’s view to a manifest excess of powers within the meaning of Article 52(1)(b).”³⁸

37. A number of *ad hoc* Committees have endorsed this reading of Article 52(1)(b), albeit using different words and formulations, as equally covering both instances (1) when a Tribunal assumes jurisdiction and exercises it when in fact no jurisdiction has been granted to it, and (2) when a Tribunal fails to exercise the jurisdiction which it has been granted.³⁹

38. Several arbitral awards in which Tribunals concluded that they lacked jurisdiction have subsequently been annulled by *ad hoc* Committees. In those cases, the *ad hoc* Committees, having duly considered the awards and arguments of the respective

³⁸ *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, (“*Vivendi I*”), 6 ICSID Reports, p. 363, para. 86.

³⁹ See, e.g., *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 43; *Lucchetti v. Peru*, Decision on Annulment, 5 September 2007, para. 99.

parties, reached the conclusion that the Tribunals by failing to exercise jurisdiction manifestly exceeded their powers.⁴⁰

39. The Committee further notes that under Article 52(1)(b) the excess of powers must be “manifest” in order to provide a ground for the Committee to annul an Award. As is well known, Article 52 of the ICSID Convention was inspired by Article 35 of the Model Rules on Arbitral Procedure, which were adopted by the United Nations International Law Commission in 1958 on the basis of the reports submitted by its Special Rapporteur Professor Georges Scelle. Article 35 of the Model Rules provides that

“The validity of an award may be challenged by either party on one or more of the following grounds:
(a) That the tribunal has exceeded its powers;...”⁴¹

The word “manifestly” was added to the First Draft of what was to become the ICSID Convention upon the suggestion of the German delegate, who thought that otherwise there might be some risk of frustration of Awards.⁴² The proposal to delete the word “manifestly” was put to the vote and rejected.⁴³ Therefore, because the adjective is part of the rule contained in Article 52(1)(b), it must be given effect. The question is what is the implication of the adjective “manifestly” for the proper construction of this ground for annulment.

40. The Commentary to the ICSID Convention declares that “Article 52(1)(b) entails a dual requirement: there must be an excess of powers, and that excess must be manifest.” Referring to the dictionary meaning of the term “manifest,” which may be understood as “plain,” “clear,” “obvious” or “evident,” the Commentary expresses the view that the manifest nature of an excess of powers “relates to the ease with which it is perceived,” concluding that “[a]n excess of powers is manifest if it can be discerned with

⁴⁰ See, e.g., *Vivendi I*, *supra* n. 38, paras. 86-88, 93-115; *Malaysian Historical Salvors SDN BHD v. Malaysia*, Decision on Annulment, 16 April 2009.

⁴¹ See *Yearbook of the International Law Commission, 1958*, Vol II, p. 86. (Also in *History of the ICSID Convention*, (“History”), Vol. I, p. 230). Model Rules were originally drafted for arbitral proceedings in order to settle disputes between States.

⁴² *History*, Vol. II-1, p. 423, Vol. II-2, p. 850.

⁴³ *Ibid.*, pp. 851-2.

little effort and without deeper analysis.”⁴⁴ If this were to be the case, it would mean that the important and exclusive control over the integrity of the arbitration process instituted by the Contracting States through inclusion of Article 52 in the ICSID Convention may be satisfied by a merely superficial inquiry. One may further wonder why there is need for extensive submissions by the parties on the manifest excess of power if it would suffice for the members of the Committee merely to read the award and to “discern[] with little effort and without deeper analysis”⁴⁵ that the Arbitral Tribunal exceeded its powers. Such a conclusion, of course, would have been reached on the basis of a simple reading, and would therefore be manifest.

41. The Committee is aware that several *ad hoc* Committees have in the past made a number of various pronouncements on manifest excess of power, and adopted different methodological approaches to this issue. Some favoured a “self-evident” or “simple reading” approach (test). Thus the *ad hoc* Committee in *Wena Hotels v. Egypt* stated:

“The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. Where the latter happens the excess of power is no longer manifest.”⁴⁶

For the *ad hoc* Committee in *CDC v. Seychelles*, “the excess must be plain on its face for annulment to be an available remedy.”⁴⁷ The Committee then added that “[a]ny excess apparent in a Tribunal’s conduct, if susceptible of argument ‘one way or the other,’ is not manifest.”⁴⁸ This approach reached its zenith in *Repsol v. Petroecuador*, in which the *ad hoc* Committee held the view that “manifest” should be interpreted as “obvious by itself” and ascertainable “simply by reading the Award, that is even prior to a detailed examination of its contents.”⁴⁹

⁴⁴ Ch. Schreuer with L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention, A Commentary*, 2nd ed., (2009), p. 938, para. 135.

⁴⁵ *Ibid.*

⁴⁶ *Wena Hotels Ltd. v. Egypt*, Decision on Annulment, 5 February 2002, 6 ICSID Reports, pp. 135-136, para. 25.

⁴⁷ *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, 11 ICSID Reports, p. 251, para. 41.

⁴⁸ *Ibid.*

⁴⁹ *Repsol v. Petroecuador*, Decision on Annulment, 8 January 2007, para. 36.

42. Some other Committees perceived the requirements of “manifest excess” to be a condition for the annulment related not so much to the clarity of an excess as to its extent or seriousness.⁵⁰

43. Another *ad hoc* Committee in *Soufraki v. UAE* attempted to reconcile these views when it stated:

“...the Committee believes that a strict opposition between two different meanings of ‘manifest’ – either ‘obvious’ or ‘serious’ – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantially serious.”⁵¹

44. In the view of this Committee, the requirement of a “manifest excess of power” goes to the nature of the review exercise. In cases where the jurisdiction of the Tribunal is reasonably open to more than one interpretation, the *ad hoc* Committee will give special weight to the Arbitral Tribunal’s interpretation of the jurisdictional instrument. The Committee will not intervene where the Tribunal’s decision on its jurisdiction was not unreasonable. This approach seems to be justified because what is at issue here is the interpretation of an international treaty - the BIT concluded between the two sovereign States. Such an approach has been followed by the International Court of Justice in its review jurisprudence.⁵² The Committee is convinced that the jurisprudence of ICSID *ad hoc* Committees on the “tenable” standard for review on issues of jurisdiction⁵³ is to be interpreted to like effect. The Committee considers that the excess of jurisdiction should be demonstrable and substantial and not doubtful.

45. The fact that difficult questions of law are raised, requiring extensive argument, is not necessarily conclusive of whether or not the Tribunal manifestly exceeded its powers. Instead, because the purpose of the inquiry is to determine the reasonableness

⁵⁰ *Vivendi I*, *supra* n. 38, paras. 104-112, 115.

⁵¹ *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 40.

⁵² *See Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *I.C.J. Reports 1991*, p. 69, paras. 47-48. *See also Government of Sudan and The Sudan People’s Liberation Movement/Army (the Abyei Arbitration)*, Final Award of July 22, 2009, para. 510, referring to “the standard of review established by the ICJ”.

⁵³ *See, e.g., Klöckner I v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, p. 115, para. 52.

of the Tribunal's approach, there is necessarily a heavy burden upon the applicant to establish a manifest excess of powers. The Committee must determine the reasonableness of the Tribunal's approach in light of the evidence and submissions which were before the Tribunal, and not on the basis of new evidence.

b) Parties' Submissions

46. Fraport contends that the Arbitral Tribunal manifestly exceeded its powers when it wrongly refused to exercise the jurisdiction conferred upon it by the parties' agreement to arbitrate. Fraport alleges that "the Tribunal refused jurisdiction on the basis of a series of findings of which none are 'tenable', let alone 'clearly' so."⁵⁴ Fraport challenges two findings of the tribunal's majority:

- (i) that the BIT required, as a jurisdictional prerequisite, that investments had to be made in accordance with Philippine Law at the time the investment was made; and
- (ii) that Fraport's investments were not in accordance with the Philippine Anti-Dummy law, a criminal statute.⁵⁵

47. Fraport asserts that neither of these propositions has any reasonable basis. In Fraport's view and contention,

"the Tribunal:

- (i) disregarded the express language of the BIT, remaking it to fit the Tribunal's own conception of what the BIT should, but does not, say;
- (ii) failed to apply the BIT to each of Fraport's discrete investments; and
- (iii) distorted the requirements of Philippine criminal law, in breach of fundamental norms of public international law, in order to find an imagined violation by Fraport based upon the potential for unlawful acts pursuant to a shareholding agreement that was amended prior to the occurrence of any unlawful act."⁵⁶

Fraport's criticism of the majority conclusion on the lack of the Tribunal's jurisdiction is thus three-pronged.

⁵⁴ Memorial, para. 46.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, para. 47.

48. On the first prong, namely that the Tribunal allegedly disregarded the express language of the BIT, Fraport puts emphasis on Article 1(1) of the BIT. It quotes what it considers to be a relevant part:

“The term ‘investment’ shall mean any kind of asset **accepted in accordance with the respective laws and regulations of** either Contracting State, and more particularly, though not exclusively ...” (emphasis added by Fraport).

Fraport argues that the Tribunal ignored the word “accepted” in Article 1(1) and failed to interpret that provision in accordance with its ordinary meaning as required by Article 31(1) of the Vienna Convention on the Law of Treaties.⁵⁷

49. Fraport agrees that “the BIT permits the Philippines to put in place laws and regulations that regulate its acceptance of assets as investments.”⁵⁸ But in its view, “to the extent no legal regime for the acceptance of foreign investments exists, the requirement in the treaty can refer only to legal requirements for certain types of property rights under host state Law.”⁵⁹ Fraport further adds that the ordinary meaning of the BIT comports with Philippine law, which has set up “an acceptance regime for certain types of investments requiring certain conditions to be met for admission of investments.”⁶⁰ Fraport, however, notes that its investment did not require homologation under this regime to be accepted.⁶¹ Fraport maintains that the ordinary meaning of the treaty in light of the statutory regime in place in the Philippines on its face shows that the Tribunal was vested with jurisdiction *ratione materiae* on account of the acceptance requirement in Article 1(1) of the BIT. In its view, “any issue of legality that the majority believed to exist with respect to any investment of Fraport could have been relevant only to determinations about the merits or compensation.”⁶²

⁵⁷ *Ibid.*, para. 50.

⁵⁸ *Ibid.*, para. 51.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, para. 53. Fraport specifically refers to Republic Act N^o 7042, entitled “An Act To Promote Foreign Investments, Prescribe the Procedures For Registering Entreprises Doing Business in the Philippines And For Other Purposes”, as amended, known as the “Foreign Investment Act of 1991”.

⁶¹ *Ibid.*

⁶² *Ibid.*

50. Fraport is particularly critical of the majority's statement in the Award that

“(i) the BIT explicitly and reiteratedly required that an investment, in order to qualify for BIT protection, had *to be* in accordance with the host state's law.”⁶³

In Fraport's view, the majority “erased” the word “accepted” from the definition of investment in Article 1(1) of the BIT.⁶⁴ It goes as far as asserting that the “Majority removed an operative word from the BIT to reach its desired result.”⁶⁵ Fraport contends that “the BIT does not define an investment as an investment made in accordance with law.”⁶⁶ Fraport points to the fact that the Tribunal replaced the express words of the BIT in Article 1(1) “any kind of asset accepted in accordance with the law” by its own formulation “any kind of economic transaction made in accordance with the law,”⁶⁷ which, according to Fraport, are two different things. Fraport submits that the relevant language of the BIT operates as an admission provision, and not as the majority construed it as a legality requirement provision.⁶⁸

51. The second prong of Fraport's challenge of the Award on account of the alleged manifest excess of power consists of the assertion that the Tribunal failed to apply its jurisdictional analysis to its discrete investments.⁶⁹

52. Fraport explains that it made investments not only through the purchase of the shares but also provided loans to PIATCO, PTI, PTH and PAGS and guarantees (securing loans granted by banks to PIATCO). It criticizes the majority for having reached the conclusion that the Tribunal lacked jurisdiction solely on the basis of Fraport's conduct (namely the entry of secret shareholder's agreements on 6 July 1999) which concerned only part of its investments consisting of shares, but had nothing to do with its other

⁶³ *Ibid.*, para. 54. The quote is from para. 398 of the Award, emphasis added by Fraport.

⁶⁴ Reply, para. 19.

⁶⁵ *Ibid.*

⁶⁶ Transcript, Day 1, 38.

⁶⁷ *Ibid.*, p. 58.

⁶⁸ Memorial, para. 61.

⁶⁹ *Ibid.*, paras. 72-84.

investments (such as Fraport's shareholdings themselves, loans and guarantees). It adds that it had made successive investments in the 1999-2001 period, some of them after the amendments of the provisions, deemed by the majority as offensive, of the shareholding agreement on 23 August 2001.⁷⁰

53. The third prong of Fraport's challenge of the award as being the result of the manifest excess of power by the Tribunal is directed against the Tribunal's allegedly wrong application of Philippine law, the Anti-Dummy Law, as a precondition to its jurisdiction *ratione materiae* under the BIT and against "an untenable interpretation of that Law."⁷¹

54. Fraport argues that "the majority improperly extended the reach of the Philippine Anti-Dummy Law, a criminal statute, to impute a violation to Fraport, where there clearly was none" and "[i]n doing so, the majority declined jurisdiction on a manifestly erroneous basis."⁷²

55. In order to follow the argument of Fraport on this point, it is useful to quote Section 2-A of the Anti-Dummy Law, which Fraport according to the majority of the Tribunal "knowingly and intentionally circumvented"⁷³ and thus committed its violation which "could not be deemed to be inadvertent and irrelevant to the investment."⁷⁴

The pertinent section reads as follows:

"Section 2-A – Unlawful use, exploitation or enjoyment:

Any **person, corporation, or association** which, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to **citizens** of the Philippines or of any other specific country, or to **corporations or associations** at least sixty per centum of the capital of which is owned by such citizens,

⁷⁰ *Ibid.*, para. 82; Reply, para. 35.

⁷¹ Memorial, para. 87.

⁷² *Ibid.*, paras. 88, 90.

⁷³ Award, para. 401.

⁷⁴ *Ibid.*, para. 398.

permits or allows the use, exploitation or enjoyment thereof by a **person, corporation or association** not possessing the requisites prescribed by the Constitution or the laws of the Philippines;

or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a **person, corporation or association** not otherwise qualified under the Constitution, or the provisions of the existing laws;

or in any manner permits or allows any **person**, not possessing the qualifications required by the Constitution, or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, **to intervene in the management, operation, administration or control thereof, whether as an officer, employee or labourer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice,**

and any **person who knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated**

shall be punished by imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos:

Provided, however, That the **president, managers or persons in charge of corporations, associations or partnerships** violating the provisions of this section shall be criminally liable in lieu thereof:

Provided, further, **That any person, corporation or association** shall, in addition to the penalty imposed therein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act:

And Provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.⁷⁵

56. Fraport argues that it did not possess the necessary quality as perpetrator of the violation of the ADL's Section 2-A as it did not fulfil the *ratione personae* conditions of Section 2-A. The Award, Fraport contends, makes no finding that Fraport had in its name or under its control a right, franchise, privilege, property or business subject to nationality

⁷⁵ The text of Section 2-A is quoted in para. 349 of the Award. It consists of a single complex sentence. Broken into paragraphs, as above, in order to facilitate the reading, it appears in para. 92 of the Memorial (emphasis by Fraport).

restrictions and permitted or allowed any person, corporation or association not possessing the nationality condition to intervene in the management, operation, administration or control of such right, franchise, privilege, property or business.⁷⁶

57. Fraport further points to the *actus reus* under Section 2-A which it interprets as consisting of permitting or allowing a third party to intervene in the management, operation, administration or control of a public utility concession falling within that Section.⁷⁷ Fraport stresses that the Award fails to establish the existence of the *actus reus*.⁷⁸

58. Fraport further submits that it could not have violated Section 2-A as an aidor, assistor or abettor as “there can be no crime of aiding, assisting or abetting in the absence of a criminal act committed by a principal.”⁷⁹ It maintains that “[i]f there is no principal, there can be no accessory.”⁸⁰ Fraport points out that the Tribunal’s majority failed to find any wrongful act by a principal. It further adds that in any case the accessory has to be a natural person.⁸¹ With reference to the Philippine Supreme Court decision in *Agan Case*, which held the Terminal 3 concession as null and void *ab initio*, Fraport draws the conclusion that the ADL was ipso facto inapplicable.⁸²

59. Fraport finally submits that the Tribunal’s majority extended the scope of the law rather than applied it as written. It quotes a following passage from the award:

“a literal interpretation [of the law] here could produce an absurdity: an alien would violate the ADL if its designated officer intervened to manage and control matters A, B, and C, but the same alien would not violate the ADL if it secretly intervened as a shareholder to manage and control the same matters. The Tribunal construes this part of the ADL as covering intervention by

⁷⁶ Memorial, paras. 93 and 95.

⁷⁷ *Ibid.*, para. 98.

⁷⁸ *Ibid.*, para. 98 and 100.

⁷⁹ *Ibid.*, para. 101.

⁸⁰ *Ibid.* See also Reply, para. 46.

⁸¹ Memorial, para. 107.

⁸² *Ibid.*, para. 106; Reply, para. 51.

shareholders, if that is the actual means of intervening in ‘the management, operation, administration or control’ of PIATCO.”⁸³

60. In Fraport’s view such expansive interpretation of the ADL violated mandatory norms of public international law. Fraport argues, relying on the Expert Opinion of Professor Antonio Cassese,⁸⁴ that it is not possible for a tribunal, including an international arbitral tribunal, to interpret and apply national criminal law extensively, even when, as in the case at hand, it is only being applied *incidenter tantum*.⁸⁵ In doing so, Fraport contends, the Tribunal’s majority violated the principle *nullum crimen sine lege* which, in its view, forms part of *jus cogens*.⁸⁶

61. Fraport concludes that the Tribunal’s majority, by disregarding the *nullum crimen* principle and thus violating international *jus cogens*, manifestly exceeded its powers⁸⁷.

62. The Respondent, the Republic of the Philippines, maintains, that “the Tribunal did not manifestly exceed its powers in declining to exercise jurisdiction over Fraport’s claims.”⁸⁸ It argues that “[t]he Tribunal ruled correctly as to its jurisdiction, articulating an interpretation of the parties’ consent to ICSID arbitration in the BIT that fully accords with the principles set forth in the Vienna Convention on the Law of Treaties and certainly was tenable.”⁸⁹

63. The Respondent denies Fraport’s argument that the Tribunal ignored the word “accepted” in Article 1(1) of the BIT. It emphasizes that the words in a treaty are to be interpreted in their context and recalls the Tribunal’s observation that “Article 31 of the

⁸³ Memorial, para. 110. The quotation is from para. 356 of the Award (emphasis added by Fraport).

⁸⁴ Expert Opinion of 9 September 2008 “How International Tribunals Should Incidentally Apply National Criminal Law”, submitted by Fraport with its Memorial, (hereinafter “*Cassese I*”).

⁸⁵ Memorial, para.123.

⁸⁶ *Ibid.*, Fraport relies on the view of Professor Cassese who states that “[i]t is widely accepted that the *nullum crimen sine lege* principle has become a general rule of international law, and is in addition endowed with the legal force of peremptory norms (*jus cogens*)”, *Cassese I*, para. 14.

⁸⁷ Memorial, para. 142.

⁸⁸ Counter-Memorial, para. 9.

⁸⁹ *Ibid.*, para. 9, also para. 79.

Vienna Convention ... enjoins the interpretation of particular provisions in their context, i.e., with reference to the rest of the treaty and in light of its objects and purposes.”⁹⁰

64. The Respondent contends that “the Tribunal came to the tenable conclusion that the language of both Articles 1 and 2 refer to the temporal requirement that an investment must comply with host State Law at ‘the initiation of the investment’.”⁹¹

65. The Respondent further rejects Fraport’s allegation that the Tribunal manifestly exceeded its powers applying Article 1(1) of the BIT incorrectly. The Respondent maintains that the Tribunal’s application of Article 1(1) was tenable.⁹² It points to the holding of the Tribunal that Article 1(1) required that economic transactions undertaken by a national of one of the parties to the BIT had to meet certain legal requirements of the host state in order to qualify as an ‘investment’ and fall under the Treaty.⁹³ As the Tribunal considered that an asset accepted in accordance with Philippine law need not only refer to a single asset, but plainly may refer to a bundle of rights, particularly when it is a bundle of inter-related rights acquired in a single transaction, as it was in the case of Fraport which, in the Tribunal’s view, agreed to acquire equity interests on the basis that it would enjoy related rights of control, the Respondent maintains that the Tribunal, when it concluded that the bundle of rights so acquired by Fraport violated requirements under Philippine law and Fraport’s “investment” thus was not covered by the BIT, did not manifestly exceed its powers.⁹⁴

66. In reply to Fraport’s contention that the Tribunal manifestly exceeded its powers by failing to consider Fraport’s “other discrete” investments, including additional purchases of equity and loans and guarantees contributed over time to the project, the Respondent argues that “there is no basis to require a tribunal to treat separate elements of an investment in separate categories or on a per unit basis, and then to make separate

⁹⁰ *Ibid.*, para. 82 quoting para. 339 of the Award.

⁹¹ *Ibid.*, para. 88, referring to para. 345 of the Award.

⁹² *Ibid.*, paras 114-118, 124-128.

