

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

In the arbitration proceeding between

FRAPORT AG FRANKFURT AIRPORT SERVICES WORLDWIDE

Claimant

and

REPUBLIC OF THE PHILIPPINES

Respondent

ICSID Case No. ARB/11/12

AWARD

Members of the Tribunal
Professor Piero Bernardini, President
Mr. Stanimir A. Alexandrov
Professor Albert Jan van den Berg

Secretary of the Tribunal
Ms. Aurélia Antonietti

Date of dispatch to the Parties: December 10, 2014

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ADB	Asian Development Bank
ADL	Anti-Dummy Law (CBII-4)
Arbitration Rules	ICSID 2006 Rules of Procedure for Arbitration Proceedings
ARCA	Amended and Restated Concession Agreement for the Build-Operate-And-Transfer Arrangement of the Ninoy Aquino International Airport Passenger Terminal III dated November 26, 1998 signed between the Government and PIATCO (CBII-55)
BIT or Treaty	Agreement between the Federal Republic of Germany and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments dated April 18, 1997 (CA-1)
Blue Ribbon Committee	Senate Committee on Accountability of Public Officers and Investigations
BOT law	Republic Act No. 7718 entitled “An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector and for Other Purposes” (CBII-12)
BSP	Bangko Sentral ng Pilipinas
[CA] [RL]	[Claimant] [Respondent] Legal Authority
[CE] [RE]	[Claimant] [Respondent] Exhibit
C-Mem.	Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction, including counterclaims dated November 19, 2012
Clark	Clark Field Airport
Concession Agreement	Concession Agreement for the Build-Operate-And-Transfer Arrangement of the Ninoy Aquino International Airport Passenger Terminal III dated July 12, 1997, signed between the Government and PIATCO (CBII-43)

Datacenta Agreement	Agreement for the Provision of Consultancy Services in relation to tax and efficiency planning in respect of Terminal III dated August 22, 1997 signed between PIATCO and Datacenta Ltd. (RE-326)
DOJ	Philippine Department of Justice
DOTC	Philippine Department of Transportation and Communication
EPC Contract	Agreement entered into by PIATCO and Takenaka for the construction of Terminal 3 dated March 31, 2000 (CBII-104)
FAG	Flughafen Frankfurt Main AG (currently known as Fraport AG Frankfurt Services Worldwide)
Fraport	Fraport AG Frankfurt Services Worldwide
Hearing	Hearing on jurisdiction, liability and counterclaims held from September 16 through 26, 2013
Hr. Tr. [Day #], [page]	Transcript of the hearing on jurisdiction, liability and counterclaims held from September 16 through 26, 2013
ICC	NEDA Investment Coordination Committee
ICC-CC	ICC Cabinet Committee
ICC Arbitration	ICC arbitration proceedings, <i>Philippine International Air Terminals Co., Inc. (Philippines) vs. The Government of the Republic of the Philippines (Acting through the Department of Transportation and Communications and the Manila International Airport Authority)</i> , ICC Case No. 12610/TE/MW/AVH/JEM/MLK
ICSID or the Centre	International Centre for Settlement of Investment Disputes
[ICSID-#]	Documents filed in the ICSID 1 arbitration proceedings
ICSID 1	<i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines</i> (ICSID Case No. ARB/03/25)
ICSID 1 Award	Award rendered on August 16, 2007, in <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines</i> (ICSID Case No. ARB/03/25) (CBII-409)

ICSID 1 Tr. [Day #] [page]	Transcript of the hearing on jurisdiction and liability in <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines</i> (ICSID Case No. ARB/03/25) held from January 6 through 17, 2006
ICSID Annulment	Annulment proceedings in <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines</i> (ICSID Case No. ARB/03/25)
ICSID Annulment Decision	ICSID <i>ad hoc</i> Committee's Decision in the annulment proceedings in <i>Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines</i> (ICSID Case No. ARB/03/25) dated December 23, 2010 (CBII-417)
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
IRR	1994 Implementing Rules and Regulations (CBII-13)
KfW	Kreditanstalt für Wiederaufbau
MASO	MIA-NAIA Association of Service Operators
Mem.	Claimant's Memorial on Liability dated August 17, 2012
MIAA	Manila International Airport Authority
NAIA	Ninoy Aquino International Airport
NBI	National Bureau of Investigation
NEDA	Philippine National Economic Development Authority
O&M Agreement	Operations & Maintenance Agreement dated July 27, 2001 signed between PIATCO and PTI (CBII-189)
PAGC	Presidential Anti-Graft Commission
PAGS	Philippine Airport & Ground Services, Inc.
PAIRCARGO	People's Aircargo & Warehousing Co., Inc.
PAL	Philippine Airlines
PBAC	Prequalification Bids and Awards Committee
PEZA	Philippine Economic Zone Authority
PHB1	Post-hearing briefs dated March 3, 2014

PHB2	Reply post-hearing briefs dated on April 2, 2014
PIATCO	Philippine International Air Terminals Co., Inc.
Pooling Agreement	FAG-PAICARGO-PAGS-PTI Shareholders Agreement, dated July 6, 1999 (CBII-80)
PTH	Philippine and Ground Services Terminals Holdings, Inc.
PTI	Philippine Airport and Ground Services Terminals, Inc.
QT	Quisumbing Torres
Rej.	Respondent's Rejoinder on the Merits and Reply on Jurisdiction, including counterclaims dated June 10, 2013
Rep.	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, including counterclaims dated April 5, 2013
Request	Request for Arbitration submitted by Fraport AG Frankfurt Services Worldwide against the Republic of the Philippines dated March 30, 2011
SEC	Securities and Exchange Commission
Skeleton	Skeleton Submissions dated September 3, 2013
Sur-Rej.	Claimant's Sur-Rejoinder on Jurisdiction, including counterclaims dated July 12, 2013
Security Bank	Security Bank Corporation
OGCC	Office of Government Corporate Counsel
VCLT	Vienna Convention on the Law of Treaties dated May 23, 1969

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the “Agreement between the Federal Republic of Germany and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments” dated April 18, 1997 and in force since February 1, 2000 (the “BIT” or “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”).
2. Claimant is Fraport AG Frankfurt Services Worldwide (“Fraport” or “Claimant”), a company incorporated in Germany. Fraport was formerly known as Flughafen Frankfurt Main AG (“FAG”).
3. Respondent is the Republic of the Philippines (“The Philippines,” the “Government,” or “Respondent”).
4. Claimant and Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

II. OVERVIEW OF THE CASE AND PARTIES’ REQUESTS FOR RELIEF

5. The Tribunal has been charged with the daunting task of deciding a dispute which has already been submitted to a first ICSID Tribunal, to an ICSID *ad hoc* Committee and which has been the subject of a related ICC arbitration and numerous Philippine proceedings.
6. This dispute centers around the invalidation of a concession to build and operate a new international terminal (“Terminal 3”) at Ninoy Aquino International Airport in Manila further to the first airport privatization in Asia.¹

¹ Cl. PHB2, para. 75.

7. Claimant, Fraport, is a direct and indirect investor in the concession project company, known as the Philippines International Air Terminals Co., Inc. (“PIATCO”).
8. In July 1997, pursuant to a concession agreement, PIATCO was awarded, under President Fidel V. Ramos, the Terminal 3 Concession under the Philippines’ Built-Operate-Transfer law. In 1999, Fraport, an experienced airport operator, became an investor in PIATCO and a “cascade” of other Philippine companies that had ownership interests in PIATCO.
9. Between 2001 and 2002, the relationship between PIATCO and Respondent soured for disputed reasons, including disagreements over the renegotiation of the terms of the concession agreement, as it will be explained in Section IV below.
10. In November 2002, as construction of Terminal 3 neared completion according to Fraport, President Gloria Macapagal-Arroyo announced that the Philippine Government had determined that the concession contracts were legally invalid and would not be honored. On May 5, 2003, the Philippine Supreme Court declared the Terminal 3 concession to be void *ab initio* because the consortium behind PIATCO allegedly did not meet the financial qualification requirements to have been awarded the concession originally, among other reasons.
11. Pursuant to expropriation procedures in domestic Philippine law, a court transferred possession of Terminal 3 to the Philippine Government in December 2004, which began operating the Terminal in 2008. Domestic court proceedings to determine the amount of compensation due PIATCO are still ongoing.
12. Fraport initiated a first ICSID case which was registered in October 2003 (ICSID Case No. ARB/03/25) (“ICSID 1”). A Tribunal composed of Messrs. L. Yves Fortier (President), Bernardo M. Cremades and W. Michael Reisman rendered an award on August 16, 2007 (the “ICSID 1 Award”) dismissing the case on jurisdiction, with a dissent from Dr. Cremades. An application for annulment was lodged by Fraport and an *ad hoc* Committee composed of Messrs. Peter Tomka (President), Dominique Hascher and Campbell McLachlan rendered a decision annulling the ICSID 1 Award on December 23, 2010 (the “ICSID Annulment Decision”).

13. PIATCO also initiated an ICC arbitration against Respondent in 2003, pursuant to an arbitration clause in an amended concession agreement. On July 22, 2010, the ICC Tribunal composed of Messrs. Michael Pryles (President), Florenz D. Regalado and V. V. Veeder rendered a partial award dismissing PIATCO's claims as inadmissible and rejecting all the counterclaims presented by Respondent.
14. In this new arbitration proceeding, Fraport claims that it was subject to an uncompensated and unlawful expropriation of its investment in PIATCO, along with other BIT violations arising out of the same series of events.
15. The Philippines argues that the Tribunal does not have jurisdiction under the BIT to hear Fraport's claims because Fraport's investment violated Philippine law, and more particularly nationality restrictions applicable to the Concession (also known as the Anti-Dummy Law (the "ADL")). It further argues that Fraport's claims are inadmissible both because of such violations, as well as corruption in obtaining and carrying out the Concession. The Philippines admits the expropriation of Terminal 3, but argues that the expropriation was lawful and that compensation has been paid and will continue to be paid. It further denies any other violation of the BIT. The Philippines also counterclaims for costs associated with the Terminal 3 Concession and amounts related to Fraport's alleged corruption.
16. Fraport responds that the Philippines' jurisdictional and admissibility objections have no legal basis and, moreover, are factually incorrect and unsupported. Fraport also contends that the Tribunal does not have jurisdiction over the Philippines' counterclaims, which are, nevertheless, meritless. Fraport claims that the Philippines destroyed its investment and unlawfully expropriated by not providing prompt and adequate compensation and failed to accord Fraport and its investment fair and equitable treatment. The Philippines is also said to have subjected Fraport and its investments to arbitrary and discriminatory treatment and to have violated the umbrella clause of the BIT in breaching the express terms of the concession agreements.
17. Fraport's request for relief is as follows:

Fraport requests that the Arbitral Tribunal in this case issue an award:

- (a) Accepting jurisdiction of Fraport's claims and rejecting the Philippines objection to jurisdiction;
- (b) Denying jurisdiction to the counterclaims of the Philippines;
- (c) Declaring that the Philippines breached its obligations under the Germany-Philippines BIT, Philippines laws and regulations and international law;
- (d) Ordering the Philippines to pay Fraport damages with respect to all injury caused to Fraport as a result of the Philippines' breaches, in an amount to be determined;
- (e) Ordering the Philippines to reimburse Fraport for the costs of this arbitration, including its legal fees and expenses, the fees and expenses of the Tribunal and the fees of the Centre;
- (f) Ordering the Philippines to pay pre-award and post-award interest at rates to be determined; and
- (g) Ordering such other relief as the Tribunal deems just and proper.²

18. The Philippines' request for relief is as follows:

For all the reasons set forth above and in its prior submissions, Respondent respectfully requests that the Tribunal (1) dismiss Claimant's claims in their entirety for lack of jurisdiction, inadmissibility, or on the merits; (2) enter a decision in favor of Respondent in respect of all of its counterclaims; and (3) order Claimant to bear all costs and expenses incurred by Respondent in defending against Claimant's claims.³

19. The Tribunal will now recall the procedural history of this case and will proceed to set forward the facts and the Parties' positions, before examining its jurisdiction.

² Sur. Rej., para. 395.

³ R. PHB2, para. 113.

III. PROCEDURAL HISTORY

20. On March 30, 2011, ICSID received a request for arbitration of the same date submitted by Fraport against the Republic of the Philippines, accompanied by exhibits CE-1 through CE-23 and legal authority CA-1 (the “Request”).
21. On April 27, 2011, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
22. By letters of May 12 and 26, 2011, the Parties agreed to constitute the Arbitral Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and that the Tribunal would consist of three arbitrators, one to be appointed by each Party, the third arbitrator and President of the Tribunal to be appointed by agreement of the Parties.
23. The Tribunal is composed of Professor Piero Bernardini, a national of Italy, President, appointed by agreement of the Parties on January 30, 2012; Mr. Stanimir A. Alexandrov, a national of Bulgaria, appointed by Claimant on June 23, 2011; and Professor Albert Jan van den Berg, a national of the Netherlands, appointed by Respondent on July 27, 2011.
24. On February 7, 2012, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Eloïse Obadia, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. She was later replaced by Ms. Aurélia Antonietti, ICSID Legal Counsel.
25. The Tribunal held a first session with the Parties on April 3, 2012, at the World Bank’s office in Washington, D.C. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules

would be those in effect from April 10, 2006, that the procedural language would be English and that the place of proceeding would be Washington, D.C. The decisions of the Tribunal and the agreement of the Parties were embodied in the Minutes of the First Session signed by the President and the Secretary of the Tribunal and circulated to the Parties on April 17, 2012.

26. At the Session, it was decided that, considering the factual background of this case, it was appropriate to address issues of jurisdiction and liability in a first phase, followed by a second phase on issues relating to quantum, if needed.⁴
27. At the Session, it was also decided that the Tribunal would first examine threshold procedural matters (the “Preliminary Phase”) raised by Respondent on March 28 and 29, 2012, and that a schedule for further procedures would be fixed once the Tribunal would have decided on the aforementioned matters.
28. By letter dated April 4, 2012, the Tribunal invited the Parties to submit observations on two points relating to the Preliminary Phase matters as specified during the First Session,⁵ namely whether and to what extent findings of fact and conclusions of law of the ICSID 1 Award were binding, and whether and to what extent the evidentiary record of the ICSID 1 proceedings and the ICC related proceedings were to be incorporated into these proceedings.
29. In accordance with the schedule set forth by the Tribunal, the Parties submitted their respective observations. Respondent’s submission dated April 18, 2012, was accompanied by exhibits RE-1 through RE-102, legal authorities RL-1 through RL-75, Annexes A through D (Legal Opinion of Professor Dr. Rudolf Dolzer dated April 18, 2012 (Annex A), and Legal Opinion of Professor Christoph Schreuer dated April 12, 2012 (Annex B)), while Claimant’s submission dated May 2, 2012, was accompanied by exhibits CE-24 through CE-35, legal authorities CA-2 through CA-42, and by a Declaration of Professor Andreas F. Lowenfeld dated May 1, 2012.

⁴ Minutes of the First Session, para. 13.3.

⁵ Minutes of the First Session, paras. 13.1.1 and 13.1.2.

30. On May 17, 2012, having considered the Parties' respective submissions, the Tribunal issued Procedural Order No. 1 whereby (i) it found that the ICSID 1 Award had been annulled in its entirety by the *ad hoc* Committee, (ii) it denied Respondent's requests to consider certain determinations of the ICSID 1 Tribunal and the ICC Tribunal binding on the Parties, and (iii) it admitted the records of the ICSID 1 proceedings and the ICC proceedings into the present record.⁶ The Tribunal also fixed a schedule for further procedures, including a date for a hearing.
31. On August 17, 2012, Claimant filed its Memorial on Liability ("Mem."), accompanied by exhibits CE-36 through CE-150, legal authorities CA-43 through CA-104, and the following supporting documents:

Witness Statements:

- Statement of Mr. Peter Henkel dated August 15, 2012 ("Henkel III")⁷;
- Statement of Dr. Dietrich F.R. Stiller dated August 17, 2012 ("Stiller IV"); and
- Statement of Mrs. Dörte Ochs dated August 9, 2012 ("Ochs") (hereinafter "Ochs (ICSID 2)").

Legal Opinion:

- Joint Legal Opinion of Justices Jose R. Melo (ret.) and Artemio G. Tuquero (ret.), and Dean Raul C. Pangalangan signed on December 12 and 18, 2011 ("Joint Legal Opinion") (hereinafter "Melo-Tuquero-Pangalangan I (ICSID 2)").

⁶ Documents from the record of ICSID 1 that are referred to in this arbitration are designated "ICSID-document number" pursuant to a Master Index agreed upon by the Parties, and those from the ICC record, "ICC-document number." For ease of reference and to the extent possible, the Tribunal will refer in this Award to the exhibit numbers used in the Parties' Core Bundle prepared for the September 2013 Hearing, "CBII-document number."

⁷ The Parties have not adopted a common naming guide for the witness statements and expert reports. The names indicated in quote under each memorial in this section are the one used by each party. Statements previously filed in ICSID 1 have also been referred to and provided by the Parties. Claimant has not used consistent abbreviations throughout its pleadings and has provided the ICSID 1 statements and reports electronically. Respondent has used consistent abbreviations and provided ICSID 1 or ICC statements and reports under RE#. As a consequence, the Tribunal has adopted its own naming guide which indicates which statements and reports were filed in these proceedings as ICSID 2, by contrast to some statements, opinions and reports filed in ICSID 1. Witness statements and expert reports from the record of ICSID 1 that are referred to in this arbitration are named "last name of witness/expert/name of organization (ICSID 1)," and those introduced in this arbitration, "last name of witness/expert/name of organization (ICSID 2)."

Expert Reports:

- PricewaterhouseCoopers (“PwC”) Supplemental Opinion by Ms. Claudia Nestler and Dr. Michael Hammes dated August 16, 2012 (“PwC Report III”); and
- Memorandum of Professor Amedeo Odoni dated August 14, 2012 (“Odoni II”).

32. On November 19, 2012, Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction (“C-Mem.”), including counterclaims, accompanied by exhibits RE-103 through RE-1358, legal authorities RL-76 through RL-431, Annexes E through G, and the following supporting documents:

Witness Statements:

- Witness Statement of Secretary Leila De Lima dated November 19, 2012 (“De Lima I”);
- Witness Statement of Major General Jose Angel A. Honrado AFP (ret.) dated November 16, 2012 (“Honrado”); and
- Witness Statement of Mr. Dennis Villa-Ignacio dated November 19, 2012 (“Villa-Ignacio”).

Legal Opinions:

- Legal Opinion of Dean Danilo L. Concepcion dated November 20, 2012 (“Concepcion”) (hereinafter “Concepcion I (ICSID 2)”);
- Expert Opinion of Professor Rudolf Dolzer dated November 15, 2012 (“Dolzer”) (hereinafter “Dolzer II (ICSID 2)”);
- Opinion of Sir Elihu Lauterpacht dated November 16, 2012 (“Lauterpacht”); and
- Legal Opinion of Professors Christoph Schreuer, Ursula Kriebaum and Christina Binder dated November 18, 2012 (“Schreuer”) (hereinafter “Schreuer-Kriebaum-Binder I (ICSID 2)”).

Expert Reports:

- Statement of Mr. Raul Manlapig (Ove Arup & Partners) dated November 16, 2012 (“Arup”);

- Expert Statement of Mr. Tim Lunt (Gleeds Cost Management Ltd.) dated November 12, 2012 (“Gleeds”);
- Statement of Mr. Richard Francis Klenk dated November 15, 2012 (“Klenk”);
- Expert Opinion of Professor Dr. Mark Pieth dated November 9, 2012 (“Pieth I (ICSID II)”);
- Expert Report of Mr. Rex E. Pingle dated November 16, 2012 (“Pingle I (ICSID II)”);
- Expert Report of Dr. Michael B. Rosenzweig dated November 19, 2012 (“Rosenzweig I (ICSID II)”); and
- Expert Report of Mr. Howard M. Silverstone dated November 19, 2012 (“Silverstone I (ICSID II)” (hereinafter “Silverstone I (ICSID 2)”)).

33. By letter of January 7, 2013, both Parties requested for the Tribunal to decide on their respective requests for production of documents, which the Tribunal decided, in the form of Redfern Schedules on January 18, 2013.

34. On April 5, 2013, Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction, including counterclaims (“Rep.”), accompanied by Annex A, exhibits CE-151 through CE-219,⁸ legal authorities CA-105 through CA-171, and the following supporting documents:

Witness Statement:

- Statement of Professor Dr. Jürgen Taschke dated April 4, 2013 (“Taschke”).

Expert Reports:

- Statement of Mr. John M. Niehuss dated April 2, 2013 (“Niehuss II”) (hereinafter “Niehuss I (ICSID 2)”);
- Expert Report of Dr. Richard de Neufville dated April 5, 2013 (“de Neufville”);
- Statement of Professor David W. Kennedy dated April 5, 2013;

⁸ Claimant filed documents twice under the exhibit number C-217, C-218 and C-219 with the Reply (Transcripts of the hearing of January 2006 in ICSID 1) and with the Sur-Rej (Jan. 2006 Inquest for investigation of the assassination of Judge Gingoyan and Letter of Mar. 21, 2013 from Duty Free Philippines to OSG).

- PwC Supplemental Opinion by Ms. Claudia Nestler and Dr. Michael Hammes dated March 2013 (“PwC Report IV”) (hereinafter “PwC II (ICSID 2)”);
- Expert Report and Disclosure of Mr. Thomas W. Golden dated April 5, 2013; and
- URS Report on the Status of NAIA Terminal 3 by Mr. Mike Jackson dated April 2013 (“URS Report”).

Legal Opinions:

- Reply Joint Legal Opinion of Justices Jose R. Melo (ret.) and Artemio G. Tuquero (ret.), and Dean Raul Pangalangan dated April 4, 2013 (“Reply Joint Legal Opinion”) (hereinafter “Melo-Tuquero-Pangalangan II (ICSID 2)”); and
- Legal Opinion of Justice Jose C. Vitug dated April 5, 2013 (“Vitug I”) (hereinafter “Vitug I (ICSID 2)”).

35. By letter dated May 13, 2013, Respondent requested the Tribunal to order Claimant to produce documents allegedly withheld further to the Tribunal’s decision of January 18, 2013. Claimant provided its observations on Respondent’s request on May 17, 2013.
36. Following several rounds of written submissions made by the Parties between May 20 and June 3, 2013, including Respondent’s further request for production of documents regarding Claimant’s claim of attorney work product protection of May 28, 2013, the Tribunal issued Procedural Order No. 2 on June 5, 2013, by which it confirmed its decision of January 18, 2013, clarified its position regarding issues raised between the Parties and rejected Respondent’s request of May 28, 2013.
37. On June 10, 2013, Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction, including counterclaims (“Rej.”), accompanied by exhibits RE-1359 through RE-2044, legal authorities RL-432 through RL-507, Annexes H through I, and the following supporting documents:

Witness Statements:

- Supplemental Witness Statement of Secretary Leila De Lima dated June 7, 2013 (“De Lima II”);
- Supplemental Witness Statement of Mr. Dennis Villa-Ignacio dated June 7, 2013 (“Villa-Ignacio II”);

- Witness Statement of Dr. Norbert Lösch dated June 2, 2013;
- Witness Statement of Secretary Alberto G. Rómulo dated June 6, 2013; and
- Witness Statement of Mr. F. Arthur Villaraza dated June 7, 2013.

Legal Opinions:

- Second Opinion of Professor Rudolf Dolzer dated June 2013 (“Dolzer II”);
- Supplemental Legal Opinion of Dean Danilo L. Concepcion dated June 10, 2013 (“Concepcion II”) (hereafter “Concepcion II (ICSID 2)”);
- Supplementary Legal Opinion by Professors Christoph Schreuer, Ursula Kriebaum and Christina Binder dated June 10, 2013 (“Schreuer II”);
- Opinion of Law of Professor Jan Paulsson dated June 4, 2013; and
- Legal Opinion of Justice Reynato S. Puno (ret.) dated June 10, 2013 (hereafter “Puno (ICSID 2)”).

Expert Reports:

- Supplemental Expert Statement of Mr. Tim Lunt (Gleeds Cost Management Ltd.) dated June 9, 2013 (“Gleeds II”);
- Supplemental Statement of Ove Arup & Partners by Messrs. Raul Manlapig and Ashok Raiji dated June 10, 2013 (“Arup II”);
- Supplemental Expert Opinion of Professor Dr. Mark Pieth dated June 9, 2013 (“Pieth II (ICSID II)”);
- Supplemental Expert Report of Mr. Rex E. Pingle dated June 10, 2013 (“Pingle II (ICSID II)”);
- Rejoinder Report of Dr. Michael B. Rosenzweig dated June 10, 2013 (“Rosenzweig II (ICSID II)”);
- Supplemental Expert Report of Mr. Howard M. Silverstone dated June 10, 2013 (“Silverstone II (ICSID II)” (hereafter “Silverstone II (ICSID 2)”); and
- Expert Report of Mr. Brent C. Kaczmarek (Navigant Consulting, Inc.) dated June 10, 2013.

38. On July 12, 2013, Claimant filed its Sur-Rejoinder on Jurisdiction, including counterclaims (“Sur-Rej.”), which was accompanied by Annex A, new exhibits CE-218 and CE-219,

exhibits CE-220 through CE-306, legal authorities CA-165 through CA-179, and the following supporting documents:

Witness Statement:

- Statement of Mr. Sanim Aydin dated July 3, 2013.

Legal Opinions:

- Second Supplemental Joint Legal Opinion of Justices Jose R. Melo (ret.) and Artemio G. Tuquero (ret.), and Dean Raul Pangalangan dated July 9, 2013 (“Sec. Supp. Joint Legal Opinion”) (hereafter “Melo-Tuquero-Pangalangan III (ICSID 2)”); and
- Reply Legal Opinion of Justice Jose C. Vitug dated July 11, 2013 (“Vitug II”) (hereafter “Vitug II (ICSID 2)”).

Expert Reports:

- Supplemental Expert Report and Disclosure of Mr. Thomas W. Golden dated July 12, 2013;
- Statement of Dr. Richard de Neufville dated June 28, 2013 (“de Neufville II”);
- Supplemental Statement of Professor David W. Kennedy dated July 12, 2013;
- PwC Second Supplemental Expert Report by Ms. Claudia Nestler and Dr. Michael Hammes dated July 10, 2013 (“PwC Report V”);
- Supplemental Statement of Mr. John M. Niehuss dated July 12, 2013 (“Niehuss III”) (hereafter “Niehuss II (ICSID 2)”); and
- Expert Report and Disclosure of Glenn Ware, Esq. (PwC) dated July 12, 2013.

39. On August 5, 2013, and in accordance with paragraph 15.9 of the Minutes of the First Session, each Party exchanged a list of witnesses and experts it wished to cross-examine at the hearing. Claimant’s and Respondent’s lists of witnesses and experts were submitted to the ICSID Secretariat on August 12, 2014 and August 14, 2014 respectively.

40. Pursuant to paragraph 15.9 of the Minutes of the First Session, each Party could request the Tribunal to be allowed to designate up to 3 of its own witnesses or experts for direct testimony, indicating the scope and questions of the direct testimony, regardless of whether such individual has been called for cross-examination by the other Party. By letter of

August 12, 2013, Fraport requested to hear Messrs. Peter Henkel, Mike Jackson (URS) and Dietrich Stiller. By letter of August 13, 2013, Respondent requested to hear Messrs. Norbert Lösch and Venner Mendoza. Respondent also requested to call two rebuttal experts for direct testimony (to rebut new analysis by Claimant in its Sur-Rejoinder), namely Messrs. Mark Pieth and Brent Kaczmarek. Claimant objected to this last request on August 15, 2013, and Respondent answered on August 16, 2013.

41. By letter of August 19, 2013, the Tribunal extended until August 26, 2013, the deadline provided under paragraph 15.9 of the Minutes of the First Session to determine the witnesses and experts who were to appear at the hearing. By the same letter, the Parties were invited to submit simultaneous Skeleton Submissions by September 3, 2013.
42. On August 20, 2013, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference to discuss the forthcoming hearing and its logistics. The decisions of the Tribunal and the agreement of the Parties were embodied in the Minutes of the Pre-Hearing Organizational Meeting signed by the President and the Secretary of the Tribunal and circulated to the Parties on August 22, 2013.⁹
43. Following several rounds of Parties' correspondence on each other's designation of witnesses and experts who were to be made available at the hearing and the scope of the direct testimony, the Tribunal issued Procedural Order No. 3 on September 2, 2013, by which it determined the list of witnesses and experts to be made available for cross-examination and direct examination at the hearing. The Tribunal allowed the Parties' requests to call Messrs. Peter Henkel, Mike Jackson (URS), Dietrich Stiller, Norbert Lösch and Venner Mendoza for direct testimony, listing the scope and questions of their direct testimonies. The Tribunal allowed the direct supplemental testimony of Messrs. Mark Pieth and Brent Kaczmarek on the condition that a written rebuttal be submitted a week before the hearing, and upon the condition that their direct examination remain within the scope of their reports and subject to Claimant's right to cross-examine them.

⁹ See also letter from the Secretary to the Parties, Aug. 30, 2013.

44. Further to disagreements between the Parties on September 5 and 6, 2013 as to the availability of some witnesses and experts and their rolling order, as well as Respondent's request to use video-conference for the cross-examination of some its witnesses, the Tribunal ordered the Parties on September 6, 2013, to confer and endeavor to agree on the schedule by September 9, 2013, and denied any examination by video at that late stage, except for Ms. De Lima and Mr. De Ocampo, for whom Claimant had not objected provided that Respondent paid for the costs of Claimant's counsel to travel to Manila and attend the examination in the video-conference room.
45. Following the submission of Claimant's Sur-Rejoinder on Jurisdiction, the Parties filed several requests to admit new documents into the record:
- By letter of August 16, 2013, Respondent requested leave to submit 27 new documents to rebut new evidence and new arguments alleged asserted by Claimant in its Sur-Rejoinder. By letter of August 21, 2013, Claimant objected to Respondent's request. By letter of August 23, 2013, the Tribunal granted Respondent leave to submit the said new documents, namely exhibits RE-2045 through RE-2071, submitted on August 31, 2013, subject to Claimant's opportunity to submit documents in response.
 - By letter of August 29, 2013, Claimant requested leave to admit into the record (and produced) 5 newly received letters from Credit Suisse and BNP Paribas, regarding the ownership of bank accounts by Messrs. Endler and Struck, that were proposed to stand in lieu of Messrs. Endler and Struck's cross-examinations. Respondent objected to that suggestion on September 1, 2013. In its Procedural Order No. 3, the Tribunal admitted in the record Claimant's letters (exhibit CE-372), and confirmed that the witnesses were to be heard at the hearing.
 - By letter of August 29, 2013, Respondent requested leave to introduce 5 new documents containing updates on related Philippine proceedings, which Claimant commented by email of September 1, 2013. By cover letter of September 2, 2013, to Procedural Order No. 3, the Tribunal partially granted

Respondent's request. Respondent submitted into the record exhibits RE-2072 through RE-2075 on September 3, 2013, and exhibits RE-2076 and RE-2077 on September 4, 2013.

- Claimant submitted exhibits CE-307 through CE-333 on September 6, 2013 responsive to (i) the documents that Respondent introduced further to its letter of August 29, 2013, and (ii) the 27 new documents submitted by Respondent on August 31, 2013.

46. On September 3, 2013, the Parties filed their respective Skeleton Submissions ("Cl./R. Skeleton").
47. On September 9, 2013, Respondent submitted written rebuttal reports of Messrs. Brent Kaczmarek and Mark Pieth, as provided by the Tribunal's letter of August 30, 2013, and Procedural Order No. 3. Respondent's submission was accompanied by Respondent's exhibits RE-2078 through RE-2093.
48. Claimant objected to these reports on September 10, 2013, and reiterated its request that the direct testimony of those experts be rejected, which prompted a series of exchange of letters between the Parties. Intensive correspondence was also exchanged between the Parties regarding the schedule of the hearing. By letter of September 12, 2013, the Tribunal rejected Claimant's request of September 10, 2013, and allowed Messrs. Pieth and Kaczmarek's testimony. The Tribunal also settled the sequence of the Parties' presentations, fixed dates for the examination of some witnesses, and took note of Respondent's decision not to call Messrs. Lösch and Villaraza. Given that Mr. Lösch had not been called by Claimant for cross-examination, the Tribunal indicated that it would evaluate Mr. Lösch's statements submitted in this proceeding and the testimony given in the previous ICSID and the ICC proceedings and would assign to that testimony such evidentiary weight as it deems appropriate under the circumstances. By contrast, Mr. Villaraza had been called by Claimant for cross-examination and Respondent did not provide justified reasons for its request to hear him by video-conference. The Tribunal decided therefore to disregard his testimony in accordance with paragraph 15.10 of the Minutes of the First Session.

49. By letter of September 15, 2013, Respondent requested leave from the Tribunal to introduce into the record 30 new documents. Pursuant to the Parties' agreement and the Tribunal's leave granted on the first day of the hearing, Respondent submitted exhibits RE-2094 through RE-2123 into the record on September 17, 2013.
50. A hearing on jurisdiction, liability and counterclaims took place in Washington, D.C. from September 16 through 26, 2013 (the "Hearing"). In addition to the Members of the Tribunal, the Secretary of the Tribunal, and ICSID paralegal, Ms. Angela Ting, present at the Hearing were:

On behalf of Claimant:

Counsel:

Mr. Michael Nolan	Milbank, Tweed, Hadley & McCloy LLP ("Milbank")
Mr. Edward Baldwin	Milbank
Ms. Elitza Popova-Talty	Milbank
Mr. Brett Lowe	Milbank
Mr. Hugh Carlson	Milbank
Mr. Mark McCrone	Milbank
Ms. Angel Anderson	Milbank
Dr. Sabine Konrad	McDermott Will & Emery ("McDermott")
Ms. Lisa M. Richman	McDermott
Mr. Arne Fuchs	McDermott
Ms. Andrea Alegrett	McDermott
Mr. Edgardo G. Balois	Siguion Reyna Montecillo & Ongsiako ("SRMO")
Mr. Cesar P. Manalaysay	SRMO
Mr. Victorio H. Macasaet	SRMO
Ms. Lesley A. Benn	Outside Consultant

Parties:

Mr. Martin Glock	Fraport AG
Mr. Peter Henkel	Fraport AG

Ms. Döerte Ochs	Fraport AG
Mr. Matthias Engler	Fraport AG
<u>Witnesses:</u>	
Mr. Wilhelm Bender	Former Chairman of the Executive Board of Fraport
Mr. Johannes Endler	Former employee of Fraport
Mr. Manfred Schölch	Former Vice-Chairman of Fraport
Mr. Dietrich Stiller	Partner of Clifford Chance, Germany
Mr. Bernd Struck	Former employee of Fraport
<u>Experts:</u>	
Mr. Mike Jackson	URS
Mr. Ryan Murphy	PwC
<u>On behalf of Respondent:</u>	
<u>Counsel:</u>	
Solicitor General Francis H. Jardeleza	Office of the Solicitor General
Mr. Bernard G. Hernandez	Assistant Solicitor General, Office of the Solicitor General
Mr. Eric Remegio O. Panga	Assistant Solicitor General, Office of the Solicitor General
Mr. Danilo D. Leyva	Senior State Solicitor, Office of the Solicitor General (Counsel)
Ms. Jane E. Yu	Senior State Solicitor, Office of the Solicitor General
Ms. Josephine D. Arias	State Solicitor, Office of the Solicitor General
Ms. Rebecca E. Khan	State Solicitor, Office of the Solicitor General
Ms. Charisse G. Olalia	State Solicitor, Office of the Solicitor General
Justice Florentino P. Feliciano	Supreme Court of the Philippines (retired)
Ms. Carolyn B. Lamm	White & Case LLP
Ms. Abby Cohen Smutny	White & Case LLP

Mr. Frank Vasquez	White & Case LLP
Mr. William Currier	White & Case LLP
Mr. Hansel Pham	White & Case LLP
Ms. Anne Smith	White & Case LLP
Mr. Frank Panopoulos	White & Case LLP
Mr. Lee Steven	White & Case LLP
Mr. Eckhard Hellbeck	White & Case LLP
Mr. Matthew Leddicotte	White & Case LLP
Mr. Brody Greenwald	White & Case LLP
Mr. Jonathan Ulrich	White & Case LLP
Mr. Michael Daly	White & Case LLP
Mr. Karthik Nagarajan	White & Case LLP
Ms. Leah Witters	White & Case LLP
Mr. Daniel Hickman	White & Case LLP
Mr. Luke Engan	White & Case LLP
Mr. Ziad Haider	White & Case LLP
Ms. Amara Levy-Moore	White & Case LLP
Mr. Nikolaos Tsolakidis	White & Case LLP
Mr. Roland Hartung	White & Case LLP
Ms. Kim Quarantello	White & Case LLP
Mr. Jeffery Stelhorn	White & Case LLP
Ms. Erin Vaccaro	White & Case LLP
Mr. Jacob Bachmaier	White & Case LLP
Mr. Timothy Perry	White & Case LLP
Mr. Robert Kosik	White & Case LLP