⁹³ *Ibid.*, para. 118 referring to para. 340 of the Award

⁹⁴ *Ibid.*, paras. 117 and 118.

jurisdictional determinations accordingly.”⁹⁵ The Respondent is of the view that the Tribunal, having found that Fraport’s investment in the project was initiated unlawfully and thus was not accepted in accordance with Philippine law, acted fully consistently with the BIT and the ICSID Convention when it decided not to treat subsequent contributions to the “tainted project” as separate investments.⁹⁶

67. The Respondent also rejects Fraport’s view that the Award is based on an untenable interpretation of the Philippine Anti-Dummy Law (ADL), that the majority improperly extended the reach of that Law and thus declined jurisdiction on a manifestly erroneous basis.

68. The Respondent submits that Article 1(1) of the BIT limits the scope of its consent to arbitrate. The scope of the consent was to be determined as a matter of international law, according to the Respondent. Although Article 1(1) contains, in Respondent’s view, “a renvoi” to Philippine law, that law – it argues – was not directly applicable but rather was to be consulted to assess in good faith what investments were intended to be covered by the BIT’s protection.⁹⁷

69. The Respondent further argues that an erroneous application of law, even if manifest, does not provide a ground for annulment. With reference to the *travaux préparatoires* of the ICSID Convention, it recalls that a proposal to insert a “manifestly incorrect application of the Law” as a ground for annulment was expressly considered and rejected.⁹⁸

70. The Respondent stresses that the Tribunal devoted over twenty pages to an analysis of the ADL and to the evidence presented that Fraport’s investment “was in violation” thereof. It takes the view that this “extensive attention ... devoted to the ADL

⁹⁵ *Ibid.*, para. 125.

⁹⁶ *Ibid.*, para. 128.

⁹⁷ *Ibid.*, para. 145.

⁹⁸ *Ibid.*, para. 149, referring in p. 276 to *History of the ICSID Convention*, Vol. II-2 at pp. 853-854.

and its application in the present case should foreclose any further inquiry as to whether the Tribunal applied the Law.”⁹⁹

71. The Respondent rejects the arguments of Fraport that it could not have breached Section 2-A of the ADL as a principal, explaining that the Tribunal concluded that Fraport’s investment was made in violation of the ADL’s provision on aiding and abetting the planning, consummation or perpetration of acts prohibited by the ADL.¹⁰⁰ Further, it adds that Fraport’s various arguments on issues relating to the ADL “are in the nature of appeals that the Tribunal was mistaken in its application of the ADL.”¹⁰¹

72. The Respondent considers the arguments of Fraport that the Tribunal’s decision violated the rule *nullum crimen sine lege*, which Fraport considers to be part of *jus cogens*, as being “without merit”.¹⁰² In the Respondent’s view, *nullum crimen sine lege* does not apply to the determination by an international tribunal of the scope of its jurisdiction over an investment dispute.¹⁰³ Relying on the Expert Opinion of Professor Pocar, it maintains that “this rule is limited to cases when statutes are applied in order to establish the individual criminal responsibility of an accused.”¹⁰⁴

c) The Committee’s Analysis

73. The Committee starts its analysis with the observation that this is a case which concerns the interpretation of a treaty, *in concreto* of the Agreement between the Federal Republic of Germany and the Republic of the Philippines, for the Promotion and Reciprocal Protection of Investments, concluded on 18 April 1997. Whether the Arbitral Tribunal was endowed with jurisdiction to decide the claims brought by Fraport depends on the interpretation of this BIT. The Committee notes that for the proper construction of the BIT, the rules of the Vienna Convention on the Law of Treaties are relevant; they are

⁹⁹ *Ibid.*, para. 154.

¹⁰⁰ *Ibid.*, para. 159.

¹⁰¹ *Ibid.*, para. 162.

¹⁰² *Ibid.*, para. 180.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, para. 183.

directly applicable as conventional rules since both Germany and the Philippines had been parties to it at the moment when they concluded the BIT in 1997.¹⁰⁵

74. The relevant Articles of the Vienna Convention for the interpretation of treaties are contained in Articles 31-33. The Committee considers sufficient to quote the text of Article 31. Article 32 concerns supplementary means of interpretation when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. One of the supplementary means specifically mentioned in Article 32, namely the preparatory work of the treaty, has not been brought to the attention of the Arbitral Tribunal. In the course of the annulment proceeding, Fraport submitted three diplomatic notes¹⁰⁶ exchanged between Germany and the Philippines in the process of their negotiating the BIT. They had not been submitted to the Tribunal. Even if they were to be deemed as bearing on the interpretation of the BIT, the Committee is of the view that it would not have been appropriate to have recourse to them in the context of the annulment proceeding. The Committee considers that it has to review the Tribunal's treatment of the BIT in light of the record concerning that Treaty which was available to the Tribunal. Article 33 of the Vienna Convention (Interpretation of treaties authenticated in two or more languages) is of little practical use in the instant case as the parties, which concluded the BIT in the German, Filipino and English languages, all three texts being authentic, expressly agreed that "in case of divergent interpretation of the German and Filipino texts, the English text shall prevail."

75. Article 31 of the Vienna Convention reads as follows:

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹⁰⁵ The Philippines ratified the Vienna Convention on 15 November 1972; Germany on 21 July 1987. Article 4 of the Vienna Convention provides: "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

¹⁰⁶ Application for Annulment, Annex F-3.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context;
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

76. Before proceeding further, a word of caution is needed. The Applicant's criticism of the interpretation of the BIT's provisions by the Tribunal and its suggestion of a different interpretation cannot be decisive. The task of the Committee is not to pronounce itself on which interpretation is better or more plausible. If the Committee were to proceed in this way, it would have been treating, as the International Court of Justice observed, "the request as an appeal and not as a *recours en nullité*."¹⁰⁷ The role of the Committee is rather to inquire whether the Tribunal manifestly exceeded its powers by failing to exercise its jurisdiction. The International Court of Justice has stated that "[s]uch manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation of the Arbitration Agreement which govern its competence."¹⁰⁸ In the present case, such arbitration agreement relied upon by Fraport is the BIT.

¹⁰⁷ *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) I.C.J. Reports 1991*, p. 69, para. 47.

¹⁰⁸ *Ibid.*, para. 48.

77. The BIT, in its Article 9, provides for ICSID jurisdiction. Article 9 reads as follows:

“Settlement of disputes between a Contracting State and an Investor of another Contracting State.

- 1) All kinds of divergencies between a Contracting State and an investor of the other Contracting State concerning an investment shall be settled amicably through negotiations.
- 2) If such divergencies cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor concerned may submit the dispute to:
 - a) the competent court of the Contracting State for decision;
 - b) the International Centre for the Settlement of Investment Disputes through conciliation or arbitration, established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, of March 18, 1965 done in Washington D.C.
- 3) Neither Contracting State shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting State has failed to abide by or to comply with the award rendered by the International Centre for Settlement of Investment Disputes.
- 4) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said Convention. The award shall be enforced in accordance with domestic law.”¹⁰⁹

78. The Respondent’s objection to the jurisdiction of ICSID, and thus to the competence of the Arbitral Tribunal, was based on the assertion that Fraport’s investment was not an investment within the meaning of that term in the BIT, in other words that Fraport’s investment is not covered by the BIT, as it allegedly was not made in compliance with Philippine law.¹¹⁰

79. So the critical question for the Tribunal was the determination whether Fraport’s investment was an investment to which the BIT was applicable, whether it was an investment as defined by the BIT.

¹⁰⁹ United Nations Treaty Series (“UNTS”), Vol. 2108, p. 24.

¹¹⁰ Award, paras. 285, 289.

80. The Tribunal started its analysis by recalling the terms of Article 1(1) of the BIT which reads as follows:

“Definitions of Terms

For the purpose of this Agreement:

1. The term “investment” shall mean any kind of asset **accepted in accordance with the respective laws and regulations of either Contracting State**, and more particularly, though not exclusively:

- a) movable and immovable property as well as other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights;
- b) shares of stocks and debentures of companies or interest in the property of such companies;
- c) claims to money utilized for the purpose of creating an economic value or to any performance having an economic value;
- d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trademarks, tradenames, trade and business secrets, technical processes, know-how, and good will;
- e) business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources;

any alteration of the form in which assets are invested shall not affect their classification as an investment.”¹¹¹

81. It was not disputed by the Respondent that the assets expended by Fraport in the Terminal 3 Project fall within the categories of assets as exemplified, of course not in an exclusive manner, in Article 1(1) of the BIT. The Respondent argued that Fraport’s assets were *not* “accepted in accordance with the respective laws and regulations of the [Philippines]”. It was for this reason that the Arbitral Tribunal highlighted the quoted formula in the reproduction of the text of Article 1(1) of the BIT in paragraph 300 of its Award. The Tribunal observed “that as a result of the BIT’s wording, the arguments of both parties address at some length the interpretation to be given to the term ‘accepted’ used in the BIT.”¹¹²

¹¹¹ The text of Article 1(1) is reproduced in para. 300 of the Award (emphasis added by the Arbitral Tribunal), *see also UNTS*, Vol. 2108, p. 20.

¹¹² *Ibid.*, para. 301.

82. Despite the above observation, the Arbitral Tribunal did not proceed immediately to the interpretation of Article 1(1) of the BIT, and in particular of the words “asset accepted in accordance with the respective laws and regulations of either Contracting State,” contained therein.

83. Instead, the Arbitral Tribunal focused its attention on what it considered were “the pertinent facts”¹¹³ of the case. It quoted extensively from a preliminary due diligence report on legal issues prepared for Fraport by the Philippine law firm Quisumbing Torres, from a due diligence report on financial issues prepared for Fraport by KPMG, from Fraport’s final report to its supervisory body, from some of Fraport’s other internal documents, from a confidential shareholders agreement of 6 July 1999 (“*Pooling Agreement*”) and the Addendum to it. Based on the analysis of these documents and other facts it considered pertinent, the Arbitral Tribunal concluded that it was “persuaded from Fraport’s own internal and contemporaneous documents that it was consistently aware that the way it was structuring its investment in the Philippines was in violation of the ADL and accordingly sought to keep those arrangements secret.”¹¹⁴

84. It is not for the *ad hoc* Committee to review, within the confines of the annulment proceeding, the consideration of the factual record by the Arbitral Tribunal nor to pronounce on the correctness of the view that “the way [Fraport] was structuring its investment in the Philippines was in violation of the ADL,”¹¹⁵ that is to say Philippine Law. When its task is limited to the determination of its jurisdiction, which has been objected to by the Respondent, the Committee observes that a dispute settlement organ should only consider the factual records to the extent necessary to make the determination regarding its own jurisdiction. Which facts are pertinent or relevant for that purpose would depend on the provisions of the legal instrument on which the Applicant wishes to base the jurisdiction of the dispute settlement organ seized of the case. Thus, in an investment treaty case, the provisions of the BIT govern the jurisdiction of the Tribunal. To determine

¹¹³ Award, pp. 142-159, paras. 308-333.

¹¹⁴ *Ibid.*, para. 332.

¹¹⁵ *Ibid.*

jurisdiction in such a case, it is only necessary to analyse such facts that are relevant to the application of the BIT's jurisdictional provisions, as properly interpreted (evidently if the case was brought under the ICSID Convention, Article 25 of the ICSID Convention will also apply).

85. In the arbitration under review, the Tribunal first reached certain conclusions on the facts, being convinced, or to use the language of the Tribunal "persuaded," that Fraport "was consistently aware that the way it was structuring its investment in the Philippines *was in violation* of the ADL."¹¹⁶ It thus formed its conviction regarding the conduct of Fraport in relation to the Philippines' statute, the ADL, without first determining whether the ADL itself, and Fraport's compliance with that statute, have a role to play in determining the Tribunal's jurisdiction.

86. Having thus first looked at the facts, the Tribunal proceeded to the determination of its jurisdiction with the following note:

"While this factual record is troubling, it does not *eo ipso* mean that the Tribunal is without jurisdiction *ratione materiae* to hear the substance of the claim. The Tribunal's task is to make this determination in accordance with applicable legal standards."¹¹⁷

Having already been troubled by the factual record, the Tribunal next proceeded to a consideration of these applicable legal standards.

87. In the section titled "The Applicable Legal Standards,"¹¹⁸ the Tribunal recalled its earlier observation that "the BIT at issue ... has a jurisdictional limitation *ratione materiae*."¹¹⁹ The Tribunal thought that there were "four explicit provisions"¹²⁰ which limit its jurisdiction *ratione materiae*, namely Articles 1(1) and 2(1) of the BIT, ad Article 2 of the Protocol to the BIT and a clause in the Philippines' Instrument of Ratification.

¹¹⁶ *Ibid.* (emphasis added).

¹¹⁷ *Ibid.*, para. 333.

¹¹⁸ *Ibid.*, p. 160.

¹¹⁹ *Ibid.*, para. 334.

¹²⁰ *Ibid.*, para. 340, *see also* para. 339.

88. What do these provisions, identified by the Tribunal as the applicable legal standards, say and how did the Tribunal interpret them?

89. Article 1(1) of the BIT provides that “[t]he term ‘investment’ shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State”. The Tribunal stated that “[t]he qualification ‘accepted in accordance with the respective laws and regulations of either Contracting State’ applies to every form of investment covered by the BIT.”¹²¹

90. Article 2, quoted by the Tribunal, reads as follows:

“Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to [in] Article 1, paragraph 1 [...].”¹²²

91. The next provision, identified by the Tribunal as the applicable legal standard, the provision ad Article 2 of the Protocol to the BIT, states the following:

“As provided for in the Constitution of the Republic of the Philippines, foreign investors are not allowed to own land in the territory of the Republic of the Philippines. However investors are allowed to own up to 40% of the equity of a company which can then acquire ownership of land.”¹²³

92. Finally, the Tribunal felt necessary to quote the text of the Philippines’ Instrument of Ratification and further to highlight its second paragraph.¹²⁴ The Committee considers that for the present purpose it is sufficient to reproduce just the highlighted paragraph of the Instrument of Ratification which reads as follows:

“Whereas, the Agreement [i.e. the BIT] provides that the investment shall be in the areas allowed by and in accordance with the Constitutions, laws and regulations of each of the Contracting Parties.”

¹²¹ *Ibid.*, para. 335.

¹²² *Ibid.*

¹²³ *Ibid.*, para. 336.

¹²⁴ *Ibid.*, para. 337.

93. The Tribunal attached to this part of the Instrument of Ratification a particular importance. In its view, “[b]ecause the exchange of instruments of ratification puts a treaty into effect in accordance with its terms, the second preambular paragraph emphasized above is particularly important in regard to the issue at bar.”¹²⁵

94. The “issue at bar” was the determination of the jurisdiction of the Arbitral Tribunal under the BIT; whether Fraport’s investment was an investment within the meaning of the BIT as that term was defined in its Article 1(1); in other words, whether Fraport’s investment falls within the scope *ratione materiae* of the BIT. If it falls within it, the Tribunal would have jurisdiction over the dispute brought to it by Fraport under Article 9 of the BIT. If Fraport’s investment is not an investment within the meaning of the BIT, falling thus outside its scope *ratione materiae*, the dispute would not be within the Tribunal’s jurisdiction.

95. The scope *ratione materiae* of the BIT, and the Tribunal’s jurisdiction, are governed by the provisions of the BIT itself. The provisions of the BIT are controlling, while a preambular paragraph of the Philippines’ Instrument of Ratification is not.¹²⁶

96. An instrument of ratification is a unilateral act by which a State expresses, on the international plane, its consent to be bound by a treaty.¹²⁷

97. It is true that through the exchange of the Instruments of Ratification of the Philippines and Germany, respectively, which occurred on 10 July 1997, the BIT entered into force in accordance with its Article 11. But that fact has no bearing on the scope *ratione materiae* of the BIT, nor does it provide any basis for attaching any particular importance to one of the two instruments of ratification.¹²⁸

98. The quoted paragraph of the Philippines’ Instrument of Ratification does not modify the legal effect of the BIT, nor was it established before the Tribunal that such was

¹²⁵ *Ibid.*, para. 338.

¹²⁶ *See* Transcript, Day 1, 63/ 1-4.

¹²⁷ *See ibid.*, 61/ 14-18.

¹²⁸ *See ibid.*, 62/ 19-22.

the intention of the Philippines. It was not formulated as a reservation, something extraordinary in the context of a bilateral treaty, nor as an interpretative declaration intimated to the other Contracting Party to the BIT, Germany, for its acceptance.¹²⁹

99. The Tribunal relied heavily on the Philippines' Instrument of Ratification to determine whether Fraport's investment fell within the meaning of the BIT.¹³⁰ The Vienna Convention on the Law of Treaties is directly applicable to the interpretation of the BIT. However, the Tribunal did not provide any explanation based on the Vienna Convention for attaching so much importance to the Instrument, in its determination of the scope *ratione materiae* of the BIT and its jurisdiction.¹³¹

100. The Tribunal proceeded to the interpretation of the above quoted provisions of Articles 1(1) and 2(1) of the BIT, of the provision of ad Article 2 of the Protocol, and of the second preambular paragraph of the Philippines' Instrument of Ratification, which it considered as "manifestly limitations *ratione materiae*", observing that "their interpretation is not simple."¹³² It referred to Article 31 of the Vienna Convention on the Law of Treaties as "enjoin[ing] interpretation of particular provisions in their context, *i.e.* with reference to the rest of the treaty and in the light of its objects and purposes."¹³³ The Tribunal observed simply that "there are three explicit references [to the condition] in the total of 16 provisions in the Treaty and Protocol plus an additional reference in the Instrument of Ratification", and concluded that "[t]he parties had in mind explicit constitutional limitations in the Philippines."¹³⁴ One can understand that the Tribunal, from its perspective of assessing Fraport's investment in the *Philippines*, was focused on the "constitutional limitations in the Philippines". However, the provisions of the bilateral treaty operate both ways, unless specifically provided otherwise.¹³⁵ The BIT uses the

¹²⁹ See Memorial, paras. 56-57, Transcript, Day 1, 61-63.

¹³⁰ See Award, paras. 337-343.

¹³¹ See Memorial, paras. 65-66; Reply, para. 25.

¹³² Award, para. 339.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ See Memorial, paras. 56-57.

formula “in accordance with the respective laws and regulations of either Contracting State.” Of the all quoted provisions on which the Tribunal relied, only the one contained in the Protocol, ad Article 2, specifically refers to the Constitution of the Republic of the Philippines and the foreign ownership restrictions contained therein.¹³⁶

101. Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties requires that a treaty be interpreted in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose.

102. Fraport is highly critical of the way the Tribunal interpreted Article 1(1) of the BIT, alleging that the Tribunal disregarded the express language of the BIT, in particular the word “accepted” in the definition of the term “investment”.¹³⁷

103. It is true that the Tribunal never expressly referred to the ordinary meaning of the terms of the BIT when it construed its provisions in order to determine its jurisdiction which had been challenged by the Respondent.¹³⁸ Rather, it emphasized the object and purpose of the BIT. On the other hand, the Tribunal was certainly aware of the limits of relying on the object and purpose in the interpretation exercise when it observed that:

“while a treaty should be interpreted in the light of its objects and purposes [encouraging investment], it would be a violation of all the canons of interpretation to pretend to use its objects and purposes, which are, by their nature, a deduction on the part of the interpreter, to nullify four explicit provisions.”¹³⁹

104. Further, it appears from the Award that the Tribunal did consider the express terms of Article 1(1) of the BIT, including the words “*accepted* in accordance with the respective laws and regulations of either Contracting State.” It pointed to some linguistic differences in the German and English versions of the BIT¹⁴⁰ but concluded that they do

¹³⁶ The assertion of the Tribunal that “the Instrument of Ratification make[s] that [i.e., “[t]hat the parties had in mind *explicit* constitutional limitations in the Philippines?”] clear beyond peradventure of doubt” lacks a basis in the actual text of the Instrument of Ratification. (Award, para. 339, emphasis added).

¹³⁷ See paras. 47 and 48 above.

¹³⁸ See Memorial, paras. 51-53.

¹³⁹ Award, para. 340.

¹⁴⁰ *Ibid.*, para. 341.

not appear to indicate an intentional nuance and hence be legally significant.¹⁴¹ Then it offered its analysis of Article 1(1) at two different places.

105. First, in paragraph 343 of the Award, although the words of Article 1(1) are not expressly used, in particular the word “accepted” emphasized by Fraport in its argument, there is no doubt that the Tribunal considered them in its discussion. It starts paragraph 343 with the observation that “[b]roadly speaking, there are two types of international investments.” It explains that “[t]he first is comprised of an investment based on or accompanied by some explicit agreement with or unilateral communication from the host state; the second involves an investment in the market of the host state without an accompanying specific agreement [...]”¹⁴² The Tribunal admits that “[t]he English version of the BIT might be read as applying Articles 1(1) and 2(1) only to the first type of investment.”¹⁴³ But it does not accept such reading of the BIT because, in its views, “such a construction would seem unreasonable and even doubtful for a number of reasons.”¹⁴⁴ It explains:

“First, it is unlikely that state parties would insist on compliance with their respective constitutions, laws and regulations only with respect to the first type of investment, but would, at the same time, discharge potential investors from such compliance with respect to the quite common type of investments in the second category. Second, ad Article 2 of the Protocol, which elaborates Article 2 of the Treaty, relates to purchasing shares in a company which might then acquire land in the territory of the Republic. The acquisition of shares by a foreign investor in a domestic corporation is a legal transaction that does not, by its nature, involve some action by the government involving acceptance or permission. ... So it would appear that the material restrictions on investments relate both to investments of the first and second types.”¹⁴⁵

106. Second, in another section of its jurisdictional analysis, titled “The Claimant’s Concealment of the Secret Shareholder Agreements,”¹⁴⁶ the Tribunal specifically addressed Fraport’s argument that the word “accepted” in Article 1(1) of the BIT implies

¹⁴¹ *Ibid.*, para. 342.