Parties:

Ambassador Jose L. Cuisia Jr.	Philippine Embassy
Ms. Maria Andrelita S. Austria	Deputy Chief of Mission, Philippine Embassy
Ms. Ariel Penaranda	Consul General and Legislative Affairs Minister, Philippine Embassy

Ms. Arlene Magno	First Secretary and Consul for Consular Affairs, Philippine Embassy
Mr. Emil Fernandez	First Secretary and Consul and Minister for Cultural Affairs, Philippine Embassy
Ms. Lilibeth Almonte-Arbez	Second Secretary and Consul for Economic Affairs, Philippine Embassy
Ms. Corina Reyes	Third Secretary and Vice Consul for Political Affairs, Philippine Embassy
Ms. Shiena Escoto-Tesorero	Third Secretary and Vice Consul for Administrative and Legal Affairs, Philippine Embassy
Ms. Ma. Perla E. Dumo	Manager, Legal Office, MIAA
Ms. Irene P. Montalbo	Manager, Finance Department, MIAA
Ms. Joycelyn B. Mapanao	Manager, Accounting Division, MIAA

Witnesses:

Ms. Leila De Lima (via video-conference)	Secretary, Department of Justice
Mr. Jose Angel Honrado	General Manager, MIAA
Mr. Venner M. Mendoza	Former Computer-Aided Design Operator, Wintrack Builders
Mr. Alberto Rómulo	Former Executive Secretary to the President (retired)
Mr. Dennis Villa-Ignacio	Special Prosecutor of the Philippines

Experts:

Mr. Juval Aviv	Interfor Inc.
Mr. Brent Kaczmarek	Navigant Consulting, Inc.
Mr. Matthew Shopp	Navigant Consulting, Inc.
Ms. Yelena Aleksandrovich	Navigant Consulting, Inc.
Mr. Richard Francis Klenk	Independent Consultant
Mr. Tim Lunt	Gleeds Cost Management Ltd.
Mr. Raul Manlapig	Ove Arup & Partners

Mr. Edmond Asis	Ove Arup & Partners
Mr. Mark Pieth	University of Basel, Switzerland
Mr. Howard Silverstone	Forensic Resolutions, Inc.
Ms. Kathrin Betz	University of Basel, Switzerland

51. The following persons were examined:

On behalf of Claimant:

Witnesses:

Mr. Wilhelm Bender	Former Chairman of the Executive Board of Fraport
Mr. Johannes Endler	Former employee of Fraport
Mr. Peter Henkel	Vice President of Fraport
Mr. Manfred Schölch	Former Vice-Chairman of Fraport
Mr. Dietrich Stiller	Partner of Clifford Chance, Germany
Mr. Bernd Struck	Former employee of Fraport

Experts:

Mr. Mike Jackson	URS
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On behalf of Respondent:

Witnesses:

Ms. Leila De Lima (via video-conference)	Secretary, Department of Justice
Mr. Jose Angel Honrado	General Manager, MIAA
Mr. Venner M. Mendoza	Former Computer-Aided Design Operator, Wintrack Builders
Mr. Alberto Rómulo	Former Executive Secretary to the President (retired)
Mr. Dennis Villa-Ignacio	Special Prosecutor of the Philippines

Experts:

Mr. Juval Aviv	Interfor Inc.
Mr. Brent Kaczmarek	Navigant Consulting, Inc.
Mr. Tim Lunt	Gleeds Cost Management Ltd.

Mr. Raul Manlapig
Dr. Mark Pieth

Ove Arup & Partners
University of Basel, Switzerland

52. On September 27, 2013, the Tribunal issued Procedural Order No. 4 providing the subsequent procedural steps, including a schedule for the Parties to submit the slides used during the Hearing (with “limited and only necessary (marked-up) corrections to their slides”¹⁰ permitted), for the revisions to the Hearing transcripts, for post-hearing briefs and submissions on costs. Specific steps were taken for the production of documents expressly relied upon during direct and cross examinations, which had not been exchanged between the Parties and were not yet part of the record, as well as for documents exchanged between the Parties in view of direct and cross examinations but not expressly relied upon during those examinations and which were to be introduced into the record only upon leave granted by the Tribunal to be requested within 2 weeks after the finalization of the transcripts. In addition, the Parties were requested to submit together with their post-hearing briefs a list of “*every question submitted to the Tribunal*” within the meaning of Article 48(3) of the ICSID Convention. For each question, reference was to be given to the relevant part of the written and oral pleadings as well as exhibits and witness statements and experts’ reports.
53. On October 4, 2013, the Parties submitted the electronic version of their respective slides used during the Hearing.
54. By letters dated October 11, 2013, Respondent alleged that Claimant made modifications to its slides in violation of paragraph 2(a) of the Tribunal’s Procedural Order No. 4. Claimant presented similar allegations by letter dated October 12, 2013, in which it also commented on Respondent’s allegations. On October 14, 2013, Respondent provided its response to Claimant’s letter of October 12, 2013, to which Claimant replied by letter dated October 15, 2013. By email of the same date, Respondent reiterated its position against Claimant’s assertions.

¹⁰ Tribunal’s Procedural Order No. 4, Sept. 27, 2013, para. 2(a).

55. Having considered the Parties' respective positions, the Tribunal issued Procedural Order No. 5 on October 24, 2013, by which it decided to retain the slides as submitted by each Party, (i) keeping in mind the Parties' respective observations on record, (ii) taking into account that the Tribunal had at its disposal the original hard copy of the slides provided by the Parties at the Hearing, also on record, and (iii) having regard to the forthcoming post-hearing briefs in which each Party were allowed to comment on the alleged additions by the other Party in its slides.
56. By email dated November 26, 2013, Respondent informed the Centre that the Parties were still conferring on the proposed revisions to the Hearing transcripts in the hopes of reaching an agreement. On November 27, 2013, Claimant submitted on behalf of both Parties a joint errata sheet identifying the proposed revisions to the Hearing transcripts on which the Parties agreed and disagreed. The Parties submitted later that day their respective reasoning for their objections to the disputed proposed revisions to the Hearing transcripts.
57. By letter dated December 4, 2013, Claimant requested leave from the Tribunal to introduce into the record letters from IBIS Capital LP, Credit Suisse S.A. and BNP Paribas responding to a release letter by Mr. Struck, the production of which had not been objected to by Respondent during the Hearing. On December 5, 2013, Claimant submitted these letters into the record (exhibit CE-373) further to the Tribunal's decision granting leave.
58. By letter dated December 8, 2013, Respondent submitted on behalf of both Parties an updated version of the Hearing transcripts reflecting the Parties' proposed revisions, along with a corrected joint errata sheet identifying the Parties' proposed revisions to the Hearing transcripts. By letter dated December 11, 2013, Respondent submitted on behalf of both Parties a further corrected joint errata sheet.
59. On December 16, 2013, finalized Hearing transcripts incorporating the Parties' proposed revisions on which the Parties agreed, and the Tribunal's decision on the Parties' disputed proposed revisions, were circulated to the Parties.

60. Further to the finalization of the Hearing transcripts, the Tribunal determined that the starting date for the remaining schedule set forth in the Tribunal's Procedural Order No. 4 would be January 2, 2014, having considered the Parties' respective response of December 16, 2013 to the Secretary.
61. As scheduled, the Parties filed simultaneous post-hearing briefs on March 3, 2014 ("Cl./R. PHB1"), and simultaneous reply post-hearing briefs on April 2, 2014 ("Cl./R. PHB2").
62. The Parties filed simultaneous submissions on costs on May 2, 2014, and simultaneous reply submissions on costs on May 19, 2014.
63. Following the completion of the Hearing, the Parties also filed several requests to admit new documents into the record:
 - By letters of January 17, 2014, the Parties respectively requested leave from the Tribunal to introduce into the record additional documents in accordance with paragraph 4 of Procedural Order No. 4. In its letter, Respondent further requested leave from the Tribunal to introduce into the record "copies of brief, motions, and decisions filed from October onward in the Philippine just compensation proceedings."¹¹ As directed by the Tribunal, Claimant filed its observations on Respondent's further request by letter dated January 22, 2014. By letter dated January 24, 2014, Respondent submitted unsolicited comments. By letter of the same date, the Tribunal granted the Parties leave to introduce the additional documents into the record, namely Claimant's exhibits CE-334 through CE-373 and legal authorities CA-180 and CA-181, and Respondent's exhibits RE-2123 through RE-2139, respectively submitted by the Parties on January 17, 2013, and denied Respondent's further request.
 - By letter of February 13, 2014, Respondent requested leave from the Tribunal to introduce into the record (i) documents relating to the

¹¹ Respondent's letter, Jan. 17, 2014.

Philippines' efforts to extradite Mr. Alfonso Liongson from the United States, (ii) a cover letter attached to the Draft Memorandum from Clifford Chance to Fraport dated September 6, 2006 (CBII-309) and (iii) the ICSID Brown Book. By letter dated February 17, 2014, the Tribunal granted the Respondent's leave to introduce into the record these documents, namely Respondent's exhibits RE-2140 and RE-2141 and legal authority RL-508.

- By letter of March 12, 2014, Claimant requested leave from the Tribunal to introduce into the record three documents relating to new developments in the Philippine court. By letters dated March 17, 2014, Respondent submitted its observations, including its request to be permitted to introduce into the record its own additional documents were the Tribunal to grant Claimant's request. As directed by the Tribunal, Respondent provided further observations by letter dated March 19, 2014. By letter dated March 20, 2014, the Tribunal decided to grant the Parties leave to submit their respective documents into the record, namely Claimant's exhibits CE-374 through CE-376, submitted on March 20, 2014, and Respondent's exhibits RE-2142 through RE-2145, submitted on March 21, 2014. The Parties had the opportunity to provide their comments in their second PHBs.
- By letter of April 14, 2014, Respondent requested leave from the Tribunal to introduce into the record the Philippine Supreme Court decision in *People v. Henry Go* (G.R. No. 168539). On April 21, 2014, Claimant provided its observations. On April 22, 2014, the Tribunal decided to grant Respondent leave to introduce into the record the aforementioned decision, namely exhibit RE-2146, submitted on April 24, 2014. Claimant provided its comments on this document by letter of April 28, 2014 and in its reply submission on costs on May 19, 2014.
- By letter of June 6, 2014, Respondent requested leave from the Tribunal to introduce into the record a one-page Philippine Supreme Court Resolution issued in the domestic expropriation proceedings. On June 9, 2014, the

Tribunal decided to grant Respondent leave to introduce into the record the aforementioned document, namely exhibit RE-2147, submitted on June 9, 2014. Claimant provided its comments on this document by letter of June 13, 2014.

- By letter of September 9, 2014, Respondent requested leave from the Tribunal to introduce into the record a Manifestation filed by Respondent to the Supreme Court in the Philippine expropriation proceedings. By letter of September 15, 2014, Claimant submitted its observations. By letter of September 16, 2014, the Tribunal denied Respondent's request.

64. The Tribunal declared the proceedings closed on December 10, 2014.

IV. FACTUAL BACKGROUND

65. The Tribunal needs to set out the factual matrix of this case as it arises from the evidence, written and oral, presented by the Parties and to review the history of Fraport's investment in the Terminal 3 Project. To do so, it will adopt a chronological timeline when possible, taking into consideration that the Parties are in disagreement over important facts. To the extent relevant or useful, some facts will be discussed in more detail in the Tribunal's analysis of the disputed issues.

A. The NAIA Terminal 3 Project and the Concession Agreements

66. In the early 1990s, the Philippine Government under President Fidel V. Ramos decided to establish a new international passenger terminal ("Terminal 3") at Ninoy Aquino International Airport ("NAIA"), using procedures provided in the 1994 Philippines' Built-Operate-Transfer ("BOT") law.¹²

67. NAIA Terminal 1 had been built in 1981 and handled domestic flights of carriers other than the Philippines Airlines ("PAL"). Terminal 2 had opened in 1999 and was devoted to

¹² CBII-12, 1994 BOT law.

domestic flights and PAL's domestic and international flights. The new Terminal 3 was supposed to exclusively handle international flights, while Terminals 1 and 2 would be closed to international flights from the date Terminal 3 was to enter into service.

68. The successful bidder was to have the sole and exclusive responsibility to finance, construct, manage and operate Terminal 3, and was supposed to transfer the Terminal to the Government at the end of a concession period of 25 years. The successful bidder was to generate revenue from public and non-public revenues in line with airport practices.
69. The 1994 BOT law allowed "unsolicited" proposals from private entities (*i.e.*, not solicited by the Government), provided that such proposals could *only* be accepted if they did not create financial exposure for the Government.¹³ Under the BOT law, unsolicited proposals must meet financial, technical, and legal prequalification requirements. Prior to final approval of an unsolicited proposal, the Government must solicit competing proposals from other bidders to complete the Project at a lower price, although the original proposer was given the right to match any competing bid within 30 days (also known as the "Swiss Challenge").¹⁴
70. The pre-bidding and bidding process was overseen by the Pre-qualification, Bids and Awards Committee ("PBAC"), an agency of the Department of Transportation and Communications ("DOTC"), in charge of applying the 1994 Implementing Rules and Regulations¹⁵ ("IRR") of the BOT law. The approval of the Project was of the jurisdiction of the National Economic Development Authority ("NEDA"), chaired by the President of the Philippines, and its Investment Coordination Committee ("ICC"), run by the ICC Cabinet Committee ("ICC-CC") chaired by the Secretary of Finance.

¹³ CBII-12, 1994 BOT law, new Section IV-A.

¹⁴ CBII-13, 1994 IRR, Section 11.1(c).

¹⁵ CBII-13, 1994 IRR.

71. For unsolicited proposals, Section 11.4 of the IRR provides that an unsolicited proposal “shall be submitted to the ICC¹⁶ only upon official endorsement by the Head of the concerned Agency [...]. ICC shall approve the project scope in accordance with the guidelines” attached as Annex B to the IRR. Regarding the contract approval for unsolicited proposals, Section 12.1 of the IRR provides that the contract shall be approved by the Head of the concerned Agency subject to various conditions, one of which being “clearance from the ICC on a no-objection basis pursuant to section 9.2.” Section 9.2 of the IRR entitled “ICC clearance” provides:

SECTION 9.2 ICC Clearance. - In case of projects involving substantial government undertakings as defined under the ICC guidelines hereto attached as Annex B, the concerned Agency/LGU shall, prior to the approval of the Notice of Awards, submit the draft contract to the ICC for clearance on a no-objection basis, specifically on the extent of the final government undertaking to be provided to the project, if any, within seven (7) calendar days from the date the decision to award the contract is made. If the draft contract includes government undertakings within the scope of an earlier ICC approval, then the submission will only be for the information of the ICC. However, should it include additional provisions or provisions different from the original scope of government undertakings, then the draft contract will have to be reviewed by the ICC. In which case, the ICC shall act on the final draft contract within fifteen (15) working days upon submission of complete documentation. Unless otherwise previously notified in writing by the ICC, failure to act within this prescribed period shall mean that the concerned Agency/LGU may proceed with contract award. The concerned Head of Agency/LGU shall approve the Notice of Award within seven (7) calendar days from the date the clearance by the ICC on a no-objection basis for the contract has been received. The Notice of Award shall then be issued within seven (7) calendar days from the approval thereof.

Annex B of the IRR is entitled “ICC Guidelines for the Review of Projects Proposed to be Financed under the Various Private Sector Investment (PSI) Schemes.”

72. The Parties disagree as to the specific approval process to be followed for a concession contract. For Claimant, after approval of the project by PBAC, it was bided out with a

¹⁶ ICC being defined as “the Investment Coordination Committee of the National Economic Development Authority (NEDA) Board,” 1994 IRR, Section 1.3(k) (CBII-13).

draft contract. The ICC clearance of the draft contract is on a no objections basis¹⁷ and it suffices to constitute the approval of the contract since contracts and drafts contracts are of the sole responsibility of the ICC under Section 9.2 of the 1994 IRR. For Respondent, once the ICC clearance is secured, the project needs to be elevated to the NEDA Board for approval with the issuance of a NEDA Board resolution pursuant to Section IV.1.d of Annex B-2 to the IRR.¹⁸ Any condition reflected in such a resolution must be the basis for loans negotiations, the compliance of which is monitored and reported to the ICC.¹⁹ In any event, Respondent argues, if the contract includes additional provisions or provisions different from the original in a range of 10% of costs increase, then the draft contract has to be reviewed by the ICC.²⁰

73. As it will be explained below, the Parties disagree as to whether certain key agreements in this case have been actually approved.²¹

74. In October 1994, Asia's Emerging Dragon Corp. ("AEDC") – a project company formed by Lucio Tan, the Chairman/owner of Philippines Air Lines,²² and five other prominent

¹⁷ Michael Nolan, Hr. Tr. Day 5, 1061 and 1070; Cl. PHB1, paras. 21-22.

¹⁸ Carolyn Lamm, Hr. Tr. Day 5, referring to CBII-13, 1994 IRR, Annex B-2 ICC Guidelines and Procedures, Section IV.1.d.: "Projects are initially reviewed by the ICC Secretariat for possible endorsement to the ICC Technical Board and Cabinet Committee for clearance. [...] Once an ICC clearance has been secured, the project is elevated to the NEDA Board for approval, with the issuance of a NEDA Board Resolution. Exception to this, however, include projects involving foreign borrowings below the prescribed cut-off level as well as program/policy and sector loans incurred strictly for BOP/budgetary support which would no longer undergo ICC review. Rather, these projects can be referred directly to the NEDA Board for approval as may be endorsed by the ICC Secretariat, copy furnished ICC for notation/monitoring purposes."

¹⁹ RE-239, Tan (ICSID 1), para. 28.

The Tribunal notes that under Section 2, definition (d) BOT of the BOT law, the approval of the President of the Philippines seems needed, *see* CBII-12. It further notes that the approval of the President of the Philippines was deemed not to be necessary for the concession agreement in this case by the ICC-Technical Working Group (*see* CBII-39, Summary of ICC-TWG review discussions, items 3 and 18) subject to clarification in the NEDA Board Resolution.

²⁰ CBII-13, 1994 IRR, Annex B, Section 2.2.1; R. Closing argument, Slide 23, under Prequalification and BOT Law; Ms. Lamm, Hr. Tr. Day 8, 2090-2091.

²¹ The Tribunal has noted the Parties' expert reports – Commissioner Bartolome Fernandez for Respondent (RE-228 and RE-229), and UnderSecretary Gracia Tan (RE-239 and RE-240) and Professor Sison and Justice Cruz for Claimant (ICSID-1058, Sison II (ICSID 1), Apr. 4, 2005; ICSID-1046, Cruz (ICSID 1), Apr. 1, 2005).

²² According to Claimant, Lucio Tan is the second richest person in the Philippines, owns the Philippine National Bank, property, brewery and tobacco enterprises. He then owned PAL and MacroAsia, a concessionaire which

Filipino-Chinese businessmen (all known as the “Taipans”) – made an “unsolicited” BOT proposal to establish and operate the new international terminal at NAIA.²³

75. In September 1995, AEDC made a revised BOT proposal for both Terminal 3 and the planned Clark International Airport (outside of Manila), which was approved under certain conditions by the NEDA Board in February 13, 1996.²⁴ The DOTC then solicited competing proposals, as required by the BOT law.²⁵
76. On September 3, 1996, the PAIRCARGO Consortium (consisting of 3 Philippine companies: PAIRCARGO,²⁶ Philippines Airport and Ground Services, Inc. (“PAGS”), and Security Bank, a Philippine commercial bank) applied to PBAC to be exempted from minimum equity requirements; this request was denied. Nevertheless, the PAIRCARGO consortium was allowed to show that the consortium members – rather than the entity that would be incorporated to undertake the Terminal 3 Project, *i.e.*, PIATCO – had the required capital.²⁷
77. On September 19, 1996, the PAIRCARGO Consortium put forward a bid for the Terminal 3 Project²⁸ that, according to Fraport, would include significantly higher payments to the Government than the AEDC bid would.²⁹ The PAIRCARGO Consortium was prequalified

controls much of the ground handling, catering and other operations at NAIA, and which was said to lose substantial revenues if it did not dominate the airside services at Terminal 3 (Cl. PHB1, paras. 70-71). Mr. Tan also allegedly controlled MASO with Ricky Delgado (the MIA-NAIA Association of Service Operators) incorporated in mid-2001, which is said to have engaged in aggressive campaigns against Fraport and PIATCO (Cl. Skeleton, p. 13; Cl. PHB1, para. 72).

²³ CBII-11, AEDC 1994 Proposal.

²⁴ CBII-16, NEDA Board Resolution No. 2, Feb. 13, 1996.

²⁵ CBII-17, Bid documents, June 1996; CBII-19, Draft Concession Agreement, June 1, 1996.

²⁶ Paircargo was owned by Cheng Yong and his son, Jefferson Cheng (the “Chengs”).

²⁷ CBII-18, PBAC Bid Bulletin No. 5, DOTC’s answer to the queries of Paircargo as per letters of Sept. 3 and 10, 1996, question 1, CM0734.

²⁸ CBII-24/25, Paircargo’s Bid documents.

²⁹ Respondent contends that this statement ignores the role of DOTC Secretary Pantaleon Alvarez in the award of the Concession, and his alleged corruption (in return *inter alia* for contracts for Nomerco and Wintrack to perform all of the demolition works, with subsequent inflated invoices) (R. PHB2, para. 53) as well as Fraport’s knowledge of his involvement at the time of its investment (R. PHB2, para. 69). In addition, Respondent challenges this statement based on misleading revenue streams (*Id.*, para. 70).

by PBAC to bid for the Project on September 26, 1996.³⁰ In October 1996, PBAC declared that the technical proposal was complying with the technical requirements of the Bid,³¹ and complying with the Bid Documents for the purpose of matching the price challenge.³² AEDC had 30 days to match the price challenge.

78. According to Fraport,³³ and this does not seem to be disputed, the Taipans never submitted a bid to match the PAIRCARGO's bid. AEDC objected however that the PAIRCARGO Consortium's bid did not have sufficient capital to meet the pre-qualification requirement, and that by law only 15% of the net worth of Security Bank, rather than 100%, should be counted towards the PAIRCARGO Consortium's minimum equity.³⁴ AEDC also requested a copy of the proposal. PBAC rejected the challenge.³⁵
79. On February 17, 1997, PIATCO was incorporated by PAIRCARGO, PAGS, and SB Capital Investment Corp. (the last of which is authorized to act on behalf of Security Bank), but not by Security Bank itself.³⁶ PIATCO's original president was Cheng Yong, later replaced by Henry T. Go.
80. The circumstances surrounding the finalization of the Concession Agreement are highly disputed among the Parties together with the question of whether the Concession Agreement was approved by the appropriate body.

³⁰ CBII-26, PBAC Resolution, Sept. 26, 1996. Respondent argues that Paircargo qualification was obtained by fraud, with exorbitant payments by PIATCO for no legitimate purpose (R. PHB1, paras. 66-74) and through financial and technical misrepresentations (R. PHB1, paras. 107-118). Respondent also submits that Security Bank and PIATCO had direct connection to President Estrada (R. PHB2, para. 54).

³¹ CBII-32, PBAC Resolution, Oct. 11, 1996.

³² CBII-35, PBAC Resolution, Oct. 16, 1996.

³³ Mem., para. 99.

³⁴ ICSID-46, Letter from AEDC to PBAC, Sept. 26, 1996.

³⁵ See CBII-38, AEDC's allegation in AEDC's petition, Regional Trial Court, Pasig City, Apr. 15, 1997.

³⁶ Respondent submits that Paircargo misrepresented that Security Bank would be an incorporator of PIATCO and would finance the Project alongside other lenders (R. PHB2, para. 67).

81. On April 15, 1997, the ICC Technical Working Group met to review the final draft concession agreement and “recommend[ed] the *notation* of the BOT contract subject to DOTC’s consideration of points” attached in a separate summary document.³⁷
82. On April 16, 1997, the NEDA Deputy Director General/Technical Board Chairman, Dante Calans, wrote to the 9 members of the ICC “for [their] decision on the final draft project agreement.” Attaching the draft contract and the ICC Technical Working Group summary, he wrote “[t]o facilitate the ICC processing of the project, we would appreciate receiving the accomplished ad referendum³⁸ signature sheet” by April 16, 1997.³⁹
83. The ICC Minutes dated April 17, 1997, indicate as follows under the heading “VI Other Matters,” “NAIA Terminal 3 International Passenger Terminal BOT Project”:

The ICC conducted an ad referendum to facilitate the approval, on a no objections basis, of the BIT agreement between DOTC and PIATCO. The ad referendum was able to gather four signatures – OP, CCAP, BSP and NEDA. Ad referendum approval requires six signatures.

Action taken:

The ICC *noted* the BOT agreement.⁴⁰

84. The Parties are in agreement that the Project of Terminal 3, at the time upon AEDC’s proposal, was approved by a NEDA Board resolution on February 13, 1996. However they disagree as whether a subsequent NEDA Board resolution was needed for the actual award of the Concession Agreement.

³⁷ CBII-39, Summary attached to the letter from Dante Canlas, NEDA Deputy Director General to the 9 NEDA ICC Members for decision on the final draft project agreement, Apr. 16, 1997 (emphasis added). For Claimant, the word “notation” used by the Technical Working Group is no different than the word “approval” (Hr. Tr. Day 5, 1069).

³⁸ According to Michael Nolan, *ad referendum* approval means “circular approval” (Hr. Tr. Day 5, 1066), or voting in the absence of physical presence (*see also* Cl. PHB1, para. 25).

³⁹ CBII-39, Letter from Dante Canlas, NEDA Deputy Director General to the 9 NEDA ICC Members for decision on the final draft project agreement, Apr. 16, 1997. Both Parties were asked to provide their interpretation of this cover letter on Day 5 of the Hearing (Hr. Tr. Day 5, 1033-1082).

⁴⁰ CBII-40, Minutes of the ICC Cabinet Committee Meetings Minutes, Apr. 17, 1997 (emphasis added) (document largely redacted), p. RE-0324_9. An un-redacted version was handed over at the Hearing, p. ICC-00121_9.

85. Fraport submits that the ICC did approve the agreement,⁴¹ while Respondent submits that it was not approved but merely noted.⁴² This specific point was argued by both Parties at the Hearing (day 3 and 5) in response to the Tribunal’s questions. A similar discussion arose between the Parties regarding the approval of the ARCA (*see infra*).
86. AEDC was denied in May 1997 a preliminary injunction against the DOTC for awarding the Project to PIATCO.⁴³ A Memorandum from the Chief Legal Counsel to the President

⁴¹ Mem., para. 167, referring to a letter from NEDA to DOTC of July 6, 1999 (CBII-84), whereby it is mentioned that “the ICC-NEDA likewise approved the BOT contract.” Fraport relies on NEDA Board Resolution No. 2 from 1996 (CBII-16) which indicates that the project was “unanimously approved” on Feb. 13, 1996. Fraport questions the requirement for 6 signatures under the IRR, highlighting that it was a no-objections basis process and that it is not a legal requirement but a tradition (Cl. PHB1, para. 25). Fraport is anyhow relying on the 2002 statement by former NEDA Director Canlas before the Blue Ribbon Committee (ICSID-272-CM4761) which indicated having collected 4 signatures and received 3 more subsequently (Trade & Industry, Agriculture and Energy), not reflected in the Apr. 1997 ICC Minutes. CBII-39 shows 7 signatures. In addition, Fraport relies on Acting Secretary of Justice Gutierrez’s Nov. 28, 2002, Memorandum to Secretary Rómulo stating that the concession agreement was approved (CBII-338) and to her testimony in the first ICSID arbitration (ICSID 1, Hr. Tr. 1908.15). In any event, Fraport refers to a Memorandum from President Estrada of Feb. 12, 1999 (CBII-60) mentioning that the Government “has committed to the fulfilment of all its obligation under the Concession Agreement dated July 12, 1997 (as amended and restated on Nov. 26, 1998).” Claimant further points out that the ARCA supplanted the Concession Agreement and that “any issue of approval, therefore, would have been cured with the approval of the ARCA” (Cl. Slide 19, Hr. Day 3).

See also Cl. Slides, Hr. Day 3 and 5, Sept. 18 and 20, 2013; Hr. Tr. Day 5, 1057-1078.

⁴² C-Mem., para. 129, indicating at fn. 261 “The ICC Secretariat by tradition requires that in instances when action must be performed in the absence of physical presence, any voting by ad referendum must produce at least a minimum of votes representing a quorum, *i.e.*, fifty percent (50%) of the members of the ICC Cabinet Committee, plus one, which means six votes, De Ocampo (ICSID) (RE-116) ¶ 33.” For Respondent, the BOT agreement was noted because it only had received 4 signatures. According to Respondent, as indicated in CBII-39, PIATCO’s Bid security was to expire on Apr. 19, 1997, and the ICC-NEDA Committee was asked to expedite its review. Respondent relies on Secretary De Ocampo statement (RE-116, para. 25) according to whom the NEDA Board’s approval of Feb. 13, 1996 (CBII-16) was subject to *inter alia* the condition that the Terminal 3 and Clark airport be simultaneously developed (which Claimant objects to as the Clark development was not to occur before a certain passenger level for 3 years) (Hr. Tr. Day 7, 1737, CBII-17-Bid documents), as well as other conditions. According to Secretary De Ocampo, no other additional signatures were received during his service as Chair of the NEDA-ICC until early 1998 (CBII-311, ICC Hr. Tr. Mar. 9, 2009, 1082-1083). Respondent argues that there were only 4 signatures until 2002 and 3 faxed undated and illegible signatures as of Jan. 2003 (ICSID-01226) and that Canlas claimed for the first time before the Blue Ribbon Committee in Dec. 2002 that the additional signatures existed and that he was contradicted by NEDA and its then Deputy Director General, Mr. Lotilla. Respondent also uses statements made before the Blue Ribbon Committee to submit that the original Concession Agreement had only be noted, and not approved. In any event, Respondent submits that there was no NEDA Board resolution approving the Concession Agreement.

See R. Slides, Hr. Day 3 and 5 on Tribunal Questions, Sept. 18 and 20, 2013; Hr. Tr. Day 5, 1033-1056. See C-Mem., paras. 126-129; Rej., para. 169.

⁴³ CBII-38, AEDC Petition, Regional Trial Court, Pasig City, Apr. 15, 1997. CBII-41, Answer of the Philippines, Regional Trial Court, Pasag City, May 16, 1997.

Ramos advised on July 10, 1997, to proceed without delay in implementing the awarding of the Project to PIATCO.⁴⁴

87. Mid-July 1997, the DOTC issued the official Notice of Award in favor of PIATCO.⁴⁵ On July 12, 1997, the Terminal 3 Concession Agreement⁴⁶ was signed by PIATCO, the Secretary of the DOTC, and the head of the Manila airport authority (“MIAA”).
88. The Concession Agreement provided that PIATCO was to finance, construct, and operate the Terminal 3 for 25 years. Terminal 3 was to be the only international terminal at NAIA and duty free operations were to be located there, which Fraport insists was a key aspect of the Terminal 3 Project.⁴⁷
89. On July 14, 1997, PIATCO Shareholders entered into a Shareholders’ Agreement.⁴⁸
90. MIAA issued on July 14, 1997, PIATCO with a Notice to Commence Work for the Project.⁴⁹
91. In June 1998, President Joseph Estrada succeeded President Ramos.
92. *AEDC’s challenge*: As previously mentioned, between April 1997 and April 1999, AEDC sued the DOTC over the PIATCO Concession, re-asserting *inter alia* that PIATCO was not financially prequalified.
93. On the same day that the Concession Agreement, on July 12, 1997, an agreement between the Philippines, MIAA and PIATCO was entered into to consider AEDC’s civil case and giving PIATCO the opportunity to terminate the Concession Agreement if the civil case

⁴⁴ CBII-42, Memorandum, July 10, 1997.

⁴⁵ ICSID-58, Notice of Award, July 9, 1997.

⁴⁶ CBII-43, Concession Agreement, July 12, 1997.

⁴⁷ Mem., paras. 115-118.

⁴⁸ CBII-45, Shareholders Agreement between SB Capital Investment Corp, EBC Investments, Inc., PAIRCARGO, PAGS, Nissho Iwai Corp., Chuan Hup Inc., July 14, 1997.

⁴⁹ ICSID-60, Letter from Arturo Enrile to Henry Go (NAIA Passenger Terminal III: Notice to Proceed), July 14, 1997.

was unfavorably resolved by June 30, 1998.⁵⁰ On May 20, 1998, this agreement was modified to give additional time until June 30, 1999, to the Philippines “to reach a resolution of the Civil Case or to sufficiently defend its position therein.”⁵¹

94. According to Claimant, the Government defended the suit, arguing that the standards for financial prequalification had been applied correctly.⁵² Ultimately, AEDC and the Solicitor General requested a joint motion to dismiss granted in April 1999.⁵³
95. *The ARCA*: On November 26, 1998, the Amended and Restated Concession Agreement (the “ARCA”) was signed by PIATCO and the head of DOTC/MIAA.⁵⁴ The ARCA clarified certain commitments and obligations at the request of foreign lenders, which required some changes prior to committing, and included a warranty on the part of the Philippines as to the legality and validity of the ARCA and the procedures under which it was entered into.⁵⁵
96. Section 4.04(c) of the ARCA gave the external project financiers (the “Senior Lenders,” *i.e.* a consortium made of Kreditanstalt für Wiederaufbau (KfW), the Asian Development Bank, and the World Bank’s International Finance Corporation) the option – in case of default by PIATCO – to designate a qualified nominee to operate the Terminal or to transfer it. Failing to find a nominee within certain time period, the Terminal was to be transferred to the Government upon payment of a “termination payment” to PIATCO.

⁵⁰ CBII-44, Agreement between the Philippines, MIAA and PIATCO, July 12, 1997.

⁵¹ CBII-51/ICSID-663, Amended Agreement between the Philippines, MIAA and PIATCO, May 20, 1998 (wrongly filed at first in the Core Bundle under CBII-398).

⁵² Mem., paras. 104-110.

⁵³ CBII-72, Order granting Joint Motion to Dismiss AEDC Petition, Apr. 29, 1999.

⁵⁴ CBII-55, ARCA, Nov. 26, 1998.

⁵⁵ CBII-55, ARCA, Nov. 26, 1998, Section 12.09, pp. 64-65.

97. The Parties disagree as to whether the ARCA was properly approved and as to whether Section 4.04(c) contains a Government guarantee, in breach of the IRR.⁵⁶
98. On February 12, 1999, President Estrada issued a memorandum to Government agencies “affirming the government’s commitment to extend full assistance” to the Terminal 3 Project, acknowledging the Philippines’s obligations under the Concession Agreement and the ARCA and ordering the agencies to provide full cooperation to complete the Project.⁵⁷

⁵⁶ For Claimant, the ARCA and its supplements are merely a revision of the 1997 agreement and were negotiated contracts under the IRR which could be freely modified by the parties (ICSID-1058, Sison II (ICSID 1), paras. 65-66). Claimant submits that the ARCA was approved on June 25, 1999, by the NEDA ICC-CC (CBII-78). The only item subject to approval and monitoring was the credit agreement between PIATCO and the Senior Lenders, and this is “not a ‘conditional approval’ but an approval that incorporates a future requirement” (Slide 16, Hr. Day 3; Cl. PHB1, para. 29). On Aug. 19, 1999, the NEDA Board approved the ARCA (CBII-89), referred to in a 2002 Climaco Memorandum (CBII-317, p. 3). The ARCA approval was confirmed by NEDA itself in subsequent letter dated July 6, 1999, prior to Fraport’s first equity investment (CBII-84). Canlas testified before the Senate Committee of Transportation and Communication in May 2002 that the ARCA had been approved by the NEDA Board (ICSID-1186, CRM1135). In addition, Fraport relies on Acting Secretary of Justice Gutierrez’s Nov. 28, 2002, Memorandum to Secretary Rómulo stating that the ARCA was approved by the ICC (CBII-338) (*see* Cl. Slides, Hr. Day 3 and 5 on Tribunal Questions, Sept. 18 and 20, 2013). Claimant also objects to Respondent’s qualification of Section 4.04(c)(vi) of the ARCA that it contained a direct Government guarantee, while it only contains a provision permitting the Philippines to purchase the Terminal/the assets if there is a project failure and that the lenders were to be in charge and as confirmed by the Central Bank (Hr. Tr. Day 7, 1740-1749, 1760-1764).