¹⁴² *Ibid.*, para. 343, footnote omitted.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Award, p. 183.

an acceptance *régime* for foreign investments to be established by the Contracting States. The Tribunal rejected for several reasons the Claimant's argument that "the word 'accepted' in Article 1(1) of the BIT is critical to the operation of that provision and since the Philippines did not establish an acceptance regime, that provision does not apply."¹⁴⁷

107. Its first reason was that "the word 'acceptance' does not appear in the Instrument of Ratification, which simply states that 'the Agreement provides that the investment shall be in the areas allowed by and in accordance with the Constitutions, laws and regulations of each of the Contracting Parties'."¹⁴⁸ As explained above, this reason is not well founded in the rules of interpretation binding upon the Tribunal, as the Philippines' Instrument of Ratification did not modify the legal effects of the provisions of the BIT which govern the jurisdiction of the Tribunal.¹⁴⁹

108. But the Tribunal also rejected Fraport's contention on the basis that "without regard to that [i.e., the provision of the Instrument of Ratification], it is, ... , unreasonable to assume that state parties would incorporate a reiterated insistence on compliance with their respective constitutions, laws and regulations only not to have them apply."¹⁵⁰ In particular, the Tribunal supported its view, as a matter of treaty interpretation, by reference to ad Article 2 of the Protocol to the BIT,¹⁵¹ which elaborates Article 2 of the BIT itself. In accordance with Article 11(5) of the BIT, the Protocol "forms an integral part of this Agreement." Based on its construction of that provision, the Tribunal expressed the view that there is no need for an acceptance procedure for the purchase of shares, the form of putative investment in Fraport's case, but that nevertheless "it is quite clear from the BIT and the Protocol that accordance with the host state's law is nonetheless required."¹⁵²

¹⁴⁷ Award, para. 384.

¹⁴⁸ *Ibid.* The Tribunal repeated in para. 385 of the Award that the Instrument of Ratification makes no mention of "acceptance" but speaks only of "areas allowed by and in accordance with."

¹⁴⁹ See paras. 94-99 above. See Memorial, paras. 56-57.

¹⁵⁰ Award, para. 384.

¹⁵¹ Cited *supra* para. 91.

¹⁵² Award, para. 385 in which the Tribunal repeats its explanation already provided in para. 343 of the Award and quoted in para. 105 above.

109. The point which the Committee understands the Tribunal to be making here is that it would have been unnecessary for the Contracting Parties to add an express qualification to Article 2, recognising that “investors are allowed to own up to 40% of the equity of company which can then acquire ownership of land” (a form of acquisition which required no acceptance procedure), if the limitation in Article 2 vis-à-vis the “Constitution, laws and regulations” of each Contracting State applied only in cases where a specific acceptance regime had been put in place. Rather, the Tribunal considered that the need to add this provision supported a broader construction of the requirement, to include other limitations on the making of investments under the law of the respective Contracting States. Such a construction was applied by the Tribunal equally to the definition of the investments protected by the BIT in Article 1(1), a definition to which Article 2 cross-refers.

110. An alternative and plausible interpretation of Article 1(1) of the BIT, submitted by Fraport, is that Article 1(1) contemplates the establishment of an acceptance regime. If the investment was accepted by the state under this regime, or, in the absence of an acceptance regime, if it fell within the definition of investment, then, it would constitute an investment for the purposes of the BIT which, being thus applicable to such investment, would provide protection to it (including through arbitration as envisaged in Article 9 of the BIT). On this interpretation, ad Article 2 of the Protocol was required in order to exclude an investment in land from the scope of Article 2 of the BIT. Otherwise such land ownership by foreign investors (being simply prohibited by the Constitution and, thus, not being an investment which could require an acceptance regime) would have been included within the BIT’s protections—the reverse of the objective to which the Philippines was committed under its Constitution. Once this specific exclusion from the scope *ratione materiae* of the BIT had been added, it was necessary to also add the qualification regarding minority shareholders in land-owning companies, since otherwise the exclusion would be inaccurate. Thus, the qualification found in ad Article 2 is neutral, so far as concerns the construction of the meaning of Articles 1(1) and 2 of the BIT, since ad Article

2 does not otherwise suggest that any investment must comply in all respects with Philippine law to fall within the scope *ratione materiae* of the BIT.

111. But the Tribunal rejected Fraport's interpretation. Instead the Tribunal held that "[p]lainly, ... , economic transactions undertaken by a national of one of the parties to the BIT had to meet certain legal requirements of the host state in order to qualify as an 'investment' and fall under the Treaty."¹⁵³

112. Fraport criticizes the Tribunal for its interpretation and construction of the BIT, in particular Article 1(1) thereof. Although this Committee expressed earlier some reservations about the way the Tribunal proceeded in its interpretation exercise, it is not itself empowered to act as an appeal body and substitute its own interpretation of the BIT for the one adopted by the Arbitral Tribunal. It is not for the Committee to decide which interpretation is correct. As long as the interpretation arrived at by the Tribunal is a tenable one, it is not open to the Committee to conclude that the Tribunal manifestly exceeded its powers. The Committee, without necessarily endorsing the interpretation of the BIT provided by the Tribunal, considers that the latter's interpretation, based in particular upon its reading of ad Article 2 to the Protocol, is not untenable. It cannot, therefore, conclude that, by adopting it, the Tribunal manifestly exceeded its powers.

113. The Committee cannot accept the second prong of Fraport's criticism directed at the Award, namely that the Tribunal failed to apply its jurisdictional analysis to, what Fraport calls, its "discrete investments" made after 23 August 2001 when the provision of the secret shareholder agreement of 6 July 1999, deemed by the majority as constituting the violations of the ADL, had been amended. The Committee is of the view that the Tribunal was entitled to treat Fraport's investment participation in the Terminal 3 Project as a unity pursuing the same objective. The Tribunal by applying its analysis to the investments of Fraport as a whole has not manifestly exceeded its powers.

¹⁵³ Award, para. 340.

114. It remains for the Committee to deal, in this part of its decision, with the third prong of Fraport's criticism, namely the wrong application of the ADL and its "untenable interpretation" by the Tribunal.

115. The Committee observes that the ADL, known as the Anti-Dummy Law, is a criminal statute of the Philippines as its official title clearly indicates: An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges. If the Tribunal had interpreted Article 1(1) of the BIT as encompassing only those laws which admit investments through an acceptance regime by way of explicit agreement by the host state, then, as a criminal law statute, the ADL would not have played any role in the jurisdictional analysis of the Tribunal. Rather, the Tribunal took the view that "economic transactions undertaken by a national of one of the parties to the BIT had to meet certain legal requirements of the host state in order to qualify as an 'investment' and fall under the Treaty."¹⁵⁴ This conclusion perhaps explains why the Tribunal turned to its interpretation of the ADL, although it nowhere expressly stated the ADL contains "legal requirements" which "an economic transaction...had to meet...in order to qualify as an investment."

116. The Committee does not consider it appropriate to review, in the context of an annulment procedure, the findings of the Tribunal that Fraport violated the ADL, or whether it was legally possible for Fraport to be a perpetrator of the violations of the ADL's Section 2-A. Nor does the Committee express a view on Fraport's argument that in the absence of a principal offender (who can, as Fraport stresses, be only a Philippine national), Fraport cannot be liable as aider or abettor.¹⁵⁵

117. The Tribunal's Members were not experts in Philippine law. Therefore the interpretation and construction of the Philippine law, to the extent it was relevant, should

¹⁵⁴ Award, para. 340.

¹⁵⁵ On the last point, the Committee observes that the Appeal Chamber of the International Criminal Tribunal for Former Yugoslavia (ICTY), having set aside R. Krstić's conviction as a participant in a joint criminal enterprise to commit genocide, the most serious crime, found him guilty of aiding and abetting genocide when no principal actor was yet convicted: *Prosecutor v. Radislav Krstić*, Case No.: IT-98-33-A, Judgment of the Appeal Chamber, dated 19 April 2004. It was only in 2010 that the Trial Chamber found V. Popović and L. Beara guilty of genocide. *Prosecutor v. Popović et al.*, Case No.: IT-05-88-T, Judgment of the Trial Chamber of 10 June 2010; the appeal is pending.

have been based on the evidence and research as to the actual application of that law by the competent Philippines' organs. How the Tribunal proceeded on this issue is the subject of the Committee's analysis in the next section of this Decision.

118. To conclude this section, devoted to the question of whether the Tribunal manifestly exceeded its powers when it declared the Centre without jurisdiction and itself without competence to hear the dispute and resolve it, the Committee, applying the test for review as outlined above, is of the view that it would trespass the limits of its annulment powers, transforming itself in an *organe d'appel*, if it were to uphold Fraport's claim that the Tribunal manifestly exceeded its powers.

B. Serious Departure From a Fundamental Rule of Procedure (Article 52(1)(d) of the ICSID Convention)

119. The second ground for annulment of the Award relied upon by Fraport in its Application for Annulment is "that there has been a serious departure from a fundamental rule of procedure", the ground provided for in Article 52(1)(d) of the ICSID Convention.

a) Fraport's Case

120. Fraport alleges that the Tribunal committed a serious departure from a fundamental rule of procedure in two respects:

- (a) In disregarding the principles required to be respected in determining whether a criminal law had been violated, specifically the principles of *nullum crimen sine lege* and *in dubio pro reo*.¹⁵⁶ This ground of complaint relates in particular to the manner in which the Tribunal approached the construction of the ADL;

¹⁵⁶ Memorial, paras. 150-162.

(b) By relying upon evidence admitted after the close of proceedings in denial of Fraport's right to be heard.¹⁵⁷ This ground relates in particular to the Tribunal's decision to admit evidence from the investigation leading to the decision of the Philippines Special Prosecutor on the criminal complaint concerning Fraport's alleged breach of the ADL ("*the Prosecutor's Resolution*"¹⁵⁸) after the closure of the proceedings, without providing the parties with an opportunity to be heard as to the effect of the material produced to the Tribunal.

(i) *Nullum crimen sine lege/ in dubio pro reo*

121. In its Memorial, Fraport submits, with the support of an expert Opinion of Professor Cassese dated 9 September 2008,¹⁵⁹ that the general principle of due process includes the requirement to apply the principles of *nullum crimen sine lege* and *in dubio pro reo* in the construction of the ADL.¹⁶⁰ The ADL is a criminal statute and these principles are applicable, even where such a statute is applied only incidentally in the context of international arbitral proceedings. Failure to do so amounts to the breach of a fundamental rule of procedure.¹⁶¹

122. In its Reply, Fraport submits that *in dubio* is a fundamental procedural rule "necessitated by the application of criminal law in the arbitration".¹⁶² It relies upon a further Opinion of Professor Cassese dated 14 February 2009.¹⁶³ Professor Cassese opines that international tribunals may need to determine issues relating to the criminal liability of individuals when they apply national criminal law for the purpose of ruling on an issue preliminary and incidental to the public international law dispute. International tribunals are bound to apply national law as interpreted and applied by national courts, unless the

¹⁵⁷ *Ibid.*, paras. 163-188.

¹⁵⁸ Ex RA-36: *NBI v. Cheng Yong et al* (Prosecutor's Resolution) I S No 2006-817 (27 December 2006).

¹⁵⁹ *Cassese I*, paras. 39-40.

¹⁶⁰ Memorial, paras. 150-162.

¹⁶¹ *Cassese I*, paras. 41-42.

¹⁶² Reply, para. 95.

¹⁶³ Supplementary Expert Opinion on the Incidental Application of Philippine Criminal Law by International Tribunals, (hereinafter "*Cassese 2*").

national interpretation is manifestly unreasonable. Compliance with the *nullum crimen* principle is required in the Philippines both by the Constitution and by treaties to which the Philippines is party. Fraport submits that such a principle has a *jus cogens* character and binds international tribunals.

123. Responding to the argument that *in dubio* cannot apply in international arbitration because it would be contrary to the principle of equality,¹⁶⁴ Professor Cassese expresses the view that this distinction is merely semantic, since:

“[t]he notion of ‘presumption of innocence’ is intended to convey the idea that nobody can be held to be responsible for any misconduct, whether civil (a tort) or criminal (a penal offence), without his being first heard...”¹⁶⁵

124. At the hearing, Fraport developed the application of these principles in the context of the approach of the Tribunal in the present case, in the light of Article 52(1)(d).¹⁶⁶ It submitted that *nullum crimen* and *in dubio* are expressions of the right to a fair trial in any case where a court or a tribunal is applying criminal law.¹⁶⁷ It relied, *inter alia*, upon *Orr v. Norway*¹⁶⁸ for the proposition that the criminal presumption of innocence is still applicable in the context of civil proceedings where criminal law features are apparent in the civil court’s reasoning.¹⁶⁹

125. Fraport emphasises that the ADL is a criminal statute.¹⁷⁰ It submits that the protections of Article 52(1)(d) are not to be reduced to merely technical rules of procedure, but rather include those emanations of the right to a fair trial and those principles of natural justice that govern any kind of legal procedure, including arbitral procedure.¹⁷¹

¹⁶⁴ Expert Opinion of Professor F. Pocar, “How Should an International Arbitral Tribunal Interpret and Apply Domestic Criminal Law,” submitted by the Philippines with its Counter-Memorial, (hereinafter “*Pocar I*”), paras. 41-42.

¹⁶⁵ *Cassese 2*, para. 69.

¹⁶⁶ Transcript, Day 1, 205–270, especially at 244–270.

¹⁶⁷ Transcript, Day 1, 245/ 6–9.

¹⁶⁸ Ex RA-205: ECHR, App No 31283/04, 15 May 2008, para. 51.

¹⁶⁹ Transcript, Day 1, 246/ 19–20.

¹⁷⁰ Transcript, Day 3, 657/ 11–660/ 4.

¹⁷¹ Transcript, Day 3, 674/ 17–22.

126. Fraport submits that the Award shows on its face that the Tribunal did not approach the evidence as to Fraport's breach of Section 2-A of the ADL applying such a presumption. The Tribunal expressly accepted that a literal interpretation of the ADL would not cover Fraport's conduct,¹⁷² but nevertheless proceeded to find that Fraport had infringed the law by applying the Tribunal's own view of the proscribed conduct, which found no support in the text of the ADL itself.¹⁷³ Fraport submits that the Tribunal proceeded on the basis of a 'preconviction' against Fraport, and did not entertain the possibility of doubt, in violation of the principle *in dubio*.¹⁷⁴

(ii) The right to be heard

127. The second basis on which Fraport alleges that there had been a failure to observe a fundamental rule of procedure is that the Tribunal failed to hear it by way of rebuttal on the significance of new evidence admitted after the closure of proceedings, in breach of its right to be heard.

128. The Philippines does not dispute that a failure to accord a right to be heard could constitute a breach of a fundamental rule of procedure,¹⁷⁵ thus opening the way to annulment under Article 52(1)(d). The issues under this heading relate to the application of the principle in the context of the procedures in fact adopted by the Tribunal. The essential facts as to these procedures are not in dispute, being a matter of record in the arbitration.

129. In its Application for Annulment, Fraport submits that the Tribunal breached this principle in admitting evidence and substantively relying upon it after the close of proceedings without giving Fraport an opportunity to address the new material.¹⁷⁶

¹⁷² Transcript, Day 1, 217/ 8, referring to Award, para. 356.

¹⁷³ Transcript, Day 1, 222/ 4, referring to Award, para. 395.

¹⁷⁴ Transcript, Day 1, 263/ 9–20.

¹⁷⁵ *Cassese 2*, para. 69.

¹⁷⁶ Application, para. 88.

130. This submission was developed in its Memorial by reference to the documents from the file in the arbitration proceedings.¹⁷⁷ Fraport contends, on the basis of this record, that its right of rebuttal in relation to the admission of this evidence has been violated in three respects:

(a) The majority of the Tribunal concluded that Fraport's transaction counsel, Dr Stiller, had testified falsely in the Philippines without allowing Fraport or the witness to be heard on that serious but untenable ruling;¹⁷⁸

(b) The majority made an outcome-determinative, but incorrect, factual characterisation of the record before the Philippine Prosecutor. The majority held that the critical factual question in relation to the Prosecutor's Resolution was whether the secret shareholder agreements had been part of the record and considered by the Prosecutor.¹⁷⁹ This question was not disclosed to the parties, who thus did not have an opportunity to confront the evidence upon which the Tribunal relied.¹⁸⁰ Fraport argues that the Tribunal's conclusion that the two such agreements which were dispositive could not have been disclosed to the Prosecutor because of confidentiality agreements in the arbitration was incorrect; and

(c) The majority acknowledged that, if the facts concerning these materials had been different, its decision on jurisdiction would have been different, since it would have accorded effect to an estoppel created by the Prosecutor's decision that the ADL had not been breached.¹⁸¹

¹⁷⁷ *Infra* paras. 150 and following.

¹⁷⁸ Memorial, paras. 170-175.

¹⁷⁹ Award, para. 368.

¹⁸⁰ Memorial, para. 176.

¹⁸¹ *Ibid.*, paras. 183-188, citing Award, para. 387.

131. In its Reply,¹⁸² Fraport submits that the right to be heard includes the right to confront primary facts.¹⁸³ Its application on this ground relates to primary facts, and not simply to inferences which the Tribunal might decide to draw from them. The material in question is the decision of the Special Prosecutor and his documentary record.¹⁸⁴

132. As to waiver, Fraport submits that the Tribunal had informed the parties that the procedure was used merely to complete the record rather than consider it in substance:

“[T]he Majority changed the purpose for receiving the underlying materials without informing the parties. The change in purpose was not communicated to Fraport, which is why Fraport could not respond and – as a consequence – was denied the right to be heard.”¹⁸⁵

133. At the hearing before the *ad hoc* Committee, Fraport did not further develop its submissions on this issue in opening, resting its case on the written pleadings.¹⁸⁶ In reply to the Respondent’s arguments, Fraport addressed the extent of the disclosure as to the shareholder agreements in the record in the arbitration, and before the Philippine Prosecutor.¹⁸⁷ It submitted that the Tribunal should have afforded Fraport an opportunity to be heard about the legal question of whether a finding by the Philippine Prosecutor bound the Tribunal and about the factual question of whether the shareholder agreements (including the Pooling Agreement) had in fact been produced to the Prosecutor.¹⁸⁸ These questions implicate both the equality of arms between the parties and the opportunity to confront the particular questions of concern to the Tribunal. Each of these are related, but distinct, aspects of the right to be heard.¹⁸⁹

¹⁸² Reply, paras. 131-152.

¹⁸³ *Ibid.*, para. 132, citing Counter-Memorial, para. 229.

¹⁸⁴ *Ibid.*, para. 133.

¹⁸⁵ *Ibid.*, para. 152.

¹⁸⁶ Transcript, Day 1, 205/ 20–206/ 2.

¹⁸⁷ Transcript, Day 3, 599–624.

¹⁸⁸ *Ibid.*, 602, citing Award, para. 368.

¹⁸⁹ Transcript, Day 3, 623.

b) The Philippines' Response

(i) *Nullum crimen sine lege/ in dubio pro reo*

134. The Philippines, in its Counter-Memorial, supported by expert Opinions filed by Professors Pellet, Pocar and Schreuer, submits that the Tribunal did not seriously depart from a fundamental rule of procedure in this respect, since *nullum crimen sine lege* and *in dubio pro reo* are not rules of procedure. Rather *nullum crimen* is a substantive rule, and *in dubio* establishes a standard of evidential proof applicable only to criminal cases.¹⁹⁰ In any event, the Philippines contends that the Tribunal had not infringed either principle.

135. In its Rejoinder,¹⁹¹ which was accompanied by a further round of supplemental expert opinions, the Philippines develops its submission that *in dubio* and *nullum crimen* are not rules of procedure. Professor Pellet accepts that such principles are general principles of law, but disagrees with the proposition advanced by Professor Cassese that they have a *jus cogens* character.¹⁹² He opines that to apply the principles in the context of the issue before the Tribunal would be to mistake the nature of its task, which was not to sentence Fraport for a criminal offence, but to determine the conformity of Fraport's investment with the relevant provisions of Philippine law.¹⁹³

136. This question would have been the same, whether or not the ADL were a criminal statute, since, even if it were not, there would still be "a legal prescription which needs to be given effect, whatever the sanction of its non-compliance might have been under Philippine law".¹⁹⁴ *Nullum crimen* as a general principle of law applies only to criminal proceedings. It finds no recognition in international instruments outside that context.¹⁹⁵ When international tribunals have applied it, they have done so in order to

¹⁹⁰ Counter-Memorial, paras. 207-215, relying upon Professor Schreuer's Legal Opinion dated 13 January 2009, para. 132 (hereinafter "*Schreuer I*"), Professor Pellet's Legal Opinion dated 13 January 2009, para. 31, (hereinafter "*Pellet I*"), and Professor Pocar's Legal Opinion dated 12 January 2009, para. 41, (hereinafter "*Pocar I*").

¹⁹¹ Rejoinder, paras. 128-136.

¹⁹² Professor Pellet's Supplemental Legal Opinion dated 14 July 2009, filed with the Rejoinder, paras. 5-13, (hereinafter "*Pellet 2*").

¹⁹³ *Ibid.*, para. 16.

¹⁹⁴ *Ibid.*, para. 17.