For Respondent, the ARCA was not consistent with the bidding documents and violated the BOT law as pointed out by the ICC Technical Working Group and contained more than 80 substantive changes. Nevertheless, the ARCA was elevated to the ICC Committee where the discussion was limited to Section 4.04(c)(vi) regarding a direct agreement between the concessionaire and the Senior Lenders (*i.e.*, a USD 440 million Senior Loan Agreement between PIATCO and the Senior Lenders) and a possible termination payment to be made to the concessionaire by the Philippines. It follows that the ARCA contained a direct Government guarantee and was only conditionally approved on June 25 and Aug. 19, 1999 by NEDA-ICC (ICC Minutes - CBII-78; NEDA Board resolution No. 9 - CBII-89) as the credit agreement between the concessionaire and the Senior Lenders remained subject to the approval and monitoring by the Bangko Sentral ng Pilipinas (“BSP”), to ensure that the buy-out would only be optional and the termination payment limited (C-Mem., paras. 136-137). According to Respondent, to comply with the NEDA-ICC conditions, PIATCO submitted an application for approval and registration of the Senior Loan to the BSP on May 11, 2001 (ICSID-513), which the BSP approved subject to conditions in July 2001 (ICSID-510). PIATCO failed in June 2001 to submit the complete Government direct agreement required for the Senior Loan and never received the BSP’s approval (RE-471). More importantly, the ARCA missed key certifications from the Secretary of Justice and of Finance (R. PHB1, para. 23). (*See* R. Slides, Hr. Day 3 and 5 on Tribunal Questions, Sept. 18 and 20, 2013. *See* C-Mem., paras. 130-139; Rej., para. 169.)

⁵⁷ CBII-60, Memorandum from the President, Feb. 12, 1999.

99. On June 25, 1999, the NEDA-ICC approved the ARCA⁵⁸ with the condition that the Philippine Central Bank reviewed, monitored, and approved the credit agreement between the Senior Lenders and PIATCO. This was reiterated on August 19, 1999.⁵⁹
100. Some of the agencies represented on the ICC considered that the ARCA included a direct governmental guarantee in its Section 4.04(c)(vi). However, the Central Bank’s view – that the ARCA provided the Government with an optional right to buy-out the Terminal 3 Project in the case of default by PIATCO – prevailed.⁶⁰
101. In March 2000, after six committee hearings, a review by the House Committee on Transportation and Communications finds that the award of the Terminal 3 Concession to PIATCO was “proper and valid,” and the ARCA did not contain a direct governmental guarantee or other unlawful clauses.⁶¹
102. On September 20, 2000, an investigation by the Philippine Office of the Ombudsman, in response to a petition from Mr. Estrella against the former Secretary of the DOTC, Mr. Rivera, and others, found no probable cause to indict the former DOTC Secretary or PIATCO’s President for entering into a contract disadvantageous to the Government, finding it on the contrary advantageous, or violations of the anti-graft laws.⁶²

⁵⁸ CBII-78, Minutes of the ICC Cabinet Committee Meeting, June 25, 1999.

⁵⁹ CBII-89, Minutes of the ICC Cabinet Committee Meeting, Aug. 19, 1999.

⁶⁰ CBII-78, ICC Minutes, June 25, 1999, ICSID-01104_10/11 “DOTC does not regard the termination payment in this provision as a direct guarantee. [...] The BSP’s views the ‘step-in-rights’ provision as a buy-out arrangement.” [...]The meeting clarified that a buyout will constitute a guarantee if the buyout price is more than the actual price of the asset in question, For the subject project, DOTC clarified that the pricing structure of the buy-out provision of the contract shall not be construed as a guarantee inasmuch as the claim on the asset would be based on market value.” Action taken: “The ICC approved the BOT Contract for the project with the understanding that the credit agreement between the concessionaire and the senior lenders shall be subject to the approval and monitoring by the BSP.”

⁶¹ CBII-102, Report No. 642, Committee on Transportation and Communication, Mar. 7, 2000. Respondent argues that the report was white-washed by the then-Vice Chairman of the Committee, former DOTC official Pantaleon Alvarez (C-Mem., para. 391), which Claimant disputes (Rep., fn. 409).

⁶² CBII-119, Resolution from the Ombudsman office, Sept. 20, 2000.

103. Early 2000, PIATCO selected the Japanese firm Takenaka as the Engineering, Procurement and Construction (“EPC”) contractor for the Terminal 3 Project.⁶³ In June 2000, Takenaka began construction on the Terminal 3 Project to be completed in 30 months. According to Fraport, the EPC contractor was paid by PIATCO and Fraport in total more than US \$266.7 million.⁶⁴

104. Three Supplements to the ARCA were later executed. The Parties also disagree as to the approval of the ARCA Supplements and as to their validity.⁶⁵

- The First Supplement dated August 27, 1999, concerned *inter alia* an extension of time for the Philippines to deliver clean possession of the Project site and the deletion of an access tunnel between Terminal 2 and 3.⁶⁶
- The Second Supplement dated September 4, 2000, concerned subterranean structures and transferred responsibility for clearing the Project site from the Government to PIATCO.⁶⁷
- The Third Supplement was executed on June 22, 2001, regarded the construction of a surface access road connecting Terminals 2 and 3.⁶⁸

⁶³ CBII-98, Letter from PIATCO to Takenaka, Jan. 24, 2000. CBII-104, Agreement between PIATCO and Takenaka, Mar. 31, 2000 (the “EPC Contract”).

⁶⁴ PwC II (ICSID 2), para. 107.

⁶⁵ For Claimant, there was no need for approval of the Supplements as the Second and Third ones were clarification provisions and that the First Supplement only deviated to one of the monetary compensation due to the Government but was advantageous (ICSID-1161, ROP-2-00111/00112). *See* Slides, Hr. Day 5.

According to Respondent, none of the Supplements received proper approvals. Respondent relies on the Minutes of the ICC Technical Board of Oct. 16, 2001 (RE-507) in which the Board requested the DOTC and MIAA to submit a letter informing the ICC why the 3 Supplemental Agreements had been executed neither with justification nor prior ICC approval and explained that this would have bearing on the Monetary Board approval of the project. According to Secretary Climaco, Fraport was well aware of that fact (RE-109, para. 10). (*See* Slides, Hr. Day 5. *See* C-Mem., paras. 140-145.)

⁶⁶ CBII-90, First ARCA Supplement, Aug. 27, 1999.

⁶⁷ CBII-116, Second ARCA Supplement, Sept. 4, 2000. Respondent submits that the Second Supplement purpose was to defraud the Philippines and to obtain kickbacks benefiting Pantaleon Alvarez and the Chengs by inflating invoices for the subterranean work done by Wintrack Builders (“Windtrack”), whose owner was Pantaleon Alvarez, at the time member of the Congress (C-Mem., para. 142). Respondent argues that it was obtained unlawfully resorting to Mr. Liongson to obtain it by fraud and corrupt payments (C-Mem., paras. 353-355).

⁶⁸ CBII-177, Third ARCA Supplement, June 22, 2001. Respondent submits that the Third Supplement was obtained unlawfully resorting to Mr. Liongson to bribe DOTC Secretary Alvarez (C-Mem., paras. 316-323).

- On October 16, 2001, the Third ARCA Supplement was presented to the ICC for approval.⁶⁹ The ICC deferred action pending an explanation from the DOTC and MIAA as to why the previous ARCA supplements had not been presented for its approval.⁷⁰
- A Fourth Supplement was drafted in March 2001, to reflect changes international banks requested as pre-conditions for the drawdown of long-term financing and modifying *inter alia* the Government’s obligations regarding attendant liabilities, force majeure, incremental and consequential costs, and other “special obligations,” but was not executed.⁷¹

B. Fraport’s Investment in the Terminal 3 Project

105. Claimant contends that it had invested by September 2003 more than US \$420 million⁷² in Terminal 3, becoming the principal source of funding for the Terminal 3 Project; this is not in dispute. Claimant submits that it made equity investment *pro rata* in PIATCO starting in 1999 and ending in 2002-2003 and in a cascade of Philippine companies that have ownership interests in PIATCO. It claims that it is a 30% non-controlling shareholder of PIATCO and does not hold a controlling share in any of the cascade companies,⁷³ a statement that the Respondent disputes.

106. In 1998, Fraport was retained by PIATCO as a consultant for its technical expertise. In 1999, PIATCO decided to seek Fraport’s financing due to concerns by foreign lenders over providing long-term project financing.

107. In January 1999, PIATCO, seeking Fraport’s investment, proposed a “master concession concept,” involving a shareholder agreement that would give Fraport full executive and

⁶⁹ CBII-213, Minutes of ICC Technical Board Meeting (Relevant Excerpts), Oct. 16, 2001.

⁷⁰ *Id.*

⁷¹ CBII-149, Draft Supplement No. 4, Mar. 27, 2001.

⁷² According to Fraport, the total amount of its investment to take into account additional payments for the period of September 2003 to July 2012 is US \$510 million (Sur-Rej., fn. 1). *See* PwC I (ICSID 2), para. 20. Respondent contends that Fraport has failed to establish that 93% of its payments had a legitimate purpose (“theory of the proper use”), and that US \$123 million of soft costs are red flags of corruption and fraud (R. PHB1, para. 65).

⁷³ Mem., paras. 49-50.

management control over the operation of Terminal 3 “as may be allowed by Philippine laws.”⁷⁴

108. As part of Fraport’s due diligence prior to investing in PIATCO, KPMG informed Fraport that PIATCO had only 1.5 billion pesos of paid-in equity.⁷⁵ Local counsel Quisumbing Torres warned Fraport about the need to consider nationality requirements applicable to any equity investment.⁷⁶

109. In July 1999, Fraport made its equity investment in PIATCO through a stock purchase agreement.⁷⁷

110. Fraport and PIATCO’s other shareholders entered into a series of shareholder agreements starting in 1999.⁷⁸ As part of the agreements entered into in July 1999, the company Philippines Airport and Ground Services Terminals, Inc. (“PTI”) was created⁷⁹ with the view to enter into an operations and maintenance agreement with PIATCO, and through which PTI would have become the facility operator of Terminal 3.⁸⁰

111. Fraport’s description of its acquisitions is as follows:

⁷⁴ CBII-58, Letter from PIATCO to Fraport, Jan. 19, 1999, Master Concession Concept Brief, Section 3.

⁷⁵ CBII-59, KPMG Amended Summary and Overall Assessment for Due Diligence Report on PIATCO, Jan. 20, 1999.

⁷⁶ CBII-57, Letter from Quisumbing Torres to Fraport, Jan. 17, 1999.

⁷⁷ Stiller I (ICSID 1), paras. 9-12. Respondent submits that at the time Fraport invested in July 1999, it was aware that (i) Section 4.04(c)(vi) of the ARCA contained a direct Government guarantee of PIATCO’s debts and liabilities, (ii) the NEDA had not approved the Concession Agreement or the ARCA, (iii) that the changes to the Concession Agreement were unlawful and grossly and manifestly disadvantageous to the Government, and (iv) there was serious doubt over the legal authority of the DOTC to enter into the Concession Agreement and ARCA (C-Mem., paras. 93-147).

⁷⁸ CBII-81, PTI Shareholders’ Agreement between PTH Inc. (aka PAGS Terminal Holding Inc.) and FAG, July 6, 1999. CBII-82, Addendum to PIATCO Shareholders Agreement dated July 14, 1997, July 6, 1999. CBII-83, Loan Agreement between FAG and PAGS, July 6, 1999. CBII-86, Memorandum of Understanding Among PIATCO, PAGS, and PTI, July 6, 1999 appointing PTI as the contractor-operator, following which an Operations and Maintenance Agreement (the “O&M Agreement”) was entered into on July 27, 2001 (CBII-189). CBII-87, Memorandum of Agreement between FAG, PTI, PIATCO, and PIATCO Shareholders, July 7, 1999. RE-379, Share Subscription Agreement for 40% of PTI between FAG and PAGS, July 6, 1999.

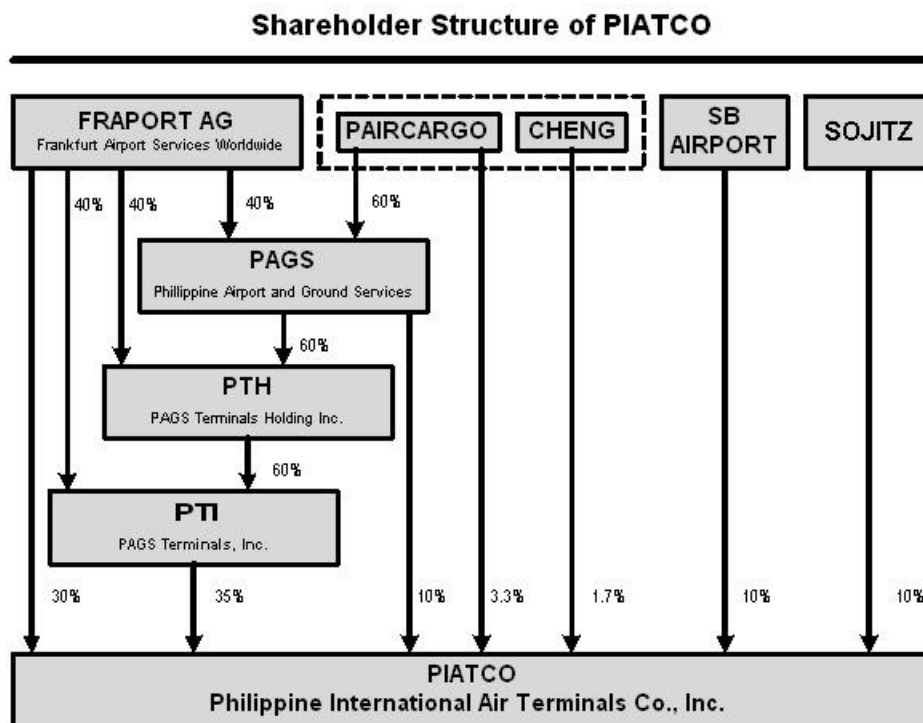
⁷⁹ CBII-81, PTI Shareholders’ Agreement between PTH Inc. (aka PAGS Terminal Holding Inc.) and FAG, July 6, 1999. Respondent argues that Fraport obtained unlawful veto power over PTI (R. PHB1, para. 43).

⁸⁰ CBII-189, Operations and Maintenance Agreement, July 27, 2001. Fraport submits that this agreement never entered into force (Rep., para. 182).

39. Fraport's indirect investment in PIATCO by means of interests in cascade companies allowed Fraport to make equity investments required by its agreements with its fellow project participants all of which comply with Philippine laws requiring control of public utilities by Philippine nationals. The following is an overview of Fraport's acquisition of its direct and indirect interests in PIATCO:
- (a) Under four agreements dated July 6, 1999 (the "1999 Share Purchase Agreements and Share Subscription Agreements"), Fraport acquired 25% of PIATCO, 40% of PTI and 40% of PTH, and PTI acquired 11% of PIATCO.
 - (b) Fraport's shareholdings were increased pursuant to two agreements dated May 5, 2000 (the "2000 Share Purchase Agreements"). Under these two agreements Fraport acquired an additional 5% of PIATCO, and PTI acquired another 24% of PIATCO.
 - (c) In 2001, Fraport acquired a 40% stake in PAGES. PAGES holds a 10% direct shareholding in PIATCO. PAGES also has 12.6% indirect shareholding in PIATCO as a result of PAGES's 60% shareholding in PTH and PTH's 60% shareholding in PTI, which owns 35% of PIATCO. This results in Fraport having an additional 9.04% indirect interest in PIATCO.
40. Accordingly, Fraport owns directly 30% of PIATCO; Fraport owns indirectly through its direct investment in PTI 14% of PIATCO; Fraport owns indirectly through its direct investment in PTH 8.4% of PIATCO, and Fraport owns indirectly through its direct investment in PAGES 9.04% of PIATCO. The result is Fraport's 61.44% direct and indirect ownership in PIATCO.⁸¹

⁸¹ CE-8/RE-8, Fraport's ICSID 1 request for arbitration, paras. 38-40, Sept. 23, 2003.

112. Fraport describes PIATCO shareholding structure as follows:⁸²



113. One of the 1999 agreements at stake is the so-called “Pooling Agreement.”⁸³ Collectively, the parties to this agreement owned a 51% stake in PIATCO. Article 2 of the Pooling Agreement provided that Fraport, PTI, PAIRCARGO, and PAGS – and their nominees on PIATCO’s board – were to vote together as a block, with common positions to be determined through discussion. If such discussions did not lead to unanimity, Section 2.02 provided that the parties were to consult FAG/Fraport on issues within its area of expertise (*i.e.*, terminal operations and management) and that the “Shareholders shall thereafter act upon the recommendations of FAG.” Section 2.05, in contrast, required the parties “to adopt and vote strictly in accordance with the position taken by PAGS” when its business operations – ground services (*e.g.*, baggage handling, catering, refueling) – are affected and, likewise, to “adopt and vote strictly in accordance with” the positions of PAGS or

⁸² Mem., para. 51.

⁸³ CBII-80/RE-34, FAG-PAICARGO-PAGS-PTI Shareholders’ Agreement (“Pooling Agreement”), July 6, 1999.

PAIRCARGO in their respective areas of operations (*i.e.*, airline services for PAGS and cargo services for PAIRCARGO).

114. Fraport claims that the Pooling Agreement was only in effect until August 23, 2001, when it was amended by another agreement.⁸⁴ Whether the Pooling Agreement complied with local Anti-Dummy Law is debated between the Parties.
115. Under a Memorandum of Agreement dated July 7, 1999,⁸⁵ Fraport was to lead in obtaining international financing for the Project, becoming the “finance arranger.” Fraport secured a Senior Loan Agreement on July 27, 2001, subject to condition precedents, as explained below.⁸⁶
116. Fraport proceeded to provide loans to the Chengs, the main shareholders of PAGS as of July 6, 1999⁸⁷ and appointed Fraport’s officials to serve in PIATCO and PTI’s boards. The Parties disagree as to the extent and the legality of such appointments.
117. In January 2001, President Arroyo replaced President Estrada.
118. In January-June 2001, Fraport (with PIATCO allegedly on the brink of insolvency as a result of having not obtained the necessary external financing while needing to pay Takenaka on the EPC Contract) provided a further US \$409 million in loans and loan guarantees and further pledges of equity contributions. Fraport begun making payments on the guarantees to Takenaka in August 2001.
119. In June 2001, opponents to PIATCO’s Terminal 3 Concession – in particular, MASO (the MIAA-NAIA Association of Service Providers, a group associated with PAL and

⁸⁴ Mem., para. 483. Respondent submits that a subsequent amendment of the Pooling Agreement did not cure the initial ADL violation (R. PHB2, paras. 38-40).

⁸⁵ CBII-87, Memorandum of Agreement between FAG, PTI, PIATCO, and PIATCO Shareholders, July 7, 1999.

⁸⁶ CBII-190, Omnibus Agreement (USD 440 million Senior Loan) with Kreditanstalt für Wiederaufbau (KfW), the Asian Development Bank (ADB), and the International Finance Corporation (IFC) (collectively “the Senior Lenders”).

⁸⁷ Respondent argues that the interest free loans were used to acquire equity rights in violation of the ADL (R. PHB1, paras. 37-40).

concessionaires at NAIA Terminals 1 and 2 who, according to Claimant,⁸⁸ stood to lose out from the terms of the Terminal 3 Concession) – started publicly campaign against PIATCO and Fraport. These efforts would intensify even more after the September 11th terrorist attacks, which had a significant negative effect on PAL’s business.

120. In June 2001, PIATCO (and Fraport according to the Respondent) retained Mr. Alberto Liongson as a “marketing and government relations” consultant to assist in obtaining crucial government agreements that would enable PIATCO to make use of the conditional Senior Loan Agreement (which would be executed the following month). The Liongson’s contract provided for payments of US \$200,000 up front, US \$200,000 per month, and a total of US \$1.8 million in milestone payments upon obtaining each agreement. The Parties are at odds as to the effects and legality of such consultancy; each Party claiming that it had been the victim of corruption for Respondent or of a kickback scheme for Claimant.⁸⁹

121. As indicated above, on July 27, 2001, Fraport and the Senior Lenders executed an agreement establishing a US \$440 million financing facility for the Terminal 3 Project, with availability of the funds subject to a number of conditions precedent, including:⁹⁰

- Approval of the Project, the ARCA, and the three ARCA Supplements by the ICC;
- Confirmation of the DOTC’s authority to enter into agreements such as the ARCA on behalf of the Philippine Government;
- Legal opinions from the Philippine DOJ and SEC as to the legality of the ARCA and its Supplements and PIATCO’s shareholding structure, respectively; and

⁸⁸ Mem., paras. 150-161.

⁸⁹ R. PHB, paras. 83-99; Rep., para. 250; C-Mem., paras. 296-395.

⁹⁰ CBII-190, Omnibus Agreement with KfW, the ADB and the IFC.

- Approval of a direct agreement between the Government and Senior Lenders applicable in case of PIATCO's insolvency, as called for in the ARCA.

122. On August 23, 2001, Fraport and other shareholders amended the 1999 Pooling Agreement to remove Fraport's right to make recommendations to the other PIATCO shareholders.⁹¹ According to Fraport, some of the 1999 agreements between Fraport and PIATCO's other shareholders were amended in August 2001⁹² to take into account the Senior Lenders' suggestions in order to secure the loan and to receive the satisfaction notice under the escrow arrangements with the Lenders.⁹³ For Respondent, this amendment was made because it desperately needed long term financing.

C. Attempts to Renegotiate Terminal 3 Concession Agreement

123. In December 2001, Secretary Climaco,⁹⁴ Presidential Adviser for Strategic Projects since November 2001, tasked with renegotiating the Terminal 3 Concession, met⁹⁵ with Fraport and PIATCO to discuss financial and legal issues with the Terminal 3 Project, beginning

⁹¹ RE-47, Fraport-Paircargo/J. Cheng-PAGS-PTI Shareholders' Agreement, Aug. 23, 2001.

⁹² RE-46, Third Addendum to the PIATCO Shareholders Agreement between PIATCO, Fraport, PTI, Paircargo, PAGS, Nissho Iwai Corporation, SB Airports, Jefferson Cheng, Cheng Yong, Jason Cheng, Bernd Struck, Hans-Arthur Vogel, S. Sanim Aydin, Stephan Bauchspiess, Hachiman Yokoi, Gil Camacho, Mario Tongson, Katherine Agnes M. C. Arnaldo, Marife T. Opulencia, Mary Antonette P. Manalo, Aug. 23, 2001. RE-48, PTI Shareholders' Agreement between PTH and FAG, Aug. 23, 2001. RE-49, PTH Shareholders' Agreement between PAGS and Fraport, Aug. 23, 2001.

⁹³ Cl. PHB1, para. 150. Cl. Slide 72, Hr. Day 9 under ADL.

⁹⁴ According to Fraport, at that time, the Terminal was more than 50% complete. Claimant submits that Secretary Climaco had no expertise in airport or infrastructure projects. Her appointment followed a campaign against Fraport. Claimant contends that she was connected to key players in the project, being the managing partner of the accounting firm Sycip Gorres Velayo & Co., the firm acting for Lucio Tan and AEDC during the bidding process. She also served on PAL board of directors and was named to the board of the Philippines National Bank, Lucio Tan's asset. Her legal advisor was Ms. Cinthya Nuval-Ambrosio who was the associate in charge of AEDC matters at the law firm of Villaraza & Cruz. (Mr. Villaraza was also President Arroyo's personal lawyer. Claimant also claims that Mr. Villaraza made an extortion attempt in 2002 (Mem., para. 215).) Claimant also alleges that Climaco resigned few days after President Arroyo declared the contract null in 2002 and was then engaged as Lucio Tan's consultant. Fraport claims that she held discussions with Fraport, and refused to speak to PIATCO. Claimant also contends that she entered into suspicious cash transactions. Claimant points out to "evidence of cronyism and government abuse" (Cl. PHB2, paras. 79-87). Respondent disputes this (C-Mem., paras. 636-640 and R. PHB1, para. 136). The Tribunal notes that Secretary Climaco was not made available for cross-examination.

⁹⁵ CBII-221, Minutes of Meeting with Secretary Climaco, Dec. 10, 2001.

eight months of negotiations. Climaco insisted on changes to the Terminal 3 concession agreements.

124. The Parties disagree about the reasons for the negotiations with Climaco. Respondent alleges that Fraport was seeking assistance from the Government to obtain approvals necessary to begin drawing upon the Senior Loan Facility, given the Project's financial straits.⁹⁶ Claimant alleges that Climaco was directed to seek renegotiation of the Concession to make it more favorable to well-connected business interests associated with PAL and that she wanted the Chungs out.⁹⁷
125. A second review by the House Committee on Transportation and Communications found in December 2001 that the Terminal 3 Concession was awarded properly and the Concession Agreement, as amended, was valid.⁹⁸
126. In January 2002, Climaco proposed a Fifth ARCA Supplement to bring the ARCA in line with the original Bid documents and eliminate the alleged governmental guarantee and other legal infirmities.⁹⁹
127. In March 2002, the Ombudsman rejected a petition from a Graft Investigation Officer, Edgard Navales, alleging corruption on the part of DOTC Secretary Alvarez and others in awarding the Terminal 3 Concession to PIATCO.¹⁰⁰
128. In April 2002, in the face of growing financial concerns with the Terminal 3 Project, Fraport replaced its representatives in Manila, especially replacing Mr. Bernd Struck by Mr. Peter Engel as chairman of PIATCO.
129. Further to various meetings and exchanges of letters throughout the first part of 2002, in August 2002, Fraport and Respondent nearly reached an agreement for the Philippines to

⁹⁶ C-Mem., para. 550.

⁹⁷ Mem., paras. 210-217.

⁹⁸ CBII-224, Report of the Committee on Transportation and Communications, Dec. 18, 2001.

⁹⁹ CBII-232, Proposed 5th ARCA Supplement and Restated Concession Agreement, Jan. 23, 2002.

¹⁰⁰ CBII-284, Memorandum/Investigation Report, Office of the Ombudsman, Apr. 29, 2002.

buy-out the Terminal 3 Concession.¹⁰¹ Claimant argues that Climaco abandoned her own plan after it became public and the press criticized it as evidence of bad governance and self-dealing.¹⁰² Respondent argues that the agreement fell apart because the Chengs insisted on an unreasonably high price for the buy-out.¹⁰³

130. In September 2002, with relations between Fraport and the Chengs having deteriorated (for disputed reasons), Fraport attempted but failed to restructure PIATCO.¹⁰⁴ Fraport decided to not provide further bridge financing for PIATCO.¹⁰⁵

D. Nullification of the Terminal 3 Concession

131. The Senate Blue Ribbon Committee held hearings as of the end of August 2002 further to a petition filed in 2001 by a number of Senators calling for the investigation of the Project. The Committee issued a report on December 10, 2002.

132. In parallel, representatives of MASO, employees of MIAA and Members of Congress¹⁰⁶ filed petitions at the Supreme Court for a writ of prohibition to keep the Philippines from enforcing the concession agreements and allowing Terminal 3 to come into service. (Three of these petitions Agan, Baterina and Lopez would be consolidated into the *Agan* case against PIATCO.)

133. In response to these petitions, on September 9, 2002, President Arroyo established an inter-agency Cabinet Review Committee to formulate the Government's position vis-à-vis the Terminal 3 Concession. The committee, in turn, established a Technical Working Group to review the commercial and legal issues with the Terminal 3 Concession.¹⁰⁷

¹⁰¹ CBII-299, Letter from Peter Henkel and J. Seyffart to Climaco, Aug. 6, 2002.

¹⁰² Mem., para. 224.

¹⁰³ C-Mem., para. 579.

¹⁰⁴ *Ibid.*, paras. 580-596.

¹⁰⁵ *Ibid.*, para. 595.

¹⁰⁶ Mem., para. 294.

¹⁰⁷ C-Mem., paras. 601-602.

134. The Technical Working Group issued an initial report on September 25, 2002, to which Climaco objected on the basis that it “presumed” the validity of the ARCA.¹⁰⁸ The Technical Working Group thus recommended that the DOJ, the SEC, and the Office of Government Corporate Counsel (“OGCC”) formulated the official Government position on the legality of the Terminal 3 Concession.¹⁰⁹
135. On September 26, 2002, Secretary Climaco submitted a memorandum to the Senate Blue Ribbon Committee expressing the view that the Terminal 3 concession contracts were “inherently void” and that a declaration of nullity should be obtained.¹¹⁰ The memorandum also detailed lack of government planning in awarding the Terminal 3 Concession and financial repercussions to the Government for failing to achieve renegotiation and argued that PIATCO lacked the necessary financial qualification at the time it was awarded the Concession. Climaco also recommended that President Arroyo seek to nullify the Terminal 3 Concession.
136. On September 30, 2002, in response to a separate request from the MIAA as to whether the 1997 Agreement, the ARCA and the three Supplements were valid, the OGCC issued a report upholding the validity of the concession agreements, but stating that the onerous provisions, if any, should be negotiated/re-negotiated.¹¹¹ The OGCC further stated that the Government could not seek to nullify the agreements, as it had already accepted benefits derived from them.¹¹²

¹⁰⁸ C-Mem., para. 603, citing Gloria L.T. Climaco (ICSID 1) (filed as RE-109) para. 108; Memorandum to Cabinet Review Committee from Gloria L.T. Climaco, Sept. 25, 2002 (RE-554). CBII-316, Memorandum from the Cabinet Committee on NAIA International Passenger Terminal 3 Project Review for President Macapagal-Arroyo, Sept. 25, 2002. CBII-317/RE-554, Memorandum to Cabinet Review Committee from Climaco, Sept. 25, 2002.

¹⁰⁹ CBII-316.

¹¹⁰ CBII-318, Secretary Climaco Report to Senate Blue Ribbon, Sept. 26, 2002.

¹¹¹ ICSID-217, OGCC’s Sept. 20, 2002 Contract Review No. 434, paras. 30-31.

¹¹² *Id.*, para. 25.

137. On October 2, 2002, the Ombudsman rejected a petition filed against PBAC members for awarding the Terminal 3 Concession to PIATCO and found no irregularity in the pre-qualification bidding and awarding of the Concession Agreement.¹¹³
138. From the end of October 2002 onwards, steps were taken for the Terminal 3 to open as PIATCO intended to open it by mid of December 2002.¹¹⁴
139. On November 7, 2002, under a newly appointed Corporate Counsel, the OGCC argued to the Supreme Court that the original Concession Agreement be declared valid and binding but that the ARCA and its Supplements were void insofar as they deviated from the provisions of the original Concession Agreement.¹¹⁵
140. On November 11, 2002, the newly appointed Philippine Solicitor General, Alfredo Benipayo, filed a brief before the Supreme Court in another case against PIATCO seeking to reinstate the terms of the original Concession Agreement and Bid documents.¹¹⁶
141. On November 18, 2002, the Philippine Solicitor General, in a further filing argued that all of the concession agreements were void because the deviations from the Bid documents were not publicly bid in accordance with the BOT law, as well the existence of a direct government guarantee in the ARCA.¹¹⁷
142. On November 28, 2002, the DOJ, under the freshly appointed Secretary Merceditas Gutierrez,¹¹⁸ issued an official position that the Terminal 3 Concession was void because the deviations from the original Bid documents, combined with the failure to allow AEDC to match the terms of PIATCO's bid, unlawfully placed PIATCO in a more favorable

¹¹³ CBII-322, Joint Resolution, *Descallar v. Cal, et al.*, Oct. 2, 2002.

¹¹⁴ CBII-351, News report, Dec. 23, 2002.

¹¹⁵ CBII-334, Comment of the Office of Government Corporate Counsel, Nov 7, 2002.

¹¹⁶ CBII-335, *Baterina et al. v. PIATCO et al.*, Comment of the Solicitor General, Nov. 11, 2002. The Tribunal notes that the Solicitor General incorporated large sections of Secretary Climaco's report verbatim.

¹¹⁷ CBII-336, *Agan et al. v. PIATCO et al.*, Comments of the Solicitor General, Nov. 18, 2002.

¹¹⁸ Ms. Gutierrez became the Philippines' Ombudsman as of December 2005.

position than other project bidders.¹¹⁹ The DOJ also found that the ARCA and its Supplements were further void because they contained additional deviations from the Bid documents.

143. On November 29, 2002, a month before Terminal 3 was scheduled to enter into commercial operations,¹²⁰ President Arroyo announced that the Terminal 3 concession agreements were null and void and would not be honored.¹²¹ President Arroyo also promised compensation for the funds expended in constructing Terminal 3 until that point and further directed the DOJ and the Presidential Anti-Graft Commission (“PAGC”) to investigate and prosecute any criminal violations associated with the Concession.

144. On the same day, Takenaka, the EPC contractor, stopped working on Terminal 3.

145. On December 9, 2002, the Solicitor General filed a supplemental brief before the Supreme Court, arguing that the award of the Terminal 3 Concession was void because the PAIRCARGO Consortium did not meet the financial qualifications at the time of the award.¹²²

146. On December 10, 2002, the Senate Blue Ribbon Committee issued its final report,¹²³ concluding that (1) the Terminal 3 Concession Agreement was intrinsically void because six required signatures from ICC members were not obtained, (2) the concession agreements were void because of deviations from the Bid documents, (3) the concession agreements contained onerous provisions that were contrary to public policy and the BOT law, (4) improper payments had been made to Liongson, (5) the Concession provided for a prohibited direct Government guarantee, and (6) the condition of the Terminal raised serious security concerns.

¹¹⁹ CBII-338, Memo from Acting Secretary of Justice Gutierrez to Executive Secretary Rómulo, Nov. 28, 2002.

¹²⁰ Mem., para. 262. Claimant submits that by the end of November 2002 the Terminal was 98% complete, this is disputed by Respondent, which claims structural deficiency (R. PHB2, para. 107).

¹²¹ CBII-339, President Gloria Macapagal-Arroyo’s speech, Nov. 29, 2002.

¹²² CBII-344, *Baterina et al. v. PIATCO et al. and Agan et al. v PIATCO et al.*, Supplemental Comment with opposition, Dec. 9, 2002.

¹²³ CBII-345, Blue Senate Committee Report No. 130, Dec. 10, 2002.

147. The same day, the Supreme Court held a hearing en banc in the cases of *Baterina and Agan et al. v. PIATCO et al.*¹²⁴
148. On December 11, 2002, the Committee on Good Government of the House of Representatives issued a report whereby it concluded that the grant of a franchisee to PIATCO was “in general” in accordance with the Constitution and the IRR, but recommended that the provisions of the ARCA be clarified.¹²⁵
149. In January 2003, Secretary Climaco made a presentation to President Arroyo in connection with a possible Government buy-out of the Terminal 3 for US \$400 million.¹²⁶
150. On January 9, 2003, the OGCC, in a Supreme Court filing made jointly with the Solicitor General, modified its views and requested a declaratory judgment that all Terminal 3 related concession agreements were void for violation of the BOT law and the IRR.¹²⁷ Fraport and Respondent disagree as to whether OGCC also found constitutional issues with PIATCO’s operation of Terminal 3.
151. On February 14, 2003, Fraport issued a notice of dispute under the BIT.¹²⁸ PIATCO also initiated ICC arbitration against Respondent, pursuant to an arbitration clause in the ARCA.
152. According to Fraport, early March 2003, some last efforts were made to find a consensual resolution of the dispute with Climaco, to no avail.¹²⁹
153. On March 13, 2003, the PAGC made a recommendation to dismiss charges for lack of merits for 7 officials and referring cases of 12 other former Government employees to the

¹²⁴ CBII-346, *Baterina v. PIATCO, G.R. No. 155547 and Agan et al. v. PIATCO, G.R. 155001* (en banc), Hearing Transcript.

¹²⁵ CBII-347, Committee Report No. 1097 of the Committee on Good Government, Dec. 11, 2002.

¹²⁶ CE-224, Presentation to President Arroyo, Proposed Solution to NAIA Terminal 3.

¹²⁷ CBII-354, Memorandum of Public Respondents, *Agan et al. v. PIATCO et al. G.R. No. 155001 and Baterina et al. v. PIATCO et al. G.R. No. 155547 and Lopez et al. v. PIATCO et al. G.R. No. 155661*, Jan. 9, 2003.

¹²⁸ CBII-358, Letter from Fraport to Secretary Rómulo, Feb. 10, 2003.