¹⁹⁵ *Ibid.*, paras. 19-23.

assess the conformity of a municipal law or the decision of a municipal court with the international obligations of the state, not to apply the principle to the underlying municipal law case.¹⁹⁶

137. Professor Pocar adds that the reason why the principle of legality has become a norm of customary international law is in order to protect persons accused of criminal acts from the abuse of state power by judges and prosecutors. He explains:

Where, outside of criminal proceedings, the values protected by the principle of legality are not in jeopardy, its application is unjustifiable as it would end up protecting one side – the beneficiary of the more restrictive interpretation that this principle entails – over the other without a proper ground for such more favourable treatment.¹⁹⁷

138. Even if the principle of *nullum crimen* were applicable, this did not necessarily mandate a literal interpretation, since fidelity to the law requires interpretation in the light of the context and purpose of the particular provision.¹⁹⁸

139. At the hearing before the *ad hoc* Committee, the Philippines developed these points.¹⁹⁹ It submitted that Article 52(1)(d) was designed to ensure that parties were accorded “basic guarantees of due process”.²⁰⁰ It argued that Fraport’s submissions in relation to *nullum crimen* and *in dubio* failed for three reasons:

(a) Because both principles only apply in a criminal context, they cannot be considered a fundamental rule of procedure for ICSID purposes;

(b) Even in the criminal context, they can not properly be considered procedural rules; and,

¹⁹⁶ *Ibid.*, para. 25.

¹⁹⁷ Professor Pocar’s Supplemental Legal Opinion dated 14 July 2009, filed with the Rejoinder, para. 10, (hereinafter “*Pocar 2*”).

¹⁹⁸ *Ibid.*, para. 28.

¹⁹⁹ Transcript, Day 2, 457–515.

²⁰⁰ Transcript, Day 2, 458/ 22–459/ 1.

(c) The Tribunal did not in any event contravene either principle, even if they were applicable.²⁰¹

140. The Philippines points out that the *in dubio* principle applies in criminal proceedings, as a reflection of the fact that the state has many advantages at its disposal in such proceedings, including compulsory powers to obtain evidence and the right to indict. Moreover, the interest at stake in criminal proceedings is the liberty of the person.²⁰² Neither of these factors is present in international arbitration, and the application of the principles would therefore serve to distort the equality of the parties. It would lead to absurd results if, in order to determine admission in accordance with host state law, the Tribunal were bound to apply a higher standard of proof to more serious violations of the criminal law than to less serious violations of the civil law.²⁰³

141. A procedural rule is one which governs the work of the tribunal and the conduct of the proceedings, and not the manner in which it interprets the applicable law or assesses the evidence.²⁰⁴

142. In the view of the Philippines, the approach of the Tribunal in this case could not be criticized on the ground that it had failed fairly to assess the evidence, since it has been widely held by annulment committees that an arbitral tribunal is its own judge of the admissibility of any evidence, and of its probative value.²⁰⁵ An alleged defect in the Tribunal's approach to the evidence could not therefore amount to the breach of a fundamental rule of procedure.²⁰⁶

²⁰¹ Transcript, Day 2, 463/ 14–464/ 4.

²⁰² Transcript, Day 2, 466/ 6–467/ 4.

²⁰³ Transcript, Day 2, 471/ 7–472/ 18.

²⁰⁴ Transcript, Day 2, 477/ 8–14.

²⁰⁵ ICSID Arbitration Rule 34(1).

²⁰⁶ *Wena Hotels Ltd. v. Egypt*, Decision on Annulment, 5 February 2002, 6 ICSID Reports, p. 129, para. 65.

143. The Philippines stresses that the fundamental question is simply whether the parties had been treated fairly by the Tribunal.²⁰⁷ It accepts that a failure to accord a fair hearing would constitute a breach of Article 52(1)(d), but submits that this right has not been violated in any respect in the present case.

(ii) *The right to be heard*

144. The Philippines submits in its Counter-Memorial²⁰⁸ that Fraport did not choose to present detailed submissions on the ADL during the course of the hearing, despite the fact that it was on notice of the importance that the Tribunal attached to the construction of the ADL in the light of the shareholder agreements.²⁰⁹ Then, in its post-hearing written submissions, Fraport did in fact address in some detail the proper construction of the ADL.²¹⁰

145. Turning to the position following disclosure of the Prosecutor's Resolution, the Philippines submits that:

(a) Fraport was heard on the completeness of the record before the Philippine Prosecutor. Fraport pointed out the incompleteness of the record by letter to the Tribunal.²¹¹ In response, the Tribunal invited Fraport to supplement the record by providing the Tribunal with copies of the documents listed in its letter.²¹² Fraport continued thereafter to make submissions by letter to the Tribunal as to the completeness of the record;²¹³

(b) Fraport was heard on the explanation for the statements made to the Philippines Department of Justice by Dr Stiller, since he had in fact given

²⁰⁷ Transcript, Day 3, 841/ 21–842/ 2.

²⁰⁸ Counter-Memorial, paras. 216-256.

²⁰⁹ *Ibid.*, para. 224.

²¹⁰ *Ibid.*, para. 226.

²¹¹ Ex RA-59.

²¹² Ex RA-60.

²¹³ Letter dated 19 April 2007, Ex RA-62.

evidence before the Tribunal as to the construction of the Pooling Agreement, which the Tribunal considered and expressly rejected;²¹⁴

(c) The factual findings about the Department of Justice's access to evidence that Fraport claimed were incorrect were not outcome-determinative. Fraport had in fact submitted at the oral hearing that the Philippines had access to the shareholder agreements.²¹⁵ In any event, the Tribunal expressly pointed out that the knowledge of the Prosecutor many years later was not relevant to the question of whether the Philippines knew of the agreements in 1999, when the investment was admitted.²¹⁶ Further, the Tribunal did not consider the municipal decision binding upon it;²¹⁷ and

(d) Finally, the Philippines submits, relying on ICSID Arbitration Rule 27, that Fraport had waived the right to challenge the irregularity of the Tribunal's proceeding in this regard, not having made such an objection to the Tribunal at the time.²¹⁸

146. In its Rejoinder, the Philippines contends that the Tribunal had respected Fraport's right to be heard in addition because:

(a) The interpretation of the ADL was within the legal framework of the dispute, since it had been raised in the pleadings and at the hearing;²¹⁹ and

(b) Fraport had the opportunity to be heard on the evidentiary record before the Philippine Department of Justice:

²¹⁴ Counter-Memorial, para. 239-244.

²¹⁵ *Ibid.*, para. 248, referring to Hearing on Jurisdiction and Merits Transcript (hereinafter "*Hearing Transcript*"), (Ex RA-63) Day 11, 2933/10-16.

²¹⁶ *Ibid.*, para. 249, referring to Award paras. 344-345.

²¹⁷ *Ibid.*, para. 250, citing Award, paras. 390-391.

²¹⁸ *Ibid.*, paras. 252-256.

²¹⁹ Rejoinder, paras. 156-158.

(i) The Tribunal's request for production of documents after closure of the arbitral proceedings was proper under Article 43 of the ICSID Convention, even after the closure of proceedings;²²⁰

(ii) Fraport had the opportunity to address the completeness of the record. In fact it did so in its correspondence with the Tribunal. The Tribunal's direction limiting further submissions was fair because it applied to both parties;²²¹ and

(iii) Fraport had waived its right to object. Its correspondence in response to the Tribunal's request demonstrated that it was well aware of the importance of demonstrating the extent to which the Prosecutor had knowledge of the shareholder agreements.²²²

147. At the hearing before the *ad hoc* Committee, the Philippines submitted that:²²³

(a) The Philippines had argued that Fraport had violated the ADL in its post-hearing submissions, to which Fraport had had an opportunity to reply.²²⁴ At the hearing itself and in its post-hearing briefs, counsel for Fraport had, to the contrary, declined to take the allegations in relation to breach of the ADL seriously and to confront them,²²⁵ even when the point was put to it expressly by the Tribunal;²²⁶ and

(b) As far as the later introduction of the Prosecutor's Resolution and file was concerned, the Philippines notes that Fraport had not alleged in the annulment proceedings that the Prosecutor had had access to the Pooling Agreement; merely that he had had access to documents which referred to it. Thus the Tribunal was well entitled to reach the conclusion that this would not be

²²⁰ *Ibid.*, para. 161.

²²¹ *Ibid.*, paras. 162-166.

²²² *Ibid.*, paras. 180-181, citing Fraport letter dated 16 March 2007, Ex RA-57.

²²³ Transcript, Day 2, 518/ 13-560/ 19.

²²⁴ Transcript, Day 2, 519/ 8-520/ 15.

²²⁵ Transcript, Day 2, 522/ 12-528/ 13.

sufficient to persuade the Prosecutor that there was proof of a violation of the ADL.²²⁷ The issue was not in any event outcome-determinative, since the Tribunal held that, for an estoppel to arise, the Philippines would have had to have been aware of the Pooling Agreement at the time the investment was made.²²⁸

148. In the course of the oral submissions by way of rejoinder, the Philippines responded to two specific questions raised by the *ad hoc* Committee in relation to the ADL prosecution in the Philippines:

(a) First, it accepted (subject to its checking) that the only underlying evidence of law as to the construction of the ADL (as opposed to the statute itself or contemporaneous evidence of fact) relied upon before the Tribunal was two Department of Justice Opinions (Nos 141 and 165²²⁹) and the decision of the Supreme Court in *Luzon*.²³⁰ The Philippines submits that these Opinions went to the question of the construction of the shareholding restriction under the Foreign Investment Act and not to other means of control proscribed by the ADL,²³¹ and

(b) Second, the Philippines informed the Committee that the Department of Justice proceedings in the Philippines were still pending. Since the decisions of the Prosecutors which had been disclosed in the arbitration proceedings, there were pending motions for reconsideration and petitions for review. The DOJ had completed its investigation, but no Criminal Information had been filed.²³²

²²⁶ Referring in particular to the exchange between Arbitrator Reisman, President Fortier and Mr. Nolan, counsel for Fraport, at *Hearing Transcript*, Day 9, 2321/ 22–2331/ 7 (Ex CA-26).

²²⁷ Transcript, Day 2, 550–552.

²²⁸ Transcript, Day 2, 554–557, referring to Award, paras. 344–346, and relying upon *World Duty Free Co Ltd v. Kenya* (Award) ICSID Case No ARB/00/7, 7 October 2006, para. 180.

²²⁹ Of these, only the latter is expressly cited in the Award at para. 352.

²³⁰ Transcript, Day 3, 787/ 15–19. The Philippines subsequently confirmed by letter dated 14 September 2009, in response to the Committee’s query, that these Opinions had not in fact been produced in the record in the arbitration. *See further infra* para. 178 and n. 373.

²³¹ Transcript, Day 3, 794–797/ 8.

c) The Arbitral Tribunal's Approach

149. In the light of these submissions, it is therefore in the first place important for the Committee to consider carefully (i) the manner in which the Tribunal proceeded in relation to the new evidence produced after the oral hearing, and some of it even after the closure of the arbitral proceeding, relating to the Prosecutor's Resolution; and (ii) its significance in the light of the issues found to be dispositive by the Tribunal in its Award.

(i) Procedural treatment of new evidence on the ADL

150. The Tribunal had closed the arbitral proceedings pursuant to ICSID Arbitration Rule 38 on 25 October 2006 in the following terms:²³³

Having deliberated the Tribunal, unanimously, denies Claimant's request of 4 October 2006 for leave to file a further written submission.

The Tribunal is of the view that the presentation of their case by both parties is now completed and the instant proceedings are hereby declared closed.

Nevertheless, the Tribunal's Procedural Order of 18 July 2006, as it pertains to the ongoing expropriation proceedings in the Philippines, remains in effect and Respondent is accordingly directed to keep the Tribunal (and Claimant) informed of the status of those proceedings.²³⁴

151. Then, on 5 January 2007, the Philippines submitted to the Tribunal the Prosecutor's Resolution dismissing the criminal complaint under the ADL.²³⁵ The Philippines stated in its letter that the Prosecutor's dismissal had been made on the basis of only two publicly available documents, namely Fraport's Request for ICSID Arbitration and the Report of the Senate Blue Ribbon Committee.

²³² Transcript, Day 3, 851–852.

²³³ Ex CA-32.

²³⁴ The reference in the final paragraph was to ongoing proceedings instituted by Fraport in the Philippines for compensation for expropriation, and not to the extant ADL criminal complaint.

²³⁵ Ex CA-34.

152. Fraport responded on 8 January 2007 by submitting evidence to show that this statement was incorrect.²³⁶ The Prosecutor, Fraport claimed, had in fact had access to extensive witness and documentary evidence, some of which Fraport referred to in its letter.

153. The Tribunal requested Fraport, on 9 January 2007, to produce two documents referred to in its letter of 8 January (and offered to the Tribunal if it so requested) as establishing that the Philippines' assertion that only two documents have been available to the Prosecutor was incorrect.²³⁷ Fraport provided these on 10 January 2007, adding:

“Please understand that we do not have a full record of the DOJ proceeding.... We do not know the extent to which the DOJ's decision was premised on other documents and investigative materials in addition to those indicated in the exhibits to this letter.”²³⁸

154. The Philippines replied on 11 January 2007 asserting that: “[t]he Philippine DOJ, by contrast, has never had the central evidence proving Fraport's violations of the Anti-Dummy Law,” including, *inter alia*, the secret shareholder agreements.²³⁹ The Philippines claimed that these had been kept from the Prosecutor by reason of the confidentiality order in the arbitration, and Fraport's own blocking application in the German courts. The letter accepted that further documents in addition to the two original mentioned in its letter of 5 January 2007 had been available to the DOJ. Fraport replied on 12 January 2007, reiterating: “we do not have a full record of the DOJ proceeding and thus do not know all the documents that were before it.”²⁴⁰

155. In these circumstances, on 14 February 2007, the Tribunal directed the Philippines to submit to it additional evidence submitted to the Prosecutor, together with relevant Philippines legislation. The request included “all documents, transcripts,

²³⁶ Ex CA-35, Ex CA-37.

²³⁷ Ex RA-49.

²³⁸ Ex RA-50.

²³⁹ Ex RA-51.

²⁴⁰ Ex RA-52.

statements or other evidence received by the DOJ Prosecutor in the course of his investigation.” The Tribunal expressly stated:

“The present request is not a decision by the Tribunal to reopen the proceeding under ICSID Arbitration Rule 38. The Tribunal merely seeks to complete the evidentiary record which the Parties have constituted with their attachments to Respondent’s letter of 5 January and Claimant’s letter of 10 January.

Until further notice, the Tribunal does not wish to receive any submissions with respect to this material from either Party.

After considering the documents which it has requested, the Tribunal will determine whether it requires additional clarification from the Parties. In the meantime, it continues its deliberations.”²⁴¹

156. When the Philippines requested an extension of time to submit these documents, which was opposed by Fraport,²⁴² the Tribunal on 28 February 2007 granted the extension, noting that the documents “were pertinent to its continuing deliberations” and that, nevertheless, “its Decision/Award will be issued within as short a time as possible after submission of these documents.”²⁴³

157. In response to the Tribunal’s order, on 14 March 2007, the Philippines submitted a documentary record of more than 1900 pages, stating that this included “the entirety of the Department of Justice’s Chief State Prosecutor’s file in the Philippine anti-dummy cases.”²⁴⁴ The letter continued:

“The DOJ file does not include the confidential Fraport due diligence documents, final holding report, or the shareholder and loan agreements of PIATCO and Fraport that were presented to the Tribunal in this arbitration and relied upon by Respondent in its submissions.”

158. Further, on 19 March 2007, the Philippines produced the Prosecutor’s Resolution of 15 March 2007 on Reconsideration of his earlier decision.²⁴⁵

²⁴¹ Ex CA-38.

²⁴² Ex RA-54.

²⁴³ Ex RA-55.

²⁴⁴ Ex RA-56; Award, para. 73.

²⁴⁵ Ex RA-58.

159. Fraport responded on 26 March 2007, referencing a number of documents (comprising evidence given by Fraport officials in the DOJ investigation) which the Philippines had not produced in compliance with the Tribunal's order.²⁴⁶ Fraport stated:

“We would be happy immediately to provide copies of the above documents should the Tribunal wish to have them. Most bear stamps indicating receipt by the Philippines Department of Justice. We of course do not know whether there may have been other documents received by the DOJ that the Tribunal also has not received from Respondent.”

160. On the same day, the Tribunal invited Fraport to produce copies of the documents listed in its letter “in order to complete the evidentiary record.”²⁴⁷ This Fraport did by return.²⁴⁸

161. The Philippines responded to Fraport's letter on 30 March 2007. It produced further documents and gave the following explanation of the omissions in its previous production of documents:

“The Respondent's production of documents on 14 March 2007 was the product of an extensive search by lawyers in the OSG [Office of the Solicitor-General] of the DOJ Prosecutor's files relating to the anti-dummy investigations. The OSG is not a party to the DOJ proceedings and relies on the DOJ for access to these documents. Respondent was informed that its production to the Tribunal was complete. As is the case with government agencies in many developing countries, the Philippine DOJ Prosecutor's Office is overworked and understaffed, and its recordkeeping can be imperfect. This is the circumstance that Respondent described during the discovery process in this proceeding that necessitated the lengthy and repeated efforts to locate documents in various agencies. Any omission in Respondent's production was unintentional and inadvertent....

Respondent will supplement its production if any additional responsive documents are located.”²⁴⁹

162. Following further correspondence from the parties, dealing *inter alia* with allegations as to the extent to which the Prosecutor's Reconsideration had been procured

²⁴⁶ Ex CA-40.

²⁴⁷ Ex RA-60.

²⁴⁸ Ex RA-61.

²⁴⁹ Ex CA-41, internal footnotes omitted, emphasis added.

by the Philippines in order to assist its defence in the arbitration,²⁵⁰ the President of the Tribunal wrote to the parties on 19 April 2007 to curtail the need for further correspondence.²⁵¹ The Tribunal repeated and enlarged this direction on 23 April 2007 in the following terms:

“Until further notice, the Tribunal directs the Parties to cease and desist from sending any further letter to the Tribunal. This also applies to any further update by the Respondent in respect of the ongoing expropriation proceedings in the Philippines.”²⁵²

163. The Tribunal did not communicate further with the parties until, on 13 June 2007, it wrote:

“[T]he Tribunal is now of the view that the presentation of their case by both parties is completed and accordingly, pursuant to Arbitration Rule 38, the proceeding is now declared closed in its entirety.”²⁵³

(ii) Consideration of the ADL in the Award

164. The Tribunal referred to two categories of evidence relating to the construction of the ADL in its Award: first, factual evidence from Fraport’s contemporaneous documents relating to legal advice which it had received and its reactions to it; and, second, the evidence from the Prosecutor’s file as to the ADL proceedings.

165. As to the contemporaneous evidence of fact, the Tribunal referred to the following:²⁵⁴

- (a) A due diligence report from Fraport’s Philippine lawyers, Quisumbing Torres (“QT”) dated 11 January 1999;²⁵⁵
- (b) A provisional due diligence report from KPMG of 20 January 1999;²⁵⁶

²⁵⁰ Referred to in Fraport’s letter of 19 April 2007 (Ex RA-62).

²⁵¹ Ex RA-236.

²⁵² Ex RA-239.

²⁵³ Ex RA-240.

²⁵⁴ Award, paras. 308-333.

- (c) Fraport's final report to its supervisory body dated 26 February 1999;²⁵⁷
- (d) The PIATCO Master Concession Concept Brief of 19 January 1999, which referred to the need to conclude a shareholders' agreement in accordance with Philippine law;²⁵⁸
- (e) The comments by Dr Schmidt recorded in the minutes of a meeting of Fraport's Supervisory Board;²⁵⁹ a letter dated 18 December 1998 from the Chairman and President of FRAPORT to the Asian Development Bank, one of the Senior Lenders;²⁶⁰ and a letter from Jesse Ang, CFO of PIATCO, to John Archer of Fraport²⁶¹ which attached the Concept Brief referred to at (d) above;²⁶²
- (f) The Pooling Agreement dated 6 July 1999 itself²⁶³ and the Addendum to that Agreement;²⁶⁴
- (g) Questions raised by Mr Vogel of Fraport to QT on 14 December 1999;²⁶⁵
- (h) A letter from Mr Struck to QT that followed the SyCip report,²⁶⁶ which indicated concern at the content of QT's prior advice; and
- (i) A further letter from QT dated 21 December 1999.²⁶⁷

²⁵⁵ Ex RA-8.

²⁵⁶ Ex RA-96.

²⁵⁷ Ex RA-9.

²⁵⁸ Award, para. 314.

²⁵⁹ Ex RA-10.

²⁶⁰ Ex RA-95.

²⁶¹ Ex RA-97.

²⁶² Award, paras. 315-318.

²⁶³ Ex RA-23.

²⁶⁴ Ex RA-24.

²⁶⁵ Award, para. 324.

²⁶⁶ Ex RA-12.

166. The evidence as to the ADL proceedings to which the Tribunal referred was as follows:²⁶⁸

(a) In 2003, two Philippine lawyers, Messrs. Balayan and Bernas complained to the National Bureau of Investigation (“NBI”) that the officers and directors of Fraport and PIATCO had violated the ADL based on Fraport’s ownership of 61.44% of PIATCO’s shares. The Complaint was based solely and expressly on statements made by Fraport in the Request for ICSID arbitration;²⁶⁹

(b) The NBI Report, issued on 10 June 2004,²⁷⁰ found that the Supreme Court’s annulment of the PIATCO concession occurred before Fraport could exercise any managerial control it could have acquired in violation of the ADL. The 10 June 2004 report was followed by Reports dated 13 February 2006,²⁷¹ 13 June 2006²⁷² and 16 June 2006²⁷³ and Evaluation Comments dated 28 July 2006,²⁷⁴ and

(c) On 27 December 2006, the Prosecutor’s Resolution rejected the NBI’s recommendation to prosecute the officers and directors of Fraport and PIATCO for their “intent” to breach the ADL.²⁷⁵

167. Against that background, the Tribunal turned, in Part V Section D of its Award, to a consideration of its interpretation of the ADL. The Tribunal held that Fraport had not infringed the level of equity investment permitted to a foreign investor in a Philippine public utility.²⁷⁶ But it found that an ADL violation might alternatively be established by

²⁶⁷ Award, para. 325.

²⁶⁸ Award, paras. 357-382.

²⁶⁹ *Ibid*, paras. 357-359.

²⁷⁰ Ex RA-132.

²⁷¹ Ex RA-133.

²⁷² Ex RA-134.

²⁷³ Ex RA-135.

²⁷⁴ Ex RA-136.

²⁷⁵ Ex RA-36.

²⁷⁶ Award, para. 350.

“an actual demonstration of managerial control, in which case the quantum of equity in the company is irrelevant.”²⁷⁷ The Tribunal accepted that managerial control by means of a shareholder meeting did not infringe a literal interpretation of the ADL. But it decided:

“[A] literal interpretation here could produce an absurdity.... The Tribunal construes this part of the ADL as covering intervention by shareholders, if that is the actual means of intervening in “the management, operation, administration or control” of PIATCO.”²⁷⁸

168. The Tribunal then considered, in Section E of the Award, the ADL Proceedings in the Philippines. Noting that the Prosecutor had, by his Report of 27 December 2006, rejected the recommendation of the NBI that Fraport and its officers be prosecuted for their intent to violate the ADL, the Tribunal repeatedly observed that the Report did not give “any indication of awareness of the actual secret shareholder agreements by which the management and control prohibited by the ADL was effectively assigned to Fraport.”²⁷⁹

169. The Tribunal then stated that it had decided:

“to review the full record of evidence regarding the ADL proceedings which resulted in the Department of Justice’s Chief State Prosecutor’s Resolution of 27 December 2006 (the “Prosecutor’s Resolution”) dismissing the Bernas and Balayan complaints. Accordingly ... it requested all of those documents from the Respondent, and the Claimant supplemented the record with other documents.”²⁸⁰

170. The Tribunal continued by citing an extensive extract from the letter from the Philippines to it dated 11 January 2007 in which the latter submitted that its Department of Justice had never had the central evidence as to the secret shareholder agreements. The Tribunal conducted its own review of the Prosecutor’s Report and those documents in his file which had been produced to and inspected by the Tribunal. It concluded from that review that, although there were references to Fraport’s control of PIATCO and some

²⁷⁷ *Ibid*, para. 354.

²⁷⁸ *Ibid*, para. 356.

²⁷⁹ *Ibid*, para. 367; *see also* para. 377.

²⁸⁰ *Ibid*, para. 368.

shareholder agreements, there was no evidence that the Prosecutor had seen the critical secret shareholder agreement, namely the Pooling Agreement.²⁸¹

171. The Tribunal then cited from evidence filed by Dr. Stiller in the ADL Proceedings on 8 December 2006 and 19 January 2007, contrasting it with Dr. Schmidt's advice to the Fraport Board of 7 March 1999.²⁸²

172. The Tribunal pointed out that the Complainants may have suspected that there was a conspiracy on the part of Fraport to control PIATCO, but found that they had not had access to the secret shareholder agreements. Thus the Tribunal observed:

“Not surprisingly, the theories put forward by Bernas and Balayan, without the benefit of the secret shareholder agreements, could not and did not persuade the DOJ Prosecutor. As every lawyer knows, to bring an indictment and initiate a criminal prosecution, one needs evidence and not theories. The evidence was to be had in the secret shareholder agreements. The ADL charges were accordingly dismissed.”²⁸³

173. Finally, in this section, the Tribunal referred to Fraport's letter to it of 16 March 2007, but observed that Fraport was not able to point to the Prosecutor having had access to any of the secret shareholder agreements.²⁸⁴

174. Section F of the Award considers the effect of “[t]he Claimant's Concealment of the Secret Shareholder Agreements.” The Tribunal rejected the submission that the issue was not dealt with by the Philippines' experts on the basis that most of the evidence in relation to it was produced either immediately before or at the hearing itself.²⁸⁵ It held that the Philippines could not be estopped from making the point, as Fraport had concealed the relevant agreements.

175. As a matter of law, the Prosecutor's decision could not bind the Tribunal, since there was not sufficient identity of parties and claim. The proper extent of the Tribunal's

²⁸¹ *Ibid*, paras. 369-373.

²⁸² *Ibid*, paras. 372-374.

²⁸³ Award, para. 377.

²⁸⁴ *Ibid*, para. 381.

²⁸⁵ *Ibid*, para. 383.

jurisdiction was a matter for it and it could not be bound as to that question by the decision of a municipal legal institution.²⁸⁶

176. But in any event, Fraport's submissions were rejected by the Tribunal as a matter of fact. The Tribunal considered that, irrespective of the standard of proof which was applied, "this is a case in which *res ipsa loquitur*. The relevant facts, all of which are found in Fraport's own documents, are incontrovertible."²⁸⁷

177. Thus, the Tribunal concluded:

"Fraport knowingly and intentionally circumvented the ADL, by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment "in accordance with law." ... Because there is no "investment in accordance with law", the Tribunal lacks jurisdiction *ratione materiae*."²⁸⁸

178. Pausing at this point, the Committee observes that:

(a) The Tribunal's finding that Fraport had infringed the ADL by means of the secret shareholder agreements forms an essential part of the *ratio* of the Award, since, on the view that the Tribunal took of the matter, it is by virtue of that finding that the Tribunal decided that it lacked jurisdiction *ratione materiae*;

(b) The majority of the evidence in relation to that aspect of the matter had not been produced until immediately before or at the hearing, and accordingly its significance was not dealt with in the expert reports on Philippines law;²⁸⁹

(c) The Tribunal's analysis of illegality under Philippines law is derived from factual evidence both produced before it and before the Philippines Prosecutor.

²⁸⁶ *Ibid*, paras. 390-391.

²⁸⁷ *Ibid*, para. 399.

²⁸⁸ *Ibid.*, para. 401.

²⁸⁹ Award, para. 383.

Aside from that material, and apart from the text of the ADL itself, the Tribunal cites only one Department of Justice Opinion as to its construction;²⁹⁰

(d) By contrast to the Award, the Prosecutor's Resolution expressly finds no breach of the ADL by Fraport or its officers; and

(e) The Tribunal therefore had to find, and did find, *both* that the Prosecutor had not had access to the secret shareholder agreements *and* that, had he had such access, he would likely have found a breach of the ADL, in order to reject the significance of the evidence of the Prosecutor's Resolution for what it considered to be the central issue before it. This required the Tribunal to consider the entirety of the file of evidence collected by the Prosecutor and the terms of his Resolution.²⁹¹

179. All of this material was produced after the oral procedure and the Tribunal did not permit submissions from the parties on it.

d) The Committee's Analysis

(i) Construction of Article 52(1)(d) of the ICSID Convention

180. The object and purpose of the power to annul an award for "a serious departure from a fundamental rule of procedure" is to control the integrity of the arbitral procedure,²⁹² a formulation accepted in the present case by both parties.²⁹³ With this object in mind, Article 52(1)(d) contains the twin requirements that the rule of procedure must be fundamental and that the departure from it must be serious.

²⁹⁰ DOJ Opinion No 165 (1984), cited at para. 352 of the Award. In fact this Opinion was not produced to the Tribunal (as the Philippines accepted before the *ad hoc* Committee by its letter of 14 September 2009 in response to the Committee's query raised in its letter of 10 September 2009). The document described as DOJ Opinion No 165 s. 1984 exhibited at RA-217 (Mendoza Ex 82) is not a copy of the Opinion of 1984, but rather a note purporting to apply the badges of dummy-ship in the Opinion to the facts of the *Fraport* case.

²⁹¹ Arbitrator Cremades in his Dissenting Opinion observed, *inter alia*, that the Prosecutor had expressly rejected any test for control under the ADL other than shareholding (para. 16). He opined at para. 23 that the majority "infers a crime from the Claimant's legal advice, rather than from a careful examination of its actions in light of the text of the [ADL]."

²⁹² *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 23.

²⁹³ Applicant, Transcript, Day 1, 50/ 12-51/ 21; Philippines, Transcript, Day 2, 307/ 17-308/ 3.

181. The Convention does not define “a fundamental rule of procedure.” This ground of annulment was taken with little amendment²⁹⁴ from Article 35(c) of the Model Rules on Arbitral Procedure prepared by the International Law Commission.²⁹⁵ It was adopted unanimously by the Commission in 1952.²⁹⁶

182. The importance of this safeguard is explained in the *Commentary* to the International Law Commission’s Model Rules:

“It is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding, *the circumstance that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings*, these are the ultimate sources of the binding authority of an international arbitral award. States are required to take all necessary measures to carry into effect an award so rendered.

The converse of the foregoing is that an award rendered in violation of such principles is not binding upon the parties.”²⁹⁷

183. The *Commentary* describes this provision as affirming:

“the principle that the tribunal must function in the manner of a judicial body and with respect for the fundamental rules governing the proceedings of any judicial body. The paragraph is concerned with *error in procedendo*, not with *error in iudicando*. It is, further, concerned with serious departures from fundamental procedural rules rather than minor departures.”²⁹⁸

184. In support of this latter proposition, the *Commentary* cites with approval Carlston’s formulation of the issue:

²⁹⁴ *History*, Vol. I, pp. 230-2.

²⁹⁵ *Yearbook of the International Law Commission*, 1958, Vol. II, p. 86.

²⁹⁶ *Yearbook of the International Law Commission*, 1952, Vol. I, p. 87, para. 61.

²⁹⁷ International Law Commission “Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat of the United Nations” (A/CN.4/92), 105 (emphasis added).

²⁹⁸ *Ibid.*, p. 109.

“Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and the resulting award to lose its judicial character? Unless its effect is to prejudice materially the interests of a party, the charge of nullity should not be open to a party.”²⁹⁹

185. The *Commentary* further confirms that “[t]he right to be heard, including due opportunity to present proofs and arguments”³⁰⁰ is one such fundamental rule of procedure.

186. The *travaux* of the ICSID Convention show a consensus that not all rules of procedure contained in the ICSID Arbitration Rules would fall under this concept. Rather, the concept was restricted to the principles of natural justice, including the principles that both parties must be heard and that there must be adequate opportunity for rebuttal.³⁰¹ This view was also taken by the *ad hoc* Committee in *MINE v. Guinea*.³⁰²

187. This context to the formulation in Article 52(1)(d) demonstrates that a “fundamental rule of procedure” is intended to denote procedural rules which may properly be said to constitute “general principles of law”³⁰³, insofar as such rules concern international arbitral procedure.

(ii) *Nullum crimen sine lege/in dubio pro reo*

188. In the Committee’s view, the question whether the Tribunal committed “a serious departure from a fundamental rule of procedure” is not to be resolved by applying the principle *nullum crimen sine lege*, or the principle *in dubio pro reo*.

189. The principle *nullum crimen sine lege* encapsulates a fundamental human rights principle in the construction of criminal law for the protection of the accused that “[n]o one shall be held guilty of any penal offence on account of any act or omission which

²⁹⁹ Carlston, *The Process of International Arbitration* (1946), pp. 38-9, cited *ibid.*, pp. 109-110.

³⁰⁰ *Ibid.*, p. 110, with numerous citations of publicists in support.

³⁰¹ *History*, Vol. II-1, pp. 271, 423, 480, 517.

³⁰² *Maritime International Nominees Establishment (MINE) v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports, p. 87, para. 5.06.

³⁰³ In the sense of Article 38(1)(c) Statute of the International Court of Justice.

did not constitute a penal offence, under national or international law, at the time when it was committed.”³⁰⁴

190. The ADL, by its express terms (“An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges”³⁰⁵), has as its purpose to prohibit certain acts; to define them as criminal; and to proscribe appropriate sanctions for their commission. It was treated as a criminal statute by the Philippines at the hearing before the Tribunal and by the Tribunal itself.³⁰⁶

191. But it would be a distortion of the important function of the principle to consider it applicable in the present context as a fundamental rule of procedure. The question for the Tribunal was whether the investment was accepted or admitted in accordance with Philippines law, such that the Tribunal was endowed with jurisdiction *ratione materiae*. If a party wishes to argue that an investment was not admitted in accordance with host state law, such an argument inherently requires clear and positive evidence that host state law was not complied with. But the resolution of this question is not assisted by the invocation of a principle which exists in order to prevent the conviction of an accused person for a criminal offence. However important it may be, the principle is not procedural in character. On the contrary, it applies to the determination of the scope of the substantive law.³⁰⁷

192. The maxim “*in dubio pro reo*” also encapsulates an important human rights protection that “[e]veryone charged with a penal offence has the right to be presumed

³⁰⁴ Article 11(2) Universal Declaration of Human Rights 1947 (“UDHR”); Article 15(1) International Covenant on Civil and Political Rights (“ICCPR”) (16 December 1966, entered into force 23 March 1976). The ICCPR was ratified by Germany on 17 December 1973 and by the Philippines on 23 October 1986. Such a principle is an essential attribute of a state conducting itself in accordance with the Rule of Law: *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City (Advisory Opinion)* PCIJ Rep Ser A/B, No 65 (1935).

³⁰⁵ Ex RA-2.

³⁰⁶ Award, para. 399. The new explanation offered by Justice Feliciano as counsel during the annulment hearing, (Transcript, Day 2, 443/ 14–444/ 9 and 445/ 10–448/ 13) is inconsistent with the record on this point before the Tribunal.

³⁰⁷ It therefore receives treatment as a right separate to the right to a fair trial in the major international human rights instruments referred to *supra* n. 305.

innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”³⁰⁸

193. But such a principle cannot be applied in the context of international arbitral proceedings instituted by an investor against a state. Indeed, the application of such a presumption could itself, in the context of ICSID proceedings, amount to a failure of due process since it may unbalance the essential equality between the parties. The principle *in dubio* has proper application as a right of the defence in criminal proceedings, because it counterbalances the coercive power of the state. It cannot, however, be transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties.

194. The Committee is fortified in reaching this view by the fact that, despite very extensive citation of jurisprudence and doctrine in these annulment proceedings, it was not referred to any arbitral decision in which either *nullum crimen* or *in dubio* had been held by the tribunal to be applicable as a fundamental rule applicable to the procedure before it. Cases in which an international tribunal has been mandated by the parties to investigate whether a national court has met the requisite standards of international law, whether by virtue of a human rights treaty or the customary international law standard of denial of justice, raise an entirely different issue.³⁰⁹ Nor is reference to the principles applicable to the procedure of international criminal tribunals apposite, since such tribunals must, in view of their criminal function, respect the rights of the accused.

195. In the end, Fraport accepted in its written pleadings that the essential interest protected by the *in dubio* principle in the context of arbitral proceedings was the right to be heard. Thus, Professor Cassese states in his second Opinion that:

³⁰⁸ Article 11(1) UDHR, *supra* n. 305; *see also* Article 14(2) ICCPR, *supra* n. 305: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

³⁰⁹ As in the case of the decisions of international tribunals cited in *Cassese 1*, paras. 12-15 and *Cassese 2*, paras. 13-25. *Mondev Int’l Ltd v. United States of America* (Award) (2002), 6 ICSID Reports, p. 181, in which the principle of *in dubio* was considered but not applied, was a case of alleged denial of justice by a national court allegedly giving rise to an investment treaty claim of failure to accord fair and equitable treatment, and is not, therefore, an exception to this point. Nor is the case of *Orr v. Norway*, *supra* n. 169, of assistance, as that case concerned the particular issue of the relevance of an acquittal in a criminal case for determination of a civil claim in the same proceedings.

“[t]he notion of ‘presumption of innocence’ is intended to convey the idea that nobody can be held to be responsible for any misconduct, whether civil (a tort) or criminal (a penal offence), without his first having been heard....”³¹⁰

196. Thus, the critical question for the Committee to resolve is whether Fraport’s right to be heard was respected by the Tribunal.

(iii) *The content of the right to be heard*

197. The requirement that the parties be heard is undoubtedly accepted as a fundamental rule of procedure, a serious failure of which could merit annulment. It was expressly referred to as an example of such a rule by the framers of the ICSID Convention and was accepted as such by both parties to the present annulment proceeding.

198. The right to be heard has been recognised as a fundamental rule of procedure applicable to international arbitral proceedings generally. It was for that reason that the Annulment Committee in *MINE v. Guinea* stated that:

“a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides:

The parties shall be treated with equality and each party shall be given full opportunity of presenting his case.”³¹¹

199. Thus Article 34(2)(a)(ii) of the UNCITRAL Model Law further provides that one ground on which an award may be annulled is if the applicant “was otherwise unable to present his case.” This provision is in turn closely modeled on Article V(1)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which likewise provides that an award may be denied recognition if the party against whom the award was rendered “was otherwise unable to present his case.”

200. The right to present one’s case, or “principe de la contradiction,”³¹² in arbitral proceedings includes the right of each party to make submissions on evidence presented by

³¹⁰ *Cassese* 2, para. 69.

³¹¹ *Supra* n. 303.

its opponent.³¹³ If an arbitral tribunal fails to accord such a right, then its award will be subject to annulment.³¹⁴ One example of this principle being applied in the international commercial arbitration context is where the arbitral tribunal has permitted one of the parties to adduce additional documentary evidence after the oral hearing, without giving the other party the opportunity to comment on it.³¹⁵

201. The same principle also applies in proceedings before Public International Law courts and tribunals:

“[W]henever there is such new evidence, alteration of the legal basis of the claim, or amendment of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon.”³¹⁶

202. The right to present one’s case is also accepted as an essential element of the requirement to afford a fair hearing accorded in the principal human rights instruments.³¹⁷ This principle requires both equality of arms and the proper participation of the contending parties in the procedure, these being separate but related fundamental elements of a fair trial. The principle will require the tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations.³¹⁸ It is no answer to a failure to accord such a right that both parties were equally disadvantaged.³¹⁹

³¹² Gaillard & Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), pp. 947-948, para. 1638; Poudret & Besson *Comparative Law of International Commercial Arbitration* (2 ed, trans. Berti & Ponti, 2007) paras. 546-554.

³¹³ Born, *International Arbitration* (2009), pp. 2582-3.

³¹⁴ *Ibid.* and the numerous authorities there cited.

³¹⁵ See, e.g., *Rice Trading (Guyana) Ltd v. Nidera Handelscompagnie BV* (Hague Court of Appeal) (28 April 1998) (1998) XXIII Ybk Comm Arb, p. 731.

³¹⁶ Cheng *General Principles of Law as Applied by International Courts and Tribunals* (1952), p. 295, citing *inter alia* *Legal Status of Eastern Greenland Case (Denmark v. Norway)* (1933) PCIJ Rep, Ser A/B No 53, pp. 25-6; *Chorzów Factory Case (Germany v. Poland)* (1928) PCIJ Rep, Ser A No 17, p. 7, where the Permanent Court afforded a party a further opportunity to be heard on new evidence or submissions submitted by its opposing party. Specific recognition of this principle in relation to submissions made, or evidence produced, after the closure of written and oral proceedings, is given in the Rules of Court of the International Court of Justice, Articles 56 and 72.

³¹⁷ Article 10 UDHR, *supra* n. 305; Article 14 ICCPR, *supra* n. 305; Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) (signed 4 November 1950, entered into force 3 September 1953).

³¹⁸ *Feldbrugge Case* (29 May 1986) ECHR Ser A, No 99, 8 EHRR 425, para. 44.

³¹⁹ *Ibid.*

203. The right to be heard has found specific application in the only ICSID annulment decision so far to annul an Award under Article 52(1)(d).³²⁰ In that case, the ICSID Arbitration Rules expressly required that the decision of the Tribunal in question, a request for rectification, be taken only after an opportunity had been given to the other party to file observations on the request: ICSID Arbitration Rule 49(3). But the *ad hoc* Committee was in no doubt that such a requirement was in any event a fundamental rule, the breach of which was serious.³²¹

204. It is frequently observed in the context of ICSID annulment proceedings that a party may lose its right to object on this ground if it raised no such objection before the arbitral tribunal itself.³²² Such decisions have relied upon what is now ICSID Arbitration Rule 27, which provides:

“A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.”

205. In the context of the ordinary operation of ICSID arbitration proceedings in accordance with the particular arbitration rules applicable to the proceedings, this provision makes sound practical sense. It supports the validity of the procedure, by ensuring that steps taken by the tribunal stand unless one of the parties objects.³²³

206. In the context of an application for annulment on the grounds of serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention, however, Rule 27 gives effect to a more fundamental principle. That is: a

³²⁰ *Amco Asia v. Indonesia II*, Decision on Annulment, 3 December 1992, 9 ICSID Reports, pp. 55-56, paras. 9.05-9.10.

³²¹ *Ibid.*, paras. 9.08-9.10.

³²² See, e.g., *Klöckner I*, *supra* n. 53, p. 128, para. 88.

³²³ Schreuer et al., *The ICSID Convention: A Commentary* (2009), 920-1.

party forfeits its right to seek annulment under Article 52(1)(d) if it has failed promptly to raise its objection to the tribunal's procedure, upon becoming aware of it.