¹²⁹ Mem., paras. 269-270; C-Mem., paras. 633-635.

Ombudsman.¹³⁰ Respondent submits that “the PAGC made no finding with respect to the legality or constitutionality of the Concession Agreements in deference to the ongoing cases before the Supreme Court” but found that charges could have been brought against 7 officials.¹³¹

154. On May 5, 2003, the Philippine Supreme Court issued the *Agan* decision,¹³² declaring Terminal 3 Concession null and void *ab initio* on the following grounds:

- The PAIRCARGO Consortium lacked the initial financial qualifications and PBAC had erred in calculating the basis for the consortium’s financial prequalification.
- Post-award modifications to the 1997 Concession Agreement provided financial advantages to PIATCO that were not available during the bidding process and required the government to provide a “form of security” for loans to PIATCO. Therefore, the Agreement was void as contrary to public policy.
- The ARCA provided for a direct guarantee by the Government, in the event of PIATCO’s default, which was prohibited by the BOT law.
- A provision requiring that the Government pay compensation to PIATCO if it temporary took over the terminal in a time of war hampered the Government’s exercise of its police powers and contravened the Philippine Constitution.
- The provisions in the 1997 Concession Agreement and the ARCA granting PIATCO exclusive rights to control service provider concessions

¹³⁰ CBII-362/363, Resolution, Presidential Anti-Graft Commission, Mar. 13, 2003.

¹³¹ C-Mem., para. 625.

¹³² CBII-367, Decision (en banc), *Agan et al. v. PIATCO et al. G.R. No. 155001 and Baterina et al. v. PIATCO et al. G.R. No. 155547 and Lopez et al. v. PIATCO et al. G.R. No. 155661*, May 5, 2003. With separate concurring opinion, CBII-368.

at Terminal 3 and requiring the Government to terminate existing NAIA service provider contracts were impermissible.

155. According to Fraport, at the time of the *Agan* decision, Terminal 3 was more than 90% complete,¹³³ which is disputed by Respondent.

156. On June 25, 2003, President Arroyo established a Cabinet Oversight Committee on Terminal 3 to find a final and comprehensive solution. No agreement was found and the Committee was dissolved in March 2004.¹³⁴

157. In September 2003, Fraport initiated the first ICSID arbitration under the BIT.

E. Further 2003/2004 Proceedings

158. In October 2003, the Philippine National Bureau of Investigation begun criminal investigations into ADL violations by Fraport officials, on the basis of evidence of Fraport's shareholdings in PIATCO and the cascade companies contained in Fraport's ICSID submissions, as opposed to the "*interference*" grounds for the violation alleged in this arbitration.

159. From October 2003 to September 2004, private civil and criminal libel complaints were filed against Fraport executives and its Philippine counsel by President Arroyo's personal lawyer, Arthur Villaraza, and Secretary Climaco, based on statements from Fraport's ICSID first request for arbitration that were published in Philippine newspapers.¹³⁵

160. In December 2003, German law enforcement searched Fraport's offices in Frankfurt in connection with an ongoing German criminal investigation regarding bribery and corruption in the Terminal 3 Project. (No charges were ever filed in Germany.) The

¹³³ Rep., para. 7; R. PHB2, para. 109.

¹³⁴ C-Mem., paras. 678-689.

¹³⁵ CBII-382, Subpoena, *Villaraza v. Bender, Scholch, Manalaysay and Balois*, Aug. 6, 2004.

Philippines Solicitor General and chief arbitration counsel made a mutual legal assistance request of Germany for evidence of corruption.¹³⁶

161. In August 2004, a German prosecutor requested that the Philippines provided details of the alleged offender, acts, and criminal violations in support of its legal assistance request.¹³⁷
162. On September 16, 2004, upon AEDC's request, the Ombudsman for Luzon recommended to indict numerous current or former Government officials, including Pantaleon Alvarez, together with PIATCO and Fraport officials and Alfonson Liongson with respect to the Terminal 3 Project.¹³⁸

F. The Government's Taking of NAIA Terminal 3

163. On January and February 2004, PIATCO was denied its motions for reconsideration of the *Agan Decision*.¹³⁹
164. In May 2004, President Arroyo was elected for her second term (she stepped down in 2010).
165. On December 21, 2004, with PIATCO and the Philippines failing to reach a settlement over the ownership of Terminal 3 (and Fraport, as a minority shareholder, unable to settle separately),¹⁴⁰ the Philippine Solicitor General applied for and received an ex parte court order – a Writ of Possession – authorizing the expropriation (*i.e.*, exercise of eminent domain) of Terminal 3.¹⁴¹

¹³⁶ See generally Annex G to C-Mem., “*Summary of Efforts Undertaken by the Republic of The Philippines to Obtain Access to the Frankfurt’s Prosecutor Documents Concerning Fraport’s Investment*” in the NAIA Terminal 3. See also RE-1895, “*Chronology of Key Events*”.

¹³⁷ RE-1332, Note Verbale of the German Federal Foreign Office to the Philippine Embassy in Berlin, Aug. 12, 2004.

¹³⁸ CBII-383, Resolution, *AEDC v. Alvarez et al.*, Sept. 16, 2004.

¹³⁹ CBII-378-380.

¹⁴⁰ C-Mem., para. 710.

¹⁴¹ CBII-385, Complaint (With a Plea for the Immediate Issuance of a Writ of Possession), Dec. 21, 2004. CBII-386, Order, *Republic v. PIATCO, Civil Case No. 04-0876*, Dec. 21, 2004.

166. On the same day, the Philippine armed forces took control of Terminal 3.
167. By orders of January 4 and 7, 2005, the Regional Trial Court (aka, the expropriation court) ordered the payment of the proffered value of US \$62 million to PIATCO and appointed, pursuant to statutory procedures, an independent board of commissioners to conduct a valuation of the expropriated property.¹⁴²
168. Under Philippine law, following an order of expropriation, the expropriation court determines the amount of compensation due, under the Philippine law standard of “replacement value.” The procedure in such cases involves up-front payment of “proffered value” with subsequent judicial determination within 60 days as to whether additional “just compensation” is owed.¹⁴³
169. On January 13, 2005, Respondent filed criminal charges against governmental, PIATCO, and Fraport officials involved in the Terminal 3 concession award and subsequent supplemental agreements.¹⁴⁴
170. In September 2005, the Philippines resubmitted its request for legal assistance to the German prosecutor, on the basis of the rights it would have as a victim of the corruption charged in January 2005.¹⁴⁵
171. On December 13, 2005, a German prosecutor granted the Philippines access to seized files under Germany’s civil victim statute.¹⁴⁶ The Parties dispute whether the German

¹⁴² CBII-388/389, Order, *Republic v. PIATCO*, Civil Case No. 04-0876, Jan. 4, 2005 and Urgent Motion for Inhibition, *ROP et al. v. PIATCO*, 04-0876-9, Jan. 7, 2005.

¹⁴³ C-Mem., Annex E, “*Supplement on the Philippine Expropriation Proceedings*,” Nov. 19, 2012; and RE-663/ICSID-2459, *Republic v. Hon. Henrick F. Gingoyon and PIATCO G.R. No. 166429*, Dec. 19, 2005.

¹⁴⁴ CBII-392, Information, Graft Investigation and Prosecution Office, Jan. 13, 2005.

¹⁴⁵ C-Mem., Annex G, “*Summary of Efforts Undertaken by the Republic of the Philippines to Obtain Access to the Frankfurt Prosecutor’s Documents Concerning Fraport’s Involvement in the Ninoy Aquino International Airport Terminal 3 Project in Manila*,” p. 5.

¹⁴⁶ RE-1342, Letter from Mr. Schaupensteiner to Mr. Klengel, Dec. 13, 2005.

prosecutor was aware of the Government's intention to use the files in the ICSID arbitration or whether the Government misled the prosecutor.¹⁴⁷

172. On the same day, Fraport obtained an order from a German court to prevent the release of the documents.¹⁴⁸

173. On December 19, 2005, upon the Philippines' appeal of the expropriation court's order of January 2005 regarding the amount of proffered value, the Supreme Court held the Writ of Possession in abeyance until the Philippines paid the amount determined by the Supreme Court to be appropriate as proffered value.¹⁴⁹

174. In December 2005, libel charges, carrying threat of arrest, were filed against Fraport's local counsel weeks before the jurisdiction/liability hearing to be held in first ICSID arbitration.¹⁵⁰

175. On August 23, 2006, the ICC arbitral Tribunal ordered that the Philippines return Terminal 3 to PIATCO, unless it obtained a valid Writ of Possession.¹⁵¹

176. On September 11, 2006, further to the Supreme Court decision of December 2005, the Philippines paid PIATCO the equivalent of US \$53 million as proffered value, approximately half of which was transferred to Fraport,¹⁵² as a condition of receiving the Writ of Possession for Terminal 3.

¹⁴⁷ Mem., para. 430; C-Mem., para. 436.

¹⁴⁸ RE-1343, Letter from Mr. Klengel to Mr. Schauensteiner, Dec. 13, 2005. RE-1345, Letter from Dr. Jürgen Taschke, Clifford Chance, on behalf of Fraport, to Mr. Schauensteiner, Dec. 13, 2005. RE-1188, Regional Court of Frankfurt am Main, File No. 5/12 AR 1/06, Order, Feb. 24, 2006.

¹⁴⁹ RE-663/ICSID-2459, *Republic v. Hon. Henrick F. Gingoyon and PIATCO G.R. No. 166429*, Dec. 19, 2005. Judge Gingoyon was murdered on Dec. 31, 2005; see RE-1895, "Chronology of Key Events".

¹⁵⁰ CBII-401, Letter from Fraport's counsel to the ICSID 1 tribunal, Jan. 4, 2006.

¹⁵¹ CE-153, *Philippine International Air Terminals Co., Inc. v. The Government of the Republic of the Philippines* (ICC Case No. 12610/TE/MW/AVH/JEM/MLK), Order concerning Claimant's application for interim measures to maintain status quo ante, Aug. 23, 2006.

¹⁵² Mem., fn. 683; C-Mem., para. 724, which prompts Respondent to submit that "Fraport has received a portion of its just compensation for any alleged taking."

177. Between September 2006 and February 2007, corruption charges were dismissed by a Philippine court.
178. In December 2006, the DOJ rejected a recommendation to charge various Fraport officials and its international counsel with ADL violations, concluding that the “Grandfather Rule” no longer applied and that the *Agan* decision made the ADL inapplicable to Fraport and PIATCO.¹⁵³
179. On March 15, 2007, the DOJ reversed position and decided to file criminal charges for violations of the ADL against Fraport officials and outside counsel, include Fraport’s official, Peter Henkel, Dietrich Stiller, Hans Arthur Vogel, Sanim Aydin, and PIATCO’s Cheng Yong.¹⁵⁴
180. On August 16, 2007, the first ICSID Tribunal issues its Award in favor of Respondent.¹⁵⁵ The Tribunal declared that it had no jurisdiction *ratione materiae* because “Fraport knowingly and intentionally circumvented the ADL by means of secret shareholders agreements”¹⁵⁶ and “Fraport’s ostensible purchase of shares in the Terminal 3 Project, which concealed a different type of unlawful investment, is not an ‘investment’” made in accordance with Philippines law.¹⁵⁷ Dr. Bernardo Cremades dissented, stating in short that Fraport’s shareholdings constituted an investment under the BIT, that whether there was a breach of the ADL was an issue for the merits and that Respondent had not demonstrated in any event a violation by PIATCO of the ADL, nor by Fraport as an accomplice.¹⁵⁸

¹⁵³ DOJ Resolution of Dec. 26, 2006, mentioned in RE-695, Bernas Motion for Reconsideration, *NBI-AFCCD v. Cheng Yong et al.*, I.S. No. 2006-817, Jan. 18, 2007, and in RE-696, Balayan Petition for Review, Jan. 19, 2007. See also RE-697-698, Opposition (to the Motion for Reconsideration), *NBI v. Cheng Yong, et al.*, I.S. No. 2006-817 and Opposition (to Private Complainant’s Motion for Reconsideration), *NBI v. Cheng Yong, et al.*, I.S. No. 2006-817, Feb. 1, 2007.

¹⁵⁴ Mentioned in RE-707, Resolution, *NBI-AFCCD v. Cheng Yong et al.*, I.S. No. 2006-817, Oct. 16, 2007. See also RE-708.

¹⁵⁵ CBII-409, ICSID 1 Award, Aug. 16, 2007.

¹⁵⁶ *Ibid.*, para. 401.

¹⁵⁷ *Ibid.*, para. 404.

¹⁵⁸ *Ibid.*, Dissenting opinion, para. 20.

181. On November 2007, the criminal respondents (*i.e.*, Fraport officials and counsel) petitioned the DOJ Secretary for review of the ADL charges of March 2007. The petitions remained pending until January 2011.¹⁵⁹
182. On January 8, 2008, Fraport’s application for the annulment of the ICSID Award was registered.
183. Since mid-2008, according to Fraport, the Philippines started to operate the Terminal 3.
184. In January 2009, the DOJ officially resolved to file libel charges against Fraport’s local arbitration counsel.¹⁶⁰
185. In August 2009, the Philippines admitted to the *ad hoc* annulment Committee that “all [criminal] investigations had been completed.”¹⁶¹
186. On July 22, 2010, the ICC Tribunal dismissed PIATCO’s claims as inadmissible, given PIATCO’s violations of the Philippine ADL.¹⁶² According to Fraport, the Philippines misled the ICC tribunal into believing that its involvement in PIATCO violated the ADL.¹⁶³
187. On December 23, 2010, the ICSID 1 Award was annulled in its entirety by the *ad hoc* Committee.¹⁶⁴ The Committee found that the ICSID 1 Tribunal had seriously departed from a fundamental rule of procedure, prejudicing Fraport.¹⁶⁵ The ICSID 1 Tribunal was found not to have interrupted its deliberations, closing the proceedings and refusing to reopen them as well as using in the Award, documents, tendered after the closure of the proceedings, which had been produced in the DOJ’s Prosecutor investigation, including

¹⁵⁹ Mem., paras. 402, 403 and 408.

¹⁶⁰ CBII-411, Resolution finding “probable causes” against Fraport’s local counsel, Jan. 6, 2009.

¹⁶¹ Mem., para. 408. CBII-417, ICSID Annulment Decision, Dec. 23, 2010, para. 148(b).

¹⁶² CBII-414, *Philippine International Air Terminals Co., Inc. v. The Government of the Republic of the Philippines* (ICC Case No. 12610/TE/MW/AVH/JEM/MLK), Partial Award, July 22, 2010.

¹⁶³ Mem., paras. 449-463.

¹⁶⁴ CBII-417, ICSID Annulment Decision, Dec. 23, 2010.

¹⁶⁵ *Ibid.*, paras. 245-247.

drawing factual inference and a negative inference that the Prosecutor's decision in December 2006 may have been different had he been in possession of the Pooling Agreement, without hearing both parties on the adequacy and the effect of the record before the Prosecutor and the construction of the ADL, leading the Tribunal to dismiss Fraport's claims.

188. In January 2011, weeks after the ICSID Annulment Decision was issued, the DOJ denied the November 2007 petitions for review and directed prosecutor to indict Fraport officials for ADL violations arising out the investigations initiated in 2003 following Fraport's first ICSID request for arbitration.¹⁶⁶
189. In March 2011, the board of commissioners appointed by the expropriation court determined that the replacement cost for Terminal 3 was US \$376 million plus 12% interest from the time of the expropriation.¹⁶⁷
190. On March 30, 2011, Fraport filed a new request for arbitration with ICSID, which was registered on April 27, 2011.
191. On May 10, 2011, the ICC Tribunal rendered its final award on costs ordering PIATCO to pay Respondent about US \$6 million towards its arbitration costs.¹⁶⁸
192. On May 23, 2011, the expropriation court found that the compensation owed to PIATCO was only approximately US \$176 million inclusive of costs (less the previously paid US \$53 million), due to structural defects and PIATCO's failure to prove certain costs.¹⁶⁹
193. PIATCO and Takenaka appealed this determination in May and June 2011.¹⁷⁰ The Philippines filed a motion for partial reconsideration in June 2011 praying for the deletion

¹⁶⁶ CBII-419, Joint Resolution of Philippines Department of Justice, I.S. No. 2006-817, Jan. 21, 2011.

¹⁶⁷ See CBII-441 for the history of the expropriation evaluation.

¹⁶⁸ CBII-421, *Philippine International Air Terminals Co., Inc. v. The Government of the Republic of the Philippines* (ICC Case No. 12610/TE/MW/AVH/JEM/MLK), Final Award, May 10, 2011.

¹⁶⁹ CBII-422, Decision, *Republic v. PIATCO, Civil Case No. 04-0876*, May 23, 2011.

¹⁷⁰ RE-731 and mentioned in RE-736.

of US \$26 million of attendant costs; this was rejected on July 14, 2011, and on July 28, 2011, the Philippines filed an appeal against the May 2011 decision.¹⁷¹ Fraport declined to become a party to the domestic expropriation proceedings.

194. On July 8, 2011, the Philippines indicated to the expropriation court that it was ready to pay in full the amount provided it be deposited in escrow.¹⁷²

195. On October 11, 2011, the expropriation court approved the Philippines's request to exercise full rights of ownership over Terminal 3, upon placing the remaining US \$116 million due as compensation in escrow, with such funds to be released only if PIATCO assumed all responsibility for claims related to the Terminal 3 facilities and transferred full title, free from all liens and encumbrances, to the Philippines.¹⁷³

196. On March 12, 2012, the DOTC and Takenaka entered into a Memorandum of Understanding to complete Terminal 3 for US \$40 million.¹⁷⁴

197. In April 2012, MIAA made the escrow payment.¹⁷⁵

198. In 2012, according to Fraport, Terminal 3 handled 13.6 million passengers¹⁷⁶ and generated more than US \$234 million in duty free sales.¹⁷⁷ The Parties disagree as to the state-of-the-art quality of Terminal 3. Respondent claims that 85% of the passengers are

¹⁷¹ RE-741, Republic Notice of Partial Appeal, *Republic v. PIATCO*, Case No. 04-0876, July 28, 2011.

¹⁷² CBII-424, Republic's Manifestation & Motion, *Republic v. PIATCO*, Case No. 04-0876, July 8, 2011.

¹⁷³ CBII-428, Omnibus Order, *Republic v. PIATCO*, Civil Case No. 04-0876, Oct. 11, 2011.

¹⁷⁴ CBII-434, Memorandum of Understanding, between Takenaka and the DOTC, Mar. 12, 2012.

¹⁷⁵ CBII-436, Escrow agreements dated Apr. 11, 2012 and Apr. 17, 2012 between MIAA and the Land Bank of the Philippines and the Development Bank of the Philippines.

¹⁷⁶ Mem., para. 75. CE-151, NAIA 2012 Annual Statistic Report. According to Fraport, PAL Express and Air Philippines moved their operations into Terminal 3 in July 2008. Since it is reported that major companies have been using Terminal 3, such as All Nippon Airways, Cathay Pacific, Delta Airlines and Emirates (Mem., para. 75).

¹⁷⁷ Sur-Rej., para. 24.

domestic and that Terminal 3 cannot handle international passengers as it was designed to and actually operates at a loss.¹⁷⁸

199. On May 6, 2013, a new information was filed by the National Bureau of Investigation Anti-Fraud and Computer Crimes Division of the DOJ recommending indictments against five of Fraport's employees and Fraport's legal counsel further to the DOJ's resolution of March and October 2007.¹⁷⁹
200. In July 2013, the German State prosecutor pursued his investigation and confiscated various assets.¹⁸⁰
201. On August 7, 2013, the Court of Appeals of Manila modified the May 23, 2011 decision and fixed just compensation at US \$300 million, less US \$59 million already paid in September 2006, *i.e.* US \$240 million with legal interest at 6%.¹⁸¹ It ordered the Philippines to pay PIATCO US \$371 million as of July 31, 2013. The Court of Appeals confirmed this decision in a Resolution of October 29, 2013.¹⁸² Appeals against the August 2013 and October 2013 resolutions are still pending.¹⁸³
202. On February 17, 2014, the trial court issued an order directing indefinite suspension of the proceedings pending resolution by the DOJ of the various motions for reconsideration.¹⁸⁴
203. On March 25, 2014, the Supreme Court issued a decision in the case of *People v. Henry Go*, PIATCO's President and Chairman, upon AEDC's complaint,¹⁸⁵ whereby the Supreme Court directed the court below to proceed ahead with criminal charges. Claimant

¹⁷⁸ R. PHB2, paras. 111-112.

¹⁷⁹ CBII-444, ADL Joint Resolution, May 6, 2013. *See* Cl. PHB2, paras. 39-46.

¹⁸⁰ CBII-447, News clips, July 9, 2013.

¹⁸¹ CBII-450, Notice of Decision, *Philippines v. PIATCO*, CA-G.R. CV No. 98029, Aug. 7, 2013, amended on Aug. 22, 2013, CBII-451.

¹⁸² RE-2139, Court of Appeals, Notice of Resolution, Oct. 29, 2013.

¹⁸³ *See* Rej., Annex I, "Respondent's position on the Appellate Proceedings".

¹⁸⁴ CE-375, Order, Feb. 17, 2014.

¹⁸⁵ RE-2146, Supreme Court, Decision *People v. Henry Go* (G.R. 168539), Mar. 25, 2014.

considers for its part that this decision does not relate to bribery or corruption but to the execution of the 1997 Concession Agreement which pre-dates Fraport's investment, and that a motion for reconsideration had been filed against it.¹⁸⁶

204. On March 26, 2014, the Supreme Court issued a Notice where it consolidated the petitions for review of the August 22, 2013 decision of the Court of Appeal in expropriation cases of PIATCO and Takenaka and referred them to the Court en banc.¹⁸⁷

205. As of November 2014, to the knowledge of the Tribunal, also on the basis of the record, there had been no convictions or indictments of Government officials for having accepted bribes. Nor have there been any firm conviction for ADL violations or corruption in the Philippines, nor convictions in Germany. Except for the pending-suspended ADL charges and the case against Henry Go, all criminal investigations relating to Terminal 3 have been dismissed in the Philippines.

V. SUMMARY OF THE PARTIES' POSITIONS

206. The Tribunal will now provide a summary of the Parties' positions, starting with Respondent's objections to jurisdiction and admissibility, followed by Fraport's claims and Respondent's counterclaims. To the extent relevant or useful, additional arguments will be discussed in the Tribunal's analysis below.

V.I RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

207. Respondent objects to the jurisdiction of the Tribunal and to the admissibility of Fraport's claims because it argues that Fraport is in violation of Philippine law, based on Fraport's alleged ADL violations, Fraport's alleged corruption, and failure to sufficiently substantiate the ultimate use of its claimed investment in the Terminal 3.

¹⁸⁶ Fraport's letter, Apr. 28, 2014; Claimant's reply submission on costs, para. 17.

¹⁸⁷ RE-2147, Supreme Court, Notice, Mar. 26, 2014.

A. Respondent's Basis for its Objections to Jurisdiction and Inadmissibility

208. According to Respondent, the BIT does not apply to investments made in violation of Philippine law. Article 1(1) of the BIT defines “investment” as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [...].” Thus, Fraport must demonstrate that it has “an investment” that complied with Philippines law and regulations.¹⁸⁸ This is a legality requirement, which is supported by the remainder of the BIT and its Protocol.¹⁸⁹ Not only Fraport’s investment was illegal for the alleged reasons that the Tribunal will examine below, but it was not “accepted” by the Philippines.¹⁹⁰

209. Even without taking the terms of Article 1(1) of the BIT into account, for Respondent, all BITs contain a tacit jurisdictional requirement of legality¹⁹¹ and the Tribunal has no jurisdiction over disputes involving investment made in violation of host State law.¹⁹²

210. In addition, Respondent argues that “regardless of whether Fraport’s unlawful investment is considered to satisfy the BIT’s definition of an investment,”¹⁹³ its claims are inadmissible on the basis of the doctrine of clean hands and the requirement of good faith, relying mainly on Bin Cheng and *World Duty Free v. Kenya*, because Fraport invested in violation of Philippine law and international public policy, and that its investment was illegal.¹⁹⁴

¹⁸⁸ C-Mem., para. 776.

¹⁸⁹ CA-1, Protocol to the BIT (follows text of BIT).

¹⁹⁰ R. PHB1, paras. 22-23.

¹⁹¹ Rej., paras. 579-581 ; R. PHB1, paras. 9-13, relying on *Phoenix Action Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award, Apr. 15, 2009 (“*Phoenix*, Award”).

¹⁹² C-Mem., para. 808.

¹⁹³ Rej., para. 582.

¹⁹⁴ *Ibid.*, para. 588; R. PHB1, paras. 119-126.

211. Fraport considers that the BIT does not contain a legality requirement, and certainly not a *de facto* continuous one,¹⁹⁵ but rather that Article 1(1) was designed as an admittance clause, as supported by the *travaux préparatoires*.¹⁹⁶
212. Fraport further argues that the concept of admissibility based on clean hands does not apply here as Respondent has not shown corruption and “should not be able to use its own illegal acts of extortion and corruption in order to take operational Terminal without compensation.”¹⁹⁷ It considers that the allegations of corruption have nothing to do with Fraport’s investment, or the legality of such investment, either in time or facts, pointing out for instance that the acquisition of shares has never been illegal.¹⁹⁸ Respondent replies that there is no temporal limitation for the doctrine of admissibility.¹⁹⁹
213. In any event, Fraport also counter-argues that all its discrete and multiple investments are entitled to the protection of the BIT.²⁰⁰ Respondent dismisses this theory based on the “unity of investment” doctrine and argues that corruption taints the entirety of an investment.²⁰¹

B. Fraport Knowingly Based its Investment on a Concession that had been Illegally Obtained and that was Invalid under Philippine Law

214. According to Respondent, the clean hands doctrine applies to render inadmissible claims relating to an investment that was procured through fraudulent misrepresentations.²⁰² PIATCO made material misrepresentations regarding its financial capacity and technical qualifications to PBAC. PAIRCARGO misrepresented its proposed annual guaranteed payments. Fraport is said to have joined in with this fraudulent conduct because it knew

¹⁹⁵ Sur-Rej., paras. 244-246.

¹⁹⁶ Rep., para. 596; Sur-Rej., paras. 191-235; RE-21.

¹⁹⁷ Rep., para. 660.

¹⁹⁸ Sur-Rej., paras. 122, 246.

¹⁹⁹ Rej., para. 627.

²⁰⁰ Rep., paras. 642-657; Sur-Rej., paras. 250-260.

²⁰¹ C-Mem., paras. 830-849; Rej., paras. 615-626.

²⁰² C-Mem., para. 894.

before it made its own investment that PIATCO has secured the Terminal 3 Concession under false pretenses.²⁰³

215. Fraport also knew that the concessions agreements were in violation of the BOT law, including an unlawful direct Government guarantee in Section 4.04(c)(iv) of the ARCA, the lack of NEDA's approval of the Concession Agreement or the ARCA, and were missing critical approvals of the DOTC and the Minister of Finance that could not be legally obtained.²⁰⁴

216. Fraport denies those allegations and claims that it had every reason to believe that PIATCO achieved the award and concession agreements through legitimate means, which in any event turns to be the case.²⁰⁵

C. Fraport Violated the Anti-Dummy Law

217. Respondent alleges that Fraport's investment in PIATCO violated the 1936 ADL, as Fraport deliberately assisted, aided and/or abetted in the "*planning*" of an ADL violation, which deprives the Tribunal of jurisdiction over Fraport's claims and renders such claims inadmissible.²⁰⁶

1. The Philippine Anti-Dummy Law

218. The Philippine Constitution restricts operation of a public utility (which the Parties agree includes Terminal 3) to Philippine citizens or corporations established under Philippine law at least 60% of whose capital is owned by Philippine citizens. The ADL, designed to prevent circumvention of such nationality requirements, prohibits in Section 2-A "interven[tion] in the management, operation, administration, or control" of, *inter alia*, public utilities by persons who do not meet the nationality requirements.

²⁰³ C-Mem., para. 896 ; R. Skeleton, paras. 13-17.

²⁰⁴ R. Skeleton, paras. 18-24 ; C-Mem., paras. 814-816.

²⁰⁵ Sur-Rej., paras. 128-132; Cl. PHB1, para. 201.

²⁰⁶ C-Mem., Section III.C.1; C-Mem., paras. 866-872; R. PHB1, para. 32; R. PHB2, paras. 30, 33.

219. According to Respondent, Section 2-A of the ADL imposes two general restrictions: (i) it prohibits Philippine entities from allowing an unqualified person to intervene into the management, operation, or control of a public utility, and (ii) it prohibits any person, including foreigners, from knowingly aiding, assisting or abetting in the planning, consummation, or perpetration of an ADL violation.²⁰⁷
220. Respondent submits that the fact that there was no finding of an ADL violation in local proceedings is irrelevant because the DOJ investigations are focused on different facts and claims.²⁰⁸ For Respondent, “[t]he DOJ proceeding is focused on Fraport’s violation of the 60/40 Philippine nationality requirement and the method to calculate a corporation’s nationality. In contrast, the claims in this arbitration are focused on Fraport’s intervention into the management, operation, administration or control of public utility corporations in circumvention of those Philippine nationality requirements.”²⁰⁹
221. Fraport considers that the ADL is an (old) criminal law (hence subject to strict construction)²¹⁰ applied inconsistently by Philippines agencies with little judicial guidance on what it proscribes.²¹¹ It contends that at the time of its investment, the control test was to apply in determining the nationality and not the computation of equity interest (so called Grandfather Rule) as claimed by Respondent.²¹² It points out that any violation can be cured,²¹³ and dismisses any wrongdoing.

²⁰⁷ R. PHB1, para. 27.

²⁰⁸ *Ibid.*, paras. 58-60; C-Mem., paras. 269-274; Rej., paras. 91-93.

²⁰⁹ Rej., para. 93.

²¹⁰ Cl. PHB1, para. 139.

²¹¹ Cl. Skeleton, Section IV.B; Rep., para. 152; Cl. PHB1, paras. 144-147.

²¹² Cl. PHB1, para. 143.

²¹³ Rep., paras. 160-167; Cl. PHB1, paras. 171-172.

2. Fraport's Alleged ADL Violations

222. Respondent argues that Fraport violated the ADL in five ways,²¹⁴ relying on expert legal opinions from Dean Concepcion and former Chief Justice Puno. Fraport allegedly violated the ADL by:

- (i) having a right of recommendation under the Pooling Agreement;
- (ii) being the Financial Arranger in the Project;
- (iii) placing non-Filipino officials in management roles at PIATCO and PTI;
- (iv) having a veto power over PTI's corporate decisions; and
- (v) having a right to appoint PIATCO board members in excess of limitations.²¹⁵

223. Fraport, relying on expert legal opinions from former Justice Melo, former Secretary of Justice Tuquero, and Dean Pangalangan (jointly), and former Justice Vitug, argues that it has always complied with the applicable legal regulations, and that Fraport did not aid or abet in any ADL violation, failing for Respondent to have identified the principal offender and for the violation to be consummated.²¹⁶ It claims to have amended in 2001 the contractual arrangements curing any potential violation, leading Respondent to admit in the first arbitration that it resulted in a "lawful Shareholder Structure."²¹⁷ It further points out that ADL investigations have commenced in 2003, further to Fraport's first request for arbitration.

224. Fraport also makes the following cross-cutting responses to Respondent's charges:

- The nationality requirement apply to the "*operation* of a public utility" (rather than the pre-operation construction phase), so that Fraport could not have

²¹⁴ C-Mem, paras. 136-230; Rej., paras. 238-302.

²¹⁵ The Tribunal will examine these allegations under Section VI.C *infra*.

²¹⁶ Cl. PHB1, paras. 151-154, 167-170.

²¹⁷ Rep., para. 155.

violated Section 2-A of the ADL prior to Terminal 3 entering into service (which did not occur prior to the expropriation).²¹⁸

- Section 2-A of the ADL does not apply to shareholder conduct.²¹⁹
- Fraport never controlled PIATCO, the Chengs did.²²⁰

D. Fraport’s Corruption and Unlawful Conduct Render its Claims Inadmissible

225. Respondent submits that Fraport was involved in or aware of corruption and fraud in implementing the Terminal 3 Project, which makes Fraport’s claims inadmissible.²²¹

226. According to Respondent, the Tribunal may rely on recognized “red-flags” and presumption in assessing Respondent’s *prima facie* evidence of corruption.²²² Respondent’s evidence is sufficient to prove the corruption and Fraport was unable to offer rebuttal evidence.²²³ Fraport replies that Respondent has failed to meet the high burden of proof, *i.e.* “clear and convincing evidence,” that corruption allegations require.²²⁴

227. In particular, Respondent alleges that Fraport participated in bribing various Philippine officials – mainly via Alfonso Liongson and a kickback scheme involving politically-connected subcontractors – to obtain various government approvals (*e.g.*, amendments to the Concession Agreement) necessary to the Project.

1. The Four “Liongson Schemes” to Procure Government Approvals

228. Respondent alleges that PIATCO (with Fraport’s involvement) paid more than US \$10.6 million to the Chengs – the Philippine family that owned the controlling share of PIATCO

²¹⁸ See Melo-Tuquero-Pangalangan II (ICSID 2), paras. 60-88; Vitug II (ICSID 2), paras. 5-9; Melo-Tuquero-Pangalangan III (ICSID 2), paras. 6-16. *But see* Puno (ICSID 2), paras. 37-53.

²¹⁹ See Melo-Tuquero-Pangalangan II (ICSID 2), paras. 47-59; Vitug I (ICSID 2), paras. 21-28. *But see* Concepcion I (ICSID 2), paras. 131-143; Puno (ICSID 2), paras. 27-36.

²²⁰ Cl. PHB1, paras. 173-182; Cl. PHB2, para. 24.

²²¹ See C-Mem., Section III.C.2.

²²² C-Mem., para. 879 *et seq.*; R. PHB1, para. 64, referring to *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, Oct. 4, 2013.

²²³ C-Mem., para. 884.

²²⁴ Rep., paras. 626-635; Sur-Rej., paras. 277-308; Cl. PHB2, paras. 61-62.

– and “Top Victory Investments Ltd.” (whose ownership is unknown) through offshore banking accounts belonging to Alfonso Liongson – who purportedly was a marketing and government relations consultant to PIATCO, despite his alleged lack of public relations experience – and others, including Hi Kian Yu (aka “Shoehorn”), the president of a company whose major shareholder was the brother of the Executive Secretary of then-Philippine President Estrada.²²⁵ Liongson was retained by a special committee of PIATCO’s board that included two Fraport officials.²²⁶

229. According to Respondent, these payments were used to secure various Government approvals related to the Terminal 3 Concession. Specifically:

- US \$2.6 million in payments were made to the Chengs and Top Victory’s accounts within 23 days of DOTC’s approval of the Second Supplement to ARCA. The Second Supplement added demolition of below-ground structures to PIATCO’s responsibilities, thus allegedly allowing it to enter into a kickback scheme with a subcontractor, Wintrack (described *infra*).²²⁷
- US \$2.3 million in payments were made to the Chengs over the four months surrounding the approval by DOTC Secretary Pantaleon Alvarez (who allegedly had close connections to the Chengs) of PIATCO’s request to relax the required 70:30 debt-equity financing ratio for to the Terminal 3 Concession. This approval was required to continue to fund the construction of Terminal 3, as PIATCO’s Philippine shareholders could not or would not increase their equity investment and Fraport was not legally allowed to do so.²²⁸
- US \$4.9 million in payments were made to the Chengs and Top Victory in the weeks prior to and after DOTC’s approval of PTI as the contractor-operator of Terminal 3 and of the Third Supplement to the ARCA. The Third Supplement changed the terms of the agreement with respect to the construction of a road, which allegedly provided the opportunity for further corruption.²²⁹

²²⁵ Rej., para. 313.

²²⁶ See *ibid.*, para. 344.

²²⁷ See Rej., paras. 319-326; C-Mem., paras. 353-355.

²²⁸ See Rej., paras. 327-335; C-Mem., paras. 342-349. The C-Mem. refers to this as the Third Liongson Scheme.

²²⁹ See Rej., paras. 336-348; C-Mem., paras. 316-323. The C-Mem. refers to this as the First Liongson Scheme.

- US \$850,000 in payments were made to the Chengs in the weeks following DOTC's approval of Fraport's purchase of additional shares in PAGS, one of the cascade companies.²³⁰

230. Respondent relies on its experts – Messrs. Silverstone, Pieth, Pingle, and Kaczmarek – to argue that the nature of these payments, the structure of PIATCO's contract with Liongson, Liongson