207. However, if such a principle is to be invoked so as to preclude a party from its right to seek annulment for an otherwise serious departure from a fundamental rule of procedure by the tribunal, the objecting party must know of the conduct of the tribunal and have a reasonable opportunity to raise its objection. This point is, in the view of the Committee, an elementary one, since a party cannot be treated as having waived an objection to a course of action of which it was unaware. As a leading text on international arbitration puts it:

“[A] breach of due process will only justify an action to set aside or prevent enforcement of an award on condition that the party relying on the breach protested *as soon as it became aware of it*.”³²⁴

208. So, too, Schreuer observes in his *Commentary* on the ICSID Convention:

“Some violations of procedural principles will be evident to the affected party in the proceeding before the tribunal. *Others may become visible only after the award has become available. A party that is aware of a violation of proper procedure must react immediately* by stating its objection and by demanding compliance.”³²⁵

(iv) *The issue raised by the Tribunal's treatment of new evidence on the ADL*

209. In the Committee's view, there can be no concern as to the Tribunal's process up to and including receipt of the Prosecutor's Resolution on 5 January 2007. Nor was the contrary suggested by Fraport in its Annulment Application. The issue of the wider construction of Section 2-A of the ADL was raised with the parties by the Tribunal during the hearing.³²⁶ It was addressed by both parties, with specific reference to the Pooling

³²⁴ Gaillard & Savage, *supra*, n. 313, p. 951, para. 1643, emphasis added.

³²⁵ *Supra* n. 44, pp. 994-5, para. 334, emphasis added.

³²⁶ Tribunal: *Hearing Transcript* (Ex CA-26) Day 9, 2321/ 22–2331/ 7; Annulment: *Transcript*, Day 2, 525/ 5–527/ 20.

Agreement, in their post-hearing briefs.³²⁷ The limits imposed by the Tribunal on post-hearing briefs and communications were reasonable. A full opportunity to present one's case does not preclude a tribunal from setting reasonable limits on the timing and scale of both parties' submissions, provided that, in so doing, it affords the parties equality of treatment. The Committee well understands the practical difficulties faced by arbitral tribunals in achieving finality of the record, especially in the context of heavily-contested arbitral proceedings.

210. The position which had been reached on post-hearing briefs was that the Philippines specifically alleged that Fraport had knowingly implemented a scheme to evade the ADL by exercising management and control over PIATCO.³²⁸ The Philippines stated that breaches of the ADL are serious and "may give rise to potential criminal penalties."³²⁹ But it had conceded at the hearing that it had not commenced a criminal investigation for breach of the ADL, the only such investigation being as a result of a private complaint.³³⁰

211. Against this background, the receipt of the Prosecutor's Resolution was, on any view, a highly material development in relation to the issue of Philippine law which the Tribunal ultimately decided was dispositive of the case. That issue was whether "an actual demonstration of managerial control" was sufficient to establish a violation of Section 2-A of the ADL, so that "the quantum of equity in the company is irrelevant."³³¹

212. For that reason, the Philippines was right to draw it to the attention of the Tribunal, since otherwise the Tribunal could have reached a view on the construction of the ADL without the benefit of the view of the Philippine Prosecutor on the very question at issue.

³²⁷ Ex RA-72-RA-76.

³²⁸ Ex RA-73, paras. 6-38.

³²⁹ *Ibid.*, para. 38.

³³⁰ *Hearing Transcript* (Ex CA-26) Day 3, 626/ 10-627/ 22.

³³¹ Award, para. 354.

213. One of the allegations made by the private Complainants in the criminal complaint in the Philippines was that Fraport exerted control over PIATCO not simply through an impermissible level of shareholding, but also because it met the various “badges of dummy status” covered by DOJ Opinion Nos 141 and 165,³³² including “3. [t]hat the foreign investors, while being minority shareholders, manage the company.”³³³

The Complainants alleged that:

“Using such an ostensible legal set-up, respondent Fraport was able to control and in fact controls the financial, technical and operational aspects of respondent PIATCO through respondents PTH, PTI and PAGS in circumvention and gross violation of the Anti-Dummy Law.”³³⁴

214. Balayan’s Reply-Affidavit specifically alleged, relying on DOJ Opinion No 141, that:

“[T]he following terms and conditions of an agreement are indicative of a dummy relationship between the foreign investors and the Filipino stockholders: (i) nominees of the Filipino shareholders may be elected only to positions with ceremonial functions; (ii) giving the foreign investor the right to select the management personnel/staff of the corporation; and (iii) providing that during the term of the agreement, the foreign investor will exercise sole discretion and judgment in arriving at decisions for the best interest of the corporation. According to the DOJ, the effect of these provisions (together with others dealing with the first two indicators) was to allow the foreigner to dominate areas of management, administration and control and operation of the corporation to an extent not proportionate to, and much more than called for by its forty percent (40%) equity.”³³⁵

Relying on certain internal Fraport documents, the Complainants alleged that this criterion was infringed in this case.³³⁶

³³² Balayan Complaint-Affidavit, Ex RA-127, paras. 13-20.

³³³ *Ibid.*, para. 14.

³³⁴ *Ibid.*, 21.2.

³³⁵ Ex RA-176, para. 15. These paragraphs were omitted from the copy originally produced to the Tribunal and exhibited at Ex RA-50. Upon the specific request of the Tribunal, they were produced by the Philippines under cover of their letter of 14 March 2007 as document Nos ROP-T-01641 to ROP-T-01646, and are exhibited in the Annulment record at Ex RA-176.

³³⁶ *Ibid.*, paras. 16.8-17.

215. The Complaint was dismissed outright by the Prosecutor in his Resolution. The Prosecutor decided that the Control Test enacted in the Foreign Investment Law (based solely on the percentage of equity investment) was the controlling test for determining nationality, and that this test had not been infringed by Fraport by the structure of its shareholding. He specifically found that the badges of dummy status listed in DOJ Opinion Nos 141 and 165 (including criterion (3)) were no longer applicable:

“[T]his Office finds, and so holds, that these badges shall not be controlling in the present case, in view of the clear and unequivocal provisions of the Foreign Investment Act of 1991. At the time, no specific rule was established in determining the nationality, hence the need to enumerate “badges” in the absence of unequivocal rule on the matter. Considering, however, that the Foreign Investments Act has expressly provided for the Control Test, those badges are inconclusive and inapplicable to the present case.

In fine, these badges can no longer be used in this case because the Foreign Investment Act already provided that the Control Test shall be used in determining the nationality of the corporation.”³³⁷

216. This finding was not set aside by the Prosecutor in his Resolution granting the Motion for Reconsideration.³³⁸ On the contrary, the Prosecutor specifically reconfirmed the earlier finding in relation as to the irrelevance of the DOJ Opinions which predated the Foreign Investment Act.³³⁹ He held that the Complainants:

“failed to consider that said DOJ Opinion No. 165 was issued way before the DOJ, the SEC and RA No. 7042 [the Foreign Investment Act] decided to do away with the strict application and computation of the ‘Grandfather Rule’. The cited indicators or badges of dummy status now find no application vis-a-vis the categorical and clear cut rule laid down by the DOJ, the SEC and RA No. 7042 for determining the citizenship of corporations with foreign equity.

As intimated by this Honourable Office, the respondents in this case had a right to rely o[n] the provisions of RA No. 7042 and the application of the DOJ and SEC of the control test in determining corporate nationality.”³⁴⁰

³³⁷ Prosecutor’s Resolution (27 December 2006), Ex RA-36, pp. 12-13.

³³⁸ DOJ Resolution (15 March 2007), Ex RA-39.

³³⁹ *Ibid*, p. 10.

³⁴⁰ *Ibid*, pp. 10-11.

The Prosecutor based his grant of reconsideration solely on the need to investigate the actual extent of the shareholding.

217. Nevertheless, as detailed in Section C above, the Tribunal held in its Award that the exercise of managerial control was sufficient.³⁴¹ It dismissed the relevance of the Prosecutor's Resolution on the basis that there was no evidence of fact to suggest that the Prosecutor was aware of the secret shareholder agreements.³⁴² It held that the omission of these agreements from the record before the Prosecutor had been dispositive of the dismissal of the criminal complaint.³⁴³

e) Conclusions on the Right to Be Heard Before the Arbitral Tribunal

218. In the Committee's view, the Tribunal's treatment of the parties following receipt of the Prosecutor's Resolution did constitute a serious departure from the fundamental rule of procedure entitling the parties to be heard. This was so in respect of the Tribunal's consideration of both (i) the factual record before the Philippine Prosecutor; and (ii) the implications of the Prosecutor's Resolution for the issue of Philippine law before the Arbitral Tribunal as to the construction of Section 2-A of the ADL. It is necessary to explain the Committee's reasons on each of these points in turn.

(i) *As to the factual record before the Philippine Prosecutor*

219. The first respect in which the Tribunal failed to accord the parties the right to be heard was as to the factual record of material produced to the Prosecutor. The Tribunal justified its decision not to apply the Prosecutor's Resolution on the ground that there was no evidence to suggest that the Prosecutor had had available to him the Pooling Agreement, which the Tribunal regarded as the critical piece of evidence establishing breach of the ADL. Quite apart from the fact that this evidence would only be relevant to the extent that, as a matter of Philippine law, control exercised in this manner could

³⁴¹ *Supra*, para. 167, citing Award paras. 354 & 356.

³⁴² *Supra*, para. 172, citing Award para. 377.

³⁴³ *Ibid.*

constitute a breach, the Committee is bound to regard the Tribunal's approach to the determination of this question of fact as a serious departure from the right to be heard.

220. Three dates are important regarding Fraport's denial of an opportunity to address this new material, since they provide for the progressive closure of the proceedings.³⁴⁴ First, on 25 October 2006, the Tribunal declared the proceedings closed in accordance with Article 38 of the ICSID Rules, however reserving the possibility to the Philippines to inform Fraport and the Tribunal of the status of the expropriation proceedings in the Philippines. Paragraph 9 of Procedural Order N° 24 of 18 July 2006, which ordered the Respondent to update the Tribunal and the Claimant on all developments in the expropriation action, thus remained in effect notwithstanding the closing of the proceedings.³⁴⁵ Second, on 23 April 2007, the Tribunal directed the parties not to send any further letter to the Tribunal. It added: "This also applies to any further update by the Respondent in respect of the ongoing expropriation proceedings in the Philippines."³⁴⁶ Third, the Tribunal finally on 13 June 2007 informed the parties that it "is of the view that the presentation of their case by both parties is completed and accordingly, pursuant to Arbitration Rule 38, the proceeding is now closed in its entirety."³⁴⁷

221. It was the Philippines that took the initiative to inform the Tribunal on 5 January 2007 about the Prosecutor's Resolution of 27 December 2006, dismissing the ADL Criminal Complaint against PIATCO and Fraport officials, an issue which was otherwise covered by the closing order of 25 October 2006. Fraport immediately replied on 8 January 2007 to stress the Philippines had misrepresented the factual record available to the DOJ in rendering its dismissal and contended that the dismissal was not based on two documents only, i.e., Fraport's request for ICSID arbitration and the Philippine Senate Blue Ribbon Committee's Report on the Terminal 3 Project, as claimed by the Philippines.

³⁴⁴ *Supra*, para. 163.

³⁴⁵ Award, para. 61.

³⁴⁶ *Supra*, para. 162.

³⁴⁷ Award, para. 74.

222. Without reopening the proceedings, the Tribunal then decided to complete the evidentiary record of material produced to the Prosecutor (i) by asking Fraport on 9 January to submit the documents referred to in its letter of 8 January; (ii) by directing the Philippines to produce the entire evidentiary record before the Philippine Prosecutor on 14 February; and (iii) by inviting Fraport to produce copies of additional documents referred to in its letter of 26 March 2007.

223. This further production of documents added over 1900 pages of documents to the file in the arbitration. But it did not result (as the Tribunal had stated in its letter of 14 February was its objective) in any final assurance as to the completeness of the evidentiary record before the Prosecutor. As set out above, the Philippines had originally informed the Tribunal that the Prosecutor's Resolution had been based on only two documents.³⁴⁸ On Fraport informing the Tribunal in its letter of 8 January 2007 that this was not the case, the Philippines produced on 14 March 2007 some 1900 pages of documents from the Prosecutor's file. When Fraport replied on 26 March 2007 that the record was still incomplete, the response of the Philippines on 30 March 2007 was to produce yet further documents. When doing so it stated the Prosecutor's Office's "recordkeeping can be imperfect" and that "Respondent will supplement its production if any additional responsive documents are located."³⁴⁹

224. Despite its indication that it was only seeking to complete the evidentiary record, the Tribunal proceeded to make extensive use in its Award of the documents which had been produced in the Prosecutor's investigation. This included drawing an inference from a statement given before the Prosecutor as to the credibility of a witness (Dr. Stiller, Fraport's transaction counsel).³⁵⁰

225. The Tribunal also found that the secret shareholder agreements were not in the Prosecutor's file.³⁵¹ In so doing, it relied upon the Philippines' assertion in its letter of 11

³⁴⁸ Letter dated 5 January 2007, Ex CA-34.

³⁴⁹ Ex CA-41.

³⁵⁰ Award, paras. 373-374.

³⁵¹ Award, para. 381.

January 2007 that “[t]hese critical documents were unavailable to the DOJ”³⁵² and on the failure of Fraport to be able to point specifically to disclosure of the relevant document in its letter of 16 March 2007.³⁵³ But Fraport had consistently pointed out it did not have a full record of the documents disclosed to the Prosecutor,³⁵⁴ and thus cannot be taken to have conceded this point. Moreover, the Philippines had in effect conceded that the record was incomplete by its letter of 30 March 2007. Nevertheless, the Tribunal made no specific request to either party for submissions as to the adequacy of the disclosure of documents from the Prosecutor’s file. Nor did it give any indication as to the importance which it attached to establishing whether the Prosecutor had had access to the secret shareholder agreements.

226. The Tribunal then proceeded to draw the negative inference that the Prosecutor’s decision may well have been different had he been in possession of the Pooling Agreement.³⁵⁵

227. In view of the fact that the information as to what documents were in the possession of the Prosecutor had been shown to be unreliable, the Tribunal could not properly, in the Committee’s view, have made such a determination, without hearing both parties on the adequacy and effect of the record before the Prosecutor and considering such further evidentiary enquiries or proceedings as may have been necessary in light of those submissions.

228. Despite this, the Tribunal had pre-emptively, and before it had even received the additional factual material, directed by letter dated 14 February 2007 that “the Tribunal does not wish to receive any submissions with respect to this material from either party.”³⁵⁶

229. The Tribunal nonetheless continued to investigate the factual record before the Philippine Prosecutor by giving directions to the parties in this respect on 26 March

³⁵² Award, para. 368.

³⁵³ Award, para. 381.

³⁵⁴ *Supra* para. 154.

³⁵⁵ Award, para. 377.

³⁵⁶ Ex CA-38.

2007,³⁵⁷ before declaring a total closure of the proceedings on all counts on 13 June 2007. Throughout this period, as stated in its letter of 14 February 2007, the Tribunal “continue[d] its deliberations.”³⁵⁸

230. In the Committee’s view, the Tribunal’s direction of 14 February was incompatible with the fundamental obligation on the Tribunal to permit both parties to present their case in relation to the new material. Given the central importance which the proper construction of the ADL came to play in the Tribunal’s analysis, the Prosecutor’s Resolution on the evidence before him had a particular significance. The Tribunal ought not to have proceeded to analyse and consider this evidence itself in its deliberations without having afforded the parties the opportunity to make submissions on it, and availed itself of the benefit of those submissions.

231. In such a confused situation, where a factual investigation was conducted on an issue which proved determinative in the outcome of the case, while the deliberative process had already been underway for some months, the Committee considers that the Tribunal ought not to have continued its deliberations. Rather, it ought to have re-opened the proceedings, pursuant to its powers under ICSID Rule 38(2), which provides:

“Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceedings on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.”

232. However, and on the contrary, the Tribunal expressly decided on 14 February 2007 that its request “was not a decision by the Tribunal to reopen the proceeding under ICSID Arbitration Rule 38.”³⁵⁹ Whilst indicating in the same letter that it would make a determination as to whether it required additional clarification from the parties after considering the requested documents, the Tribunal in fact never made such a determination, or, if it did, it did not communicate it to the parties. Rather, it merely

³⁵⁷ Ex RA-60.

³⁵⁸ Ex RA-53.

³⁵⁹ Ex CA-38.

peremptorily foreclosed further communications from the parties, without indicating the issues to which it considered the new material might relate.

233. In view of the fact that the Tribunal had both closed the proceedings and had expressly stated that it would not receive submissions from either party on the new material, the Committee does not consider that Fraport has forfeited its right to object in these annulment proceedings to the Tribunal's failure to observe this fundamental rule of procedure. Fraport could only have forfeited its right to complain in the annulment proceeding on the ground of Article 52(1)(d) if it had known the significance that the Tribunal would draw out of this investigation in the factual record of the Prosecutor in the deliberations phase, which obviously it could not do before reading the award.

234. A party can only waive an objection if it is reasonably aware of the decision of the tribunal to which it may wish to object. In the present case, the Tribunal had stated that it "merely seeks to complete the evidentiary record."³⁶⁰ It gave no indication of the use to which it may put the new material. Moreover, it stated that it would "determine whether it requires additional clarification from the Parties"³⁶¹ after it had considered the new material, but that, in the meantime, the proceedings were not reopened under Rule 38 as they should have in order to provide the parties an opportunity to explain themselves in an adversarial manner on the factual record of the Prosecutor. The Tribunal never communicated its determination on the question whether it required additional clarification from the parties. Accordingly, there was no determination to which the parties could either have acquiesced or objected. On the contrary, the Tribunal repeatedly instructed the parties not to make submissions to it. In the circumstances, Fraport cannot be criticised for having failed to make its objection known. It was prevented from taking that very course.

³⁶⁰ Letter from Tribunal dated 14 February 2007, Ex CA-38.

³⁶¹ *Ibid.*

(ii) As to the implications of the Prosecutor's Resolution on Section 2-A of the ADL

235. Failure to reopen the proceedings following receipt of the Prosecutor's Resolution and documents from his file also had consequences with regard to the conclusions in the Award on the Respondent's objection to the jurisdiction *ratione materiae* of the Tribunal based on an alleged violation of the ADL. This was the issue which came to form the *ratio* of the Tribunal's Award. In the Committee's view, the Tribunal's failure to permit the parties to make fresh submissions to it in the light of important new material casting doubt on the whole basis on which the Tribunal was proceeding underscores the serious nature of the departure from the right to be heard.

236. In light of the express requirements of the BIT, the Tribunal decided that Philippine law, as the "laws and regulations of [a] Contracting State" had to be applied as part of its enquiry into whether it had jurisdiction *ratione materiae*.³⁶² Both international law and Philippine law are thus relevant to this enquiry.³⁶³ So far as Philippine law was concerned, the Tribunal identified ADL as the specific law in question. To the extent of its applicability, the Tribunal (whilst retaining its independent powers of assessment of the evidence and decision) should give particular consideration to municipal decisions as to the construction of the ADL in determining how it would be applied within the municipal legal system.³⁶⁴ This was particularly important in the present case as it is recognised that the Tribunal had not been chosen for its knowledge of Philippine law. It follows that the right of the parties to be heard importantly includes an opportunity to be heard on the meaning and effect of any such relevant municipal decisions.³⁶⁵

³⁶² Award, paras. 335-343.

³⁶³ See *MTD Equity Sdn Bhd ('MTD') v. Chile*, Decision on Annulment, 21 March 2007, 13 ICSID Reports, pp. 521-522, para. 72.

³⁶⁴ *Serbian Loans Case (France v. Serbia)* (1929) PCIJ Ser A, No 20, p. 46; *Brazilian Loans Case (France v. Brazil)* (1929) PCIJ Ser A, No 21, p. 124.

³⁶⁵ Accord: Recommendations 8 & 10-11, ILA Committee on International Commercial Arbitration Final Report "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration" (2008) 73 ILA Conf. Rep. pp. 850, 881-2.

237. This issue as to violation of Section 2-A of the ADL was, as the Tribunal itself accepted, “essentially argued in post-hearing submissions because most of the documents that established it were produced either immediately before the hearing on jurisdiction and liability or, at the President’s insistence, during the hearing itself.”³⁶⁶ The consequence of this was that the matter was not considered in any detail in the expert reports as to Philippine Law filed in the proceedings.³⁶⁷

238. Nor was further authority as to the issue of construction which had arisen on the application of Section 2-A cited by the parties in their post-hearing briefs.³⁶⁸

239. In the result, therefore, as was accepted by the Philippines during the oral hearing of these annulment proceedings,³⁶⁹ the evidence as to the construction of Section 2-A as a matter of Philippine law, other than contemporaneous factual documents, available to the Tribunal to assist it in its determination of the dispositive issue was limited to:

(a) The text of the ADL itself;

(b) Reference to two Department of Justice Opinions (Nos 141 and 165), the texts of which (as was accepted by the Philippines before the Committee) were not produced to the Tribunal;³⁷⁰ and

(c) The decision of the Supreme Court in *Luzon v. Anti-Dummy Board*,³⁷¹ which is concerned with the express provisions of the ADL relating to the

³⁶⁶ Award, para. 383.

³⁶⁷ The Legal Opinion of Professor Mendoza dated 18 December 2004 (Ex RA-79) and filed on behalf of the Philippines with its Counter-Memorial contains references to the ADL in three paragraphs (129-131), which cite DOJ Opinion No 165 without elaboration.

³⁶⁸ Ex RA-72–RA-76.

³⁶⁹ Transcript, Day 3, 787/ 15–788/ 3.

³⁷⁰ White & Case letter 14 September 2009. The document described as DOJ Opinion No 165 s. 1984 exhibited at RA-217 (Mendoza Ex 82) is not a copy of the Opinion of 1984, but rather a note purporting to apply the badges of dummy-ship in the Opinion to the facts of the *Fraport* case.

³⁷¹ (18 August 1972) Ex RA-13.

employment of aliens and does not decide the point at issue in the instant case.³⁷²

240. In arriving at its construction of the ADL in Section D of the Award, apart from its reference to the contemporaneous factual record, the Tribunal only cites the text of the ADL itself³⁷³ and to DOJ Opinion No 165.³⁷⁴

241. Against this background, the Prosecutor's Resolution, and the subsequent Resolution on Reconsideration of 15 March 2007, which were submitted by the Philippines on 5 January and 19 March 2007, after the closure of the proceedings by the Tribunal on 25 October 2006, provide for the first time specific evidence of Philippine law on the relevant issue. Both resolutions state in express terms, in response to a specific complaint that Fraport's exercise of management control over PIATCO constituted a breach of the ADL, that this test was no longer applicable to determine breach.

242. This is not to say that the Prosecutor's Resolution was necessarily dispositive of the point for the purpose of the Tribunal's determination of its jurisdiction. On the contrary, the decisions of municipal authorities seized of cases against an alien which arise directly out of the same set of facts may need to be scrutinised very carefully by an international tribunal. The tribunal would need to satisfy itself, *inter alia*, as to the impartiality of the relevant decision-maker, in view of the pendency of proceedings against the state of which that decision-maker is an organ. The tribunal retains the ultimate power to judge the probative value of evidence placed before it.

243. However, in the context of the manner in which the issue arose in the instant case, the Prosecutor's Resolution was of singular significance. In the first place, one of the issues raised by the complainants was the very issue of construction of the law which

³⁷² After the hearing, and in response to the Committee's enquiry in relation to the record before the Tribunal concerning the evidence of Philippine law, the Philippines supplied the Committee with a complete list of the legal authorities pertaining to Philippine nationality laws and the ADL in the record of the underlying arbitration: Letter dated 14 September 2009, *supra* n. 231. The Committee has considered all of those to the extent that they are either recited in the Award or exhibited in the Annulment Proceeding. None of them add materially to the specific issue relating to the effect of managerial control under Section 2-A of the ADL.

³⁷³ Award, para. 349.

³⁷⁴ *Ibid.*, para. 352.

troubled the Tribunal. Secondly, the Prosecutor was the very official charged with responsibility for administration of the ADL. Thirdly, his decision, being adverse to the interests of the state, appeared to have been reached independently. Fourthly, the decision specifically rejected the applicability of the one legal authority which had been cited as pertaining to the issue of managerial control (DOJ Opinion No 165). Fifthly, the Prosecutor decided that a test of managerial control was not applicable to determine Fraport's liability under the ADL.

244. The consequence is that Fraport should, as it has submitted before this Committee, have been accorded an opportunity to make submissions before the Tribunal, as to the legal effect of the Prosecutor's Resolution, including that:

(a) The Philippines was estopped from contending for a construction of the ADL contrary to that adopted by its responsible official; or alternatively,

(b) the Tribunal should have given effect to the Prosecutor's Resolution on the point, bearing in mind the obligation upon the Tribunal to apply municipal law as it would be applied in the Philippines, taking into account the evidence of the relevant authorities as to the proper construction of that law.³⁷⁵

245. The consequence is that, at least to the extent that the Tribunal determined to base the *ratio* of its decision on its construction of Section 2-A of the ADL, and to depart from the decision on its construction taken by the Prosecutor, it ought to have provided a further opportunity to the parties to submit evidence on Philippine law and to make submissions thereon relative to this specific question. Its failure to do so underscores the serious departure from a fundamental rule of procedure.

246. The departure was one which materially prejudiced Fraport, in view of the Tribunal's adverse findings both as to the question of fact relating to the record before the Prosecutor and as to the relevance of the Prosecutor's Resolution for the question of law

³⁷⁵ *Serbian Loans Case*, *supra* n. 365, p. 46; *Brazilian Loans Case*, *supra* n. 365, p. 124.

concerning the construction of the ADL (irrespective of what the proper construction of that law might finally be). Each of these related specifically to evidence which had been tendered to the Tribunal after its closure of the proceedings. Each was an essential step in the Tribunal's reasoning, leading to the decision in its Award to accept the Philippines' objection to ICSID jurisdiction and to dismiss Fraport's claim.³⁷⁶

247. Accordingly, for all of the reasons set out in Part IV B of this Decision, the Award must be annulled in its entirety.

C. Failure to State the Reasons

a) Introduction

248. The third ground for annulment of the Award raised by Fraport is "that the award has failed to state the reasons on which it is based": Article 52(1)(e) of the ICSID Convention. The *ad hoc* Committee in *CDC v. Seychelles* observed:

"Annulment under Article 52(1)(e) is permissible where a tribunal fails to state the reasons on which its award is based. This ground for annulment has been a cause of great concern to commentators since, unlike (b) and (d), it does not include any limiting terms such as 'manifest', 'serious' or 'fundamental'. Early on, *ad hoc* Committees interpreted this clause in such a way that it appeared to allow inquiry into the sufficiency or substance of the reasons offered."³⁷⁷

249. The ground for annulment under Article 52(1)(e) relates to the requirement expressed in Article 48(3) of the Washington Convention that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." The rationale for a reasoned award as required by Article 48(3) of the Washington Convention is that the parties will want to assure themselves that the Tribunal properly understood the questions before it as stated by the *ad hoc* Committee in *MINE*:

"The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. [...] In the

³⁷⁶ *Supra* para. 30; Award *dispositif*, para. 406.

³⁷⁷ *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, 11 ICSID Reports, p. 259, para. 66.

Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.”³⁷⁸

250. Reasons are important to the legitimacy of the decision. The obligation to give a reasoned award is a guarantee that the Tribunal has not decided in an arbitrary manner. The parties will want to assure themselves as to how the Tribunal reached its conclusions and whether such conclusions can be challenged before an *ad hoc* committee. Such a challenge, nevertheless, can only take place in the very limited setting of Article 52 of the ICSID Convention of reviewing the legality of the award without retrial of the factual and legal issues dealt with by the tribunal.

b) Parties' Submissions

251. First, Fraport contends that the Tribunal failed to give reasons for its finding that it violated the ADL.³⁷⁹ It submits that there are no reasons with regard to its alleged breach as principal or accessory. The fact that the parties are unclear about the meaning of the reasons set forth in paragraph 356 of the Award, according to which “[t]he Tribunal construes this part of the ADL as covering intervention by shareholders, if that is the actual means of intervening in ‘the management, operation, administration or control’ of PIATCO,” shows that the Award fails to give an understandable decision.³⁸⁰ There cannot be violation by an accessory in the absence of a violation by a principal and there was no finding of a violation by PIATCO as a principal.³⁸¹ The Tribunal would have to find with regard to the criminal act of the principal that a company holding a reserved interest such as a public utility concession permitted or allowed a non-Philippine party to intervene in the management, operation, administration or control of the company holding the reserved

³⁷⁸ *Maritime International Nominees Establishment (MINE) v. Guinea*, Decision on Annulment, 22 December 1989, ICSID Reports, p. 88, paras. 5.08-5.09.

³⁷⁹ Memorial, paras. 191-193, Transcript, Day 3, 632.

³⁸⁰ Reply, paras. 168-171.

³⁸¹ *Ibid.*, paras. 171, 174, Transcript, Day 1, 155.

interest, and that the manner of intervention, which the company holding the interest permitted, was “as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice.” With regard to accessory, the Tribunal would have to find that a person (not a corporation) carried out an act objectively aiding, assisting or abetting the act of the principal and did so knowingly, i.e., in full knowledge of the acts of the principal and that its own action was aiding, assisting or abetting.³⁸² Fraport contends that the Award is devoid of any factual finding of the existence of a constitutionally defined category of public utility with respect to which the ADL could be applicable, and asserts that the Tribunal did not state reasons as to how a public utility can be said to exist because the date of nullification of the Terminal Concession was prior to the Terminal becoming operational.³⁸³ Fraport criticizes the Award further for providing no reason as to why the QT Report and letters should have given Fraport knowledge that the Pooling Agreement could result in intervention in PIATCO management in violation of Philippine law nor as to why, having received advice that the employment of aliens by PIATCO was restricted by the terms of the ADL, Fraport knew or should have known that participation as a shareholder in a preliminary meeting could violate the ADL. According to Fraport, the Award also fails to state reasons with regard to the *mens rea*.³⁸⁴

252. Second, Fraport says that the Award does not give reasons for its conclusion that it violated the ADL. Fraport cites paragraph 395 as a “prime example” of reasons that do not enable one to follow how the tribunal proceeded from point A to point B and eventually to its conclusion.³⁸⁵ The Applicant says that paragraph 395 contradicts the majority’s hypothesis of a reference to Philippine law in Article 1 of the BIT and is even in itself contradictory. The majority of the Tribunal argues that, despite a reference to Philippine law, the commission of the *actus reus* in Section 2-A of the ADL, consisting in

³⁸² Memorial, para. 102, Reply, para. 171.

³⁸³ Transcript, Day 1, 142-148.

³⁸⁴ *Ibid.*, 179-184.

³⁸⁵ Reply, para. 180; Transcript, Day 1, 34, Day 3, 591-592.

“permitting or allowing” a third party to intervene in the “management, operation or control” of a public utility concession falling within Section 2-A, is unnecessary for finding a breach of Philippine law as “the relevance of compliance with national law for jurisdiction *ratione materiae* purposes is at the moment of the investment”,³⁸⁶ i.e., before any *actus reus* can be performed. The majority of the Tribunal also cites the part of Section 2-A of the ADL which allows for the act of assistance to be performed during the planning phase. Fraport alleges that the reader cannot determine whether what the majority had in mind was something describing an attempt to commit a breach of Section 2-A by a principal or attempted aiding and abetting. There is no guidance in the Award which of the two alternatives was on the majority’s mind, as the majority’s reasoning fails to explain whether Fraport qualifies as principal or accessory.³⁸⁷

253. Third, Fraport alleges that the Award next fails to give reasons for the failure to apply the principle of *nullum crimen sine lege*. The application of the ADL in paragraphs 356 and 395 of the Award violated this principle. The Applicant argues that, because there is no trace that the *nullum crimen* principle was considered by the Tribunal, the Award has an important lacuna which makes it impossible for the reader to follow the reasoning on this point.³⁸⁸ The Applicant also contends that the Award fails to give reasons enabling the Committee to assess the fairness of the weighing of evidence. It says that the majority did not approach the evidence with an open mind admitting the possibility of doubt. Instead, the Tribunal in paragraph 399 of the Award speaks of “a case in which *res ipsa loquitur*”. The reasons dealing with the applicable standard of evidence given by the majority and the conclusions are contradictory and do not enable the *ad hoc* Committee to verify that the Tribunal acted in accordance with the principles of fair trial and *in dubio pro reo*.³⁸⁹

³⁸⁶ Award, para. 395.

³⁸⁷ Reply, para. 180.

³⁸⁸ *Ibid.*, paras. 72-87, 183-184, Transcript, Day 1, 265-268.

³⁸⁹ *Ibid.*, paras. 186, 189, 190, Transcript, Day 1, 248-249, 265-270, Day 3, 680.

254. Fourth, Fraport contends that the Award fails to give reasons for its failure to apply the BIT separately to each of Fraport's discrete investments.³⁹⁰ There are no reasons provided in the Award for treating all of Fraport's various equity and debt investments – all of which the majority found to be legal – as a single illegal investment; for treating the entire investment as unlawful on account of the Pooling Agreement and the Addendum to the PIATCO Shareholders Agreement, which were entirely severable and independent of Fraport's investments; and finally for dismissing Fraport's investments made during 2001 after the allegedly offending provisions of the Pooling Agreement and Addendum had been amended, even though the Respondent itself accepted that following the amendments Fraport's shareholding structure was fully in accordance with Philippine law.³⁹¹ The Award does not address the question of Fraport's debt investment in the project although these non-equity investments amounted to more than US\$340 million or 80% of the overall value of Fraport's investment in the Philippines and were not governed by any of the Shareholder Agreements. Similarly, the Award does not address clearly identified equity investments with a monetary value of more than US\$25 million which were made after the allegedly offending provisions of the Shareholder Agreements had been amended.³⁹²

255. The Republic of the Philippines replies that the Award is supported by both explicit and implicit reasons sufficient to satisfy Article 52(1)(e) of the ICSID Convention.³⁹³ The Philippines recalls that neither disagreement with the reasoning of an award nor the persuasiveness of the reasons provide grounds for annulment.³⁹⁴ According to the Respondent, it is possible to follow the reasons that led the Tribunal to the conclusions that Fraport's investment as a whole fell outside the protections of the BIT.³⁹⁵ Fraport's contention that the Tribunal failed to state reasons of its conclusion that its investment ran afoul of the ADL is without merit, as each of its arguments stems from its

³⁹⁰ Memorial, para. 194.

³⁹¹ Memorial, para. 194, Reply, para. 191, Transcript, Day 1, 183-184.

³⁹² Reply, paras. 193,194.

³⁹³ Counter-Memorial, para. 258.

³⁹⁴ *Ibid.*, paras. 259, 262-265; Rejoinder, paras. 184-193; Transcript, Day 2, 333-337, 564-567.

³⁹⁵ *Ibid.*, paras. 268, 269.

substantial disagreement with the Tribunal's conclusions.³⁹⁶ In the Respondent's view, the Tribunal made all the key findings necessary to conclude that Fraport violated the aiding or abetting provision of the ADL.³⁹⁷

256. According to the Philippines, the Tribunal's conclusion that there was a principal violator is plainly evident from the face of the Award and is in any event implicit in the Tribunal's analysis.³⁹⁸ The ADL indicates that the principal violator is the Philippine citizen holding the public utility concession that permits or allows a foreign entity to intervene and control and the aider or abettor is the entity which intervenes to exercise that control.³⁹⁹ The Tribunal identified the *actus reus* as Fraport's knowing and intentional circumvention of the ADL by means of secret shareholder agreements which provided unlawful control over PIATCO. It was by planning and then entering into the Secret Shareholder Agreements that Fraport was permitted or allowed to exercise control over PIATCO, thereby committing the necessary *actus reus* as an aider or abettor. The Tribunal referred to Fraport's intent because the ADL requires an aider or abettor to knowingly act. Since this violation of Philippine law knowingly occurred at the outset of its investment, that investment did not qualify for protection under the BIT.⁴⁰⁰ In the Respondent's view, the nullity of the Concession Contract does not mean that retroactively there is no possible relevance to the constitutional limitations and ADL. The Terminal is the public service.⁴⁰¹

257. The Respondent maintains that the Tribunal did not fail to state reasons for not citing the principle of *nullum crimen sine lege* because this principle is not applicable to an international tribunal's determination of its jurisdiction in an investment dispute and was not invoked by Fraport in the arbitration.⁴⁰² Article 52(1)(e) has no role in ensuring that

³⁹⁶ Rejoinder, paras. 194, 195.

³⁹⁷ *Ibid.*, paras. 196, 199.

³⁹⁸ *Ibid.*, para. 202.

³⁹⁹ *Ibid.*, para. 199.

⁴⁰⁰ *Ibid.*, paras. 204, 205; Transcript, Day 2, 406, Day 3, 769-772.

⁴⁰¹ Transcript, Day 2, 407-409.

⁴⁰² Rejoinder, paras. 207-210, Transcript, Day 3, 778.

tribunals comply with fundamental rules of procedure. In any event, the Tribunal devoted a substantial portion of its award to consideration of the Secret Shareholder Agreements and Fraport had a full opportunity to comment in written and oral submissions.⁴⁰³ The Republic of the Philippines declares that the Tribunal did not fail to consider Fraport's entire investment in NAIA Terminal 3 Project but concluded that it was not entitled to protection because it was not accepted in accordance with Philippine law. Fraport's decision to continue to pour money into its ill-conceived and unlawfully structured investment obviously did not provide a basis for the Tribunal to consider those late additions to be lawful stand-alone investments.⁴⁰⁴ In the Respondent's view, the Tribunal considered the composite of the investments which were characterized by Fraport as a unitary investment.⁴⁰⁵ The Award is amply supported, the Republic of the Philippines argues, by explicit and implicit reasoning sufficient to satisfy the requirements of the Washington Convention.⁴⁰⁶

c) The Committee's Analysis

258. As early as in the *Klöckner I* annulment decision in 1985, it was made clear that "the Committee can only take the award as it is."⁴⁰⁷ The disputed subject matter is not submitted once again for adjudication to an *ad hoc* committee. It is only the award as made by the Tribunal which is scrutinized under the limited number of grounds of Article 52 of the ICSID Convention. The above mentioned declaration of the *Klöckner I* Committee has the following implications in the context of Article 52(1)(e).

⁴⁰³ *Ibid.*, paras. 211-212.

⁴⁰⁴ *Ibid.*, para. 216.

⁴⁰⁵ Transcript, Day 2, 338.

⁴⁰⁶ Rejoinder, para. 183.

⁴⁰⁷ *Klöckner I v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, p. 95, para. 73.

(i) The Award as actually decided by the Tribunal is controlled under Article 52(1)(e)

259. A first implication of the holding in *Klöckner I* is that an *ad hoc* committee controls the award for what has been actually decided by the Tribunal and not for what the applicant would have wished the award to be. This point has particular implication for Fraport's first, third and fourth objections under this ground.

1) *Discrete investments*

260. Fraport explains that its equity investment did not take place at one time. After its initial investment in PIATCO in 1999, Fraport stresses that it increased its shareholding in PIATCO and in cascade companies (PTI, PTH, ...) in 2000 and 2001 and that it also made non-equity investments in the form of loans and guarantees during 2000 and 2001 which accounted for the largest part of its investments by exceeding 80% of its overall claim of US\$425 million.⁴⁰⁸

261. The Award describes Fraport's investment in the Terminal 3 Project as one "made in a Philippine company, Philippine International Air Terminals Co., Inc., later known as PIATCO. Fraport's investment in PIATCO, both as a shareholder and lender, was influenced by the fact that the Respondent had, prior to the investment at issue, conferred upon PIATCO the concession rights for the construction and operation of a new international passenger airport terminal in Manila, otherwise known as Ninoy Aquino International Airport Passenger Terminal III or Terminal 3."⁴⁰⁹ At paragraph 116 which is cited by Fraport,⁴¹⁰ the Award reports that "Fraport's Investment as a financial participant in the Terminal 3 project spans a period of several years, starting in 1999 and ending in 2002-2003, when, as the evidence discloses, Fraport progressively wrote off its investment. Fraport's investment was both directly in PIATCO and, indirectly, in a cascade of Philippine companies that have ownership interests in PIATCO. In addition to its equity

⁴⁰⁸ Memorial, paras. 76, 79, 80, 81.

⁴⁰⁹ Award, para. 2.

⁴¹⁰ Memorial, footnote 108.

investments, Fraport has extended loans and loan payment guarantees to PIATCO, the cascade companies and PIATCO's lenders and contractors".

262. The Applicant has in the annulment proceeding atomized its investment as a financial participant in the Terminal 3 Project into several investments which, it claims, should have been considered individually by the Tribunal for admission under Article 1 of the BIT. However, at the time of the arbitration, the Republic of the Philippines rightly observes, Fraport characterized its investment exceeding US\$425 million which funded the design and construction of a state-of-the-art international passenger terminal at Manila's airport as one global investment in share acquisition in PIATCO and in the cascade companies in PIATCO in addition to the loans and loan and payment guarantees.⁴¹¹ Reasons are obligatory under Article 48(3) of the ICSID Convention to the extent a question was put to the Tribunal. However, Fraport here is attempting to open before the Committee a question which has not been presented to the Tribunal. The Award cannot be criticized for neglecting a question which was not addressed to the Tribunal and for not giving reasons thereof.

2) *Public utility*

263. In its discussion regarding the interpretation of the ADL, the Tribunal states that "[e]ach interpretation must be made in the light of the Constitution and the ensemble of legislation of which a particular statute is a part."⁴¹² At paragraph 309, the Award also underlines in the QT Report of 11 January 1999 the provisions of the Constitution of the Philippines which require that the participation of foreign investors in the governing body of a public utility enterprise shall be limited to their proportionate share in its capital, and that all the executive and managing officers of such corporation or association be citizens of the Philippines. The Award notes that the QT Report of 11 January 1999 states that, although the term public utility is not defined with exactitude in Philippine law and is

⁴¹¹ Claimant's Arbitration Memorial, paras. 34-41.

⁴¹² Award, para. 349.

subject to broad interpretation, “[g]enerally, the operations of the Project fall within the meaning of a public utility.”⁴¹³

264. The *ad hoc* Committee in *Wena* declared that

“[n]either Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal’s reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning. This goal does not require that each reason be stated expressly. The tribunal’s reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.”⁴¹⁴

It is also accepted that an *ad hoc* committee may clarify the reasons of the decision when they are implicit.

265. The *ad hoc* Committee in *Soufraki* explained that

“if the Committee can make clear – without adding new elements previously absent – that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the committee should not annul the initial award. For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can ‘explain’ the Award by clarifying reasons that seemed absent because they were only implicit, it should do so.”⁴¹⁵

266. In the case at hand, when the Award, at paragraph 350, declares that Fraport did not exceed the statutorily determined level of equity investment lawfully permitted to a foreign investor or loaned too much to a constitutionally defined category of public utility, there is no indication that it refers to anything else than the Terminal 3 Project. The Applicant offers no other reasonable explanation.

⁴¹³ Award, para. 309.

⁴¹⁴ *Wena Hotels Ltd. v. Egypt*, Decision on Annulment, 5 February 2002, 6 ICSID Reports, p. 146, para. 81.

⁴¹⁵ *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 24.

3) *Principal/accessory*

267. The Award declares that there are two alternative ways of establishing an ADL violation under Philippine law, a quantitative test or an actual demonstration of managerial control. In the latter case, the quantum of equity in the company is irrelevant.⁴¹⁶ The Tribunal stresses that its concern is not with Fraport's quantitative equity but with the shareholder agreements⁴¹⁷ and then holds:

“[i]t is correct that Fraport's real modality of intervention in ‘the management, operation, administration or control’ of PIATCO for the items specified in the FAG-PAIRCARGO-PAGS-PTI Shareholders’ Agreement is as a shareholder in the confidential but binding preliminary meeting described at Article 2.02 thereof. Fraport does not, as the ADL specifies, intervene, as an officer, employee or laborer in the subsequent formal board meeting that rubber-stamps the result of the confidential but binding meeting. To be sure, the formal validity of unlawful intervention would still be accomplished by Fraport's designated officer in PIATCO; indeed the real control decision would always have to be implemented, wherever it may have been made, by ‘an officer, employee or laborer’ within PIATCO; that would satisfy a literal interpretation. But a literal interpretation here could produce an absurdity: an alien would violate the ADL if its designated officer intervened to manage and control matters A, B and C, but the same would not violate the ADL if it secretly intervened as a shareholder to manage and control those same matters. The Tribunal construes this part of the ADL as covering intervention by shareholders, if that is the actual means of intervention in the management, operation, administration or control of PIATCO. Nor does this interpretation impose a retroactive burden on Fraport, for its own documents, which the Tribunal reviewed above, indicate that Fraport was well aware that the arrangements it was making were not in accordance with the ADL.”⁴¹⁸

268. According to the *Klöckner I* decision:

“[t]he text of [Article 52(1)(e)] requires a statement of reasons on which the award is based. This does not mean just any reasons, purely formal or apparent, but rather reasons having some substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law. [...] [T]here would be a ‘failure to state reasons’ in the absence of a statement of reasons that are ‘sufficiently relevant’, that is, reasonably sustainable and capable of providing a basis for the decision.”⁴¹⁹

⁴¹⁶ Award, para. 354.

⁴¹⁷ Award, paras. 323, 355.

⁴¹⁸ Award, para. 356.

⁴¹⁹ *Klöckner I v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, p. 95, paras. 119-120.

The above passage of the Award makes clear that, according to the Tribunal, Fraport did not intervene “as an officer, employee or laborer” as mentioned in Section 2-A of the ADL, but notwithstanding, it would still violate the ADL if it secretly intervened as shareholder to manage and control PIATCO. The Applicant nonetheless claims that there is a failure to state reasons for the violation of the ADL as a principal or accessory which is material to the solution. Fraport is correct in contending that a finding of its criminal liability or that of its officers or employees would have required a declaration as to whether the accused was a principal or an accessory. The construction of a criminal statute such as the ADL by an ICSID tribunal, however, does not turn the arbitration proceeding into a criminal proceeding. The question before the Tribunal was not that of the criminal liability of Fraport or of its officers or employees, but that of the Tribunal’s jurisdiction *ratione materiae* under the Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments of 18 April 1997.

269. The Award stresses that “whatever standard of proof is required under Philippine law to prove a criminal act, the jurisdictional question before this Tribunal, which is seized of an international investment dispute, is not a determination of a crime, but whether an economic transaction by a German company was made ‘in accordance’ with Philippine law and thus qualifies as an ‘investment’ under the German-Philippine BIT.”⁴²⁰ Determining the Tribunal’s jurisdiction, in view of the preliminary objection raised by the Respondent, required the Tribunal to interpret Article 1 of the BIT which reads: “the term ‘investment’ shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.”⁴²¹ The Tribunal considered the ADL in the course of its examination of whether Fraport’s investment was protected by the BIT,⁴²² not in the context of criminal charges against Fraport or its officers or employees. The Tribunal resolved the question of its jurisdiction *ratione materiae* with a

⁴²⁰ Award, para. 399.

⁴²¹ Award, paras. 334-348.

⁴²² Award, para. 396.

negative answer, holding that “Fraport knowingly and intentionally circumvented the ADL by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment ‘in accordance with law’ [...] Because there is no ‘investment in accordance with law’, the Tribunal lacks jurisdiction *ratione materiae*.”⁴²³ In reaching this conclusion, the Tribunal did not have to give reasons for the criminal liability as principal or accessory of Fraport, its officers or employees, or to the existence of a guilty mind on their part, a question of interest to a criminal court, but which was not within the remit of the Tribunal. Fraport fails to prove a defect of the Award under Article 52(1)(e).

4) *Nullum crimen sine lege/ in dubio pro reo*

270. In the context of criminal proceedings, *nullum crimen sine lege* is a substantive principle for the protection of the accused which holds that criminal law may not be extensively construed, for instance by analogy.⁴²⁴ It is common ground that Fraport, its officers or employees were never charged before the Tribunal for violation of the ADL and did not have to defend against an accusation of penal nature in the ICSID arbitration proceeding. It bears reiterating that the question submitted to the Tribunal was solely that of the legality of Fraport’s investment for jurisdictional purposes under the German-Philippines BIT of 18 April 1997. As a consequence, the Tribunal cannot be criticized for not providing in its Award reasons why it did not apply a substantive principle of criminal law. This did not come within its mission. The Committee further observes that Fraport did not invoke said principle in the arbitration proceeding. Failure to deal with questions submitted to the Tribunal may amount to a failure to state reasons where this results in a failure in the intelligibility of the reasoning in the Award itself,⁴²⁵ but this is a different situation from the present case. Fraport’s criticism of the Award for giving no reasons to

⁴²³ Award, para. 401.

⁴²⁴ See ECHR 25 May 1993, *Kokkikanis v. Greece*, No 14307/88; 12 February 2008, *Kafkaris v. Cyprus*, No 21906/04.

⁴²⁵ *Maritime International Nominees Establishment (MINE) v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports, p. 89, para. 5.13 and pp. 107-108, paras. 6.98-6.108.

arguments which the Applicant introduces for the first time in the annulment proceeding is groundless. Accordingly, there is no lacuna in the Award.

271. Commenting on the evidentiary standards, the Tribunal emphasized that the issue before it was not whether a crime under Philippine law was committed, but whether an economic transaction by Fraport was made “in accordance” with Philippine law and thus qualifies as an “investment” under the German-Philippine BIT. Then the Tribunal observed: “[e]ven assuming, however, that the ‘preponderance of evidence’ test which applies in civil law must yield in the instant case to a ‘beyond a reasonable doubt’ test because the subject of the ‘in accordance’ inquiry is a Philippine criminal statute, this is a case in which *res ipsa loquitur*. The relevant facts, all of which are found in Fraport’s own documents, are incontrovertible.”⁴²⁶ The Applicant’s arguments regarding the failure of the Tribunal to abide by the presumption of *in dubio pro reo* cannot be considered in the context of Article 52(1)(e). There are instances where the absence of reasons may impact upon other issues, for example, if the motivation of an award is so aberrant that it would violate a fundamental rule of procedure.⁴²⁷ Such grievance must then be examined under Article 52(1)(b) or Article 52(1)(d) and not under Article 52(1)(e). Accordingly, the Committee decides that the essential interest protected by the *in dubio* principle is the right to be heard and answers Fraport’s arguments in the context of the serious departure from a fundamental rule of procedure.

(ii) The scrutiny of the Award by the ad hoc Committee under Article 52(1)(e) cannot cause a reopening of the case

272. The holding in the *Klöckner I* decision, according to which “the Committee can only take the award as it is”, also implies that the annulment proceeding cannot cause an entire reopening of the case. Referring to the decisions of the *ad hoc* Committees in *MINE*, *Vivendi* and *Wena*, the *ad hoc* Committee in *CDC v. Seychelles* observed that “[i]t

⁴²⁶ Award, para. 399.

⁴²⁷ See the *Amco I* decision at para 32 on the relationship between Article 52(1)(e) and (d) and (b). *Amco Asia Corporation and others v. Republic of Indonesia (“Amco I”)*, Decision on Annulment, 16 May 1986, 1 ICSID Reports, p. 517, para. 32.

thus appears that the more recent practice among *ad hoc* Committees is to apply Article 52(1)(e) in such a manner that the Committee does not intrude into the legal and factual decision-making of the Tribunal.⁴²⁸ This point has particular significance for Fraport's second objection under this ground, the failure to give reasons as to whether an attempt constitutes an offence under the ADL. Insufficient, inadequate or contradictory reasons have been assimilated by *ad hoc* committees to a failure to state reasons as established by *Klöckner*⁴²⁹ and *Soufraki v. UAE*⁴³⁰ decisions. They must be distinguished from reasons which are claimed to be legally or factually wrong, the latter escaping from review by an *ad hoc* committee.

273. In the present case, the parties discussed the violation of the ADL by Fraport at some length in their post-hearing submissions, including whether an attempt constitutes an offense.⁴³¹ Fraport denounces what it alleges are two main contradictions in the reasoning of the Tribunal. First, Fraport argues that the Tribunal dispenses with the requirement of *actus reus* defined in Section 2-A of the ADL but nonetheless decides that a breach of Philippine law has been committed. Next, Fraport claims that the Tribunal invented a crime of attempt in Section 2-A and held that Fraport committed such crime without finding an act of assistance or abetment or without the identification of a principal.

274. The *ad hoc* Committee in *Klöckner I* stated the following on contradictory reasons in an arbitral award:

“As for ‘contradiction of reasons’, it is in principle appropriate to bring this notion under the category ‘failure to state reasons’ for the very simple reason that two *genuinely* contradictory reasons cancel each other out. Hence the failure to state reasons. The arbitrator’s obligation to state reasons which are not contradictory must therefore be accepted.”⁴³²

⁴²⁸ *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, 11 ICSID Reports, p. 260, para. 70.

⁴²⁹ *Klöckner I v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, p. 136, paras. 114-120.

⁴³⁰ *Hussein Nuaman Soufraki v. United Arab Emirates (“Soufraki”)*, Decision on Annulment, 5 June 2007, para. 126.

⁴³¹ Claimant’s post-hearing Submission, paras. 13-17; Respondent’s post-hearing Submission, paras. 3-38; Respondent’s supplemental post-hearing submission, paras. 135-161; Claimant’s Observations regarding Respondent’s second post-hearing submission, paras. 109-118; Respondent’s supplemental post-hearing Reply, paras. 94-117.

⁴³² *Klöckner I v. Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, p. 137, para. 116 (emphasis in the original).

This view has been accepted by other *ad hoc* committees, such as in *MTD v. Chile*, where the *ad hoc* Committee confirmed that “outright or unexplained contradictions can involve a failure to state reasons.”⁴³³ The Applicant’s criticisms must also be examined bearing in mind the declaration of the *ad hoc* Committee in *Vivendi v. Argentina* that “tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.”⁴³⁴

275. Having declared that “the acquisition of shares by a foreign investor in a domestic corporation is a legal transaction that does not, by its nature, require some action by the government involving acceptance or permission, yet it is quite clear from the BIT and the Protocol that accordance with the host state’s law is nonetheless required,”⁴³⁵ the Tribunal could without any contradiction hold that “the relevance of compliance with national law for jurisdiction *ratione materiae* purposes is at the moment of the investment, as explained in the analysis of the BIT’s terms. That is a limitation which actually works in favour of both the foreign investor and international jurisdiction.”⁴³⁶ The Tribunal principally relied on the fact that, in its final report of 26 February 1999 to its Supervisory Board, Fraport disregarded the requirements of Philippine law which had been expressed by QT in its due diligence report on legal issues, in particular with respect to the ADL.⁴³⁷ According to the Tribunal, Fraport’s Supervisory Board was fully aware of the inconsistency of the proposed arrangements with Philippine law, but decided to proceed with the project.⁴³⁸ The Tribunal held that Fraport implemented its strategy by means of secret shareholding agreements that circumvented Philippine law.⁴³⁹ The Tribunal explained that Fraport structured its investment in a way that “consciously, intentionally

⁴³³ *MTD Equity Sdn. Bhd. (‘MTD’) v. Chile*, Decision on Annulment, 21 March 2007, 13 ICSID Reports, p. 516, para. 78.

⁴³⁴ *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, (“*Vivendi I*”), 6 ICSID Reports, p. 358, para. 65.

⁴³⁵ Award, para. 385.

⁴³⁶ Award, para. 395.

⁴³⁷ Award, para. 313.

⁴³⁸ Award, para. 315.

⁴³⁹ Award, paras. 319-323.

and covertly” violated the ADL⁴⁴⁰ and held: “[i]n summary, Fraport had been fully advised and was fully aware of the ADL and the incompatibility with the ADL of the structure of its investment which it planned and ultimately put into place with the secret shareholder agreements.”⁴⁴¹ In light of the view which the Tribunal took as to the relevant date for the purpose of deciding the question of jurisdiction *ratione materiae*, it could reasonably deduce that the investment could not qualify for the German-Philippine BIT protection regardless of whether the Pooling Agreement was amended in 2001 to provide with a shareholder structure which complied with Philippine law.⁴⁴² The first criticism of a contradiction of reasons is accordingly inaccurate.

276. The parties expressed different views before the Tribunal as to whether the ADL criminalizes attempted violations.⁴⁴³ In Fraport’s view, which it elaborated upon in its Observations regarding the Respondent’s second post-hearing submission of 15 September 2006, the ADL does not define “attempt” as a punishable offense because no such language is present in the ADL. At any rate, Fraport further alleged that the acquisition of the ability to commit an offense does not constitute an attempt to commit such offense and added that there is no evidence that it intended to exercise any alleged rights under the 1999 Shareholder Agreements to intervene in PIATCO management. It said all that the Republic of the Philippines could demonstrate is an intent of Fraport to achieve such ability to intervene.⁴⁴⁴ Clearly, the Applicant disagrees both with the factual finding by the Tribunal of its awareness that its arrangements were not in accordance with the ADL as stated in the above cited paragraph 356 of the Award as well as with the consequences which the Tribunal made thereof.

⁴⁴⁰ Award, para. 323.

⁴⁴¹ Award, para. 327.

⁴⁴² Award, paras. 398-401.

⁴⁴³ Claimant’s Observations regarding Respondent’s second post-hearing submission, paras. 114-116; Respondent’s supplemental post-hearing Reply, paras. 94-117.

⁴⁴⁴ Claimant’s Observations regarding Respondent’s second post-hearing submission, paras. 114-116.

277. It is not the task of the *ad hoc* Committee under Article 52(1)(e) of the ICSID Convention to consider whether the reasons given by the Tribunal are convincing. As the *ad hoc* Committee in *MINE* declared:

“[t]he adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.”⁴⁴⁵

The *ad hoc* Committee in *Vivendi* also stated that “it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons.”⁴⁴⁶ The *ad hoc* Committee in *Wena v. Egypt* further made clear that “[t]he ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead to reconsider whether the reasons underlying the Tribunal’s decisions were appropriate or not, convincing or not.”⁴⁴⁷ The *ad hoc* Committee in *CDC v. Seychelles* also underlined that Article 52(1)(e) “does not provide us with the opportunity to opine on whether the Tribunal’s analysis was correct or its reasoning persuasive.”⁴⁴⁸ The second criticism of a contradiction of reasons is also unfounded.

278. The same applies to Fraport’s further criticism that the ADL could be applicable to Terminal 3 as a public utility notwithstanding the nullification *ab initio* of the Terminal Concession by the Philippine Supreme Court. Such allegation is only an affirmation inspired by the Dissenting Opinion.⁴⁴⁹ While such a view was expressed in the Dissenting Opinion,⁴⁵⁰ the point formed no part of the reasoning of the Tribunal whose award cannot therefore be criticized on this ground.

⁴⁴⁵ *Maritime International Nominees Establishment (MINE) v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports, p. 88, para. 5.08.

⁴⁴⁶ *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, (“*Vivendi I*”), 6 ICSID Reports, p. 358, para. 64.

⁴⁴⁷ *Wena Hotels Ltd. v. Egypt*, Decision on Annulment, 5 February 2002, 6 ICSID Reports, p. 146, para. 79.

⁴⁴⁸ *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, 11 ICSID Reports, p. 260, para. 70.

⁴⁴⁹ Dissenting Opinion of Arbitrator B. Cremades, para. 25.

⁴⁵⁰ *Ibid.*, paras. 25 and 26.

279. Fraport's criticism of the meaning of the QT Report and letter of 21 December 1999 in the Award and of the consequences which the Tribunal drew from it cannot be reviewed by the Committee without engaging in a discussion on the merits of the case. There is a long and consistent line of decisions of *ad hoc* committees to the effect that this does not square with the limited scope of review permitted under Article 52(1)(e). The Tribunal considered the disregard by Fraport's supervisory board of the QT report's warnings as incontrovertible evidence that Fraport's investment was knowingly made not in accordance with Philippine law. The expression "this is a case in which *res ipsa loquitur*" in paragraph 399 means that without possible contradiction, under all standards of proof which had been alluded to by the Tribunal, "preponderance of evidence" or "beyond a reasonable doubt,"⁴⁵¹ the conclusion that Fraport's investment did not meet the requirements of Article 1 of the BIT was inescapable. Fraport deplores the conclusion of the Tribunal but its argument that the Tribunal's reasoning was contradictory and incomplete is merely a criticism of the solution, a criticism which cannot be admitted by the Committee under this ground.

280. The Committee concludes that there was no lack of reasoning or contradictions in the reasoning of the Tribunal. Accordingly, the conditions for annulment of the Award under Article 52(1)(e) of the Convention are not present in the case at hand.

V. COSTS

281. The parties have submitted their claims for costs upon the invitation of the Committee. Fraport's costs for its legal representation and expenses total US\$ 2,378,902.75 and EUR 1,003,652.67, respectively. In addition, Fraport as the Applicant on Annulment, made, in accordance with Regulation 14(3)(e) of the Administrative and Financial Regulations, the whole advance payment to ICSID for the costs referred to in Regulation 14(2) of the said Regulations. The Respondent claims that

⁴⁵¹ Award, para. 399.

it incurred in total legal fees and expenses in this annulment proceeding amounting to US\$ 5,672,667.05. It requests the Committee to order the Applicant to reimburse the Respondent the costs of the latter's representation and assistance.⁴⁵²

282. Under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j), read together with Article 52(4) of the ICSID Convention and ICSID Arbitration Rule 53, the Committee has the discretion to decide how and by whom the expenses incurred by the parties in connection with the proceeding (*"the parties' costs"*), the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre (*together "the ICSID costs"*) shall be borne.

283. The Committee is of the view that, in the circumstances of the present case, and having regard to its decision to annul the Award, it would not be reasonable and fair if it were to accede to the request of the Respondent and order the Applicant to reimburse the former the party costs of the Respondent's legal representation and assistance. Accordingly, the request of the Respondent on this point is denied.

284. With respect to the costs of Fraport for its legal representation and assistance the Committee notes that the Applicant in none of its submissions to the Committee, neither written nor oral, requested that it be reimbursed for such costs by the Respondent. But in any case, having regard to the Committee's conclusion that the Award is to be annulled on the ground that it was the Tribunal which seriously departed from a fundamental rule of procedure it would not be fair and reasonable, in the view of the Committee, if it were to decide that the Respondent would have to reimburse Fraport for the costs of its legal representation and assistance.

285. Accordingly, each Party shall bear the costs of its legal representation. This decision applies equally to the costs, which were previously reserved, of the two interlocutory applications made to the *ad hoc* Committee.⁴⁵³

⁴⁵² Rejoinder, conclusion at p. 96.

⁴⁵³ Referred to *supra* at paras. 6 & 8.

286. With respect to the costs of the annulment proceeding itself, i.e., the costs incurred by ICSID, including the fees and expenses of the members of the Committee, the Committee first recalls that it reserved its decision on the allocation of costs relating to each Party's one request for incidental decision (see paragraphs 6 and 8 above) to the final stage of this annulment proceeding. Having regard to the circumstances of the case at hand, the Committee is of the view that it is appropriate and fair in the present case that ICSID costs be borne equally by both parties. Accordingly, the Respondent shall reimburse the Applicant half of the ICSID costs (including the costs of the interlocutory applications).⁴⁵⁴

VI. DECISION

For the foregoing reasons, the Committee unanimously decides:

- (1) To annul the Award of 16 August 2007 in *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (ICSID Case No. ARB/03/25);
- (2) Each Party shall bear one half of the ICSID costs incurred in connection with this annulment proceeding; and
- (3) Each Party shall bear its own party costs and expenses incurred with respect to this annulment proceeding.

⁴⁵⁴ The ICSID Secretariat will in due course provide the parties with a financial statement on the costs of the proceeding.

Peter Tomka

Judge Peter Tomka
President of the *ad hoc* Committee
Date: 17 December 2010

D. Hascher

Judge Dominique Hascher
Member of the *ad hoc* Committee
Date: 15 December 2010

C. a. McLachlan

Professor Campbell McLachlan, QC
Member of the *ad hoc* Committee
Date: 7 December 2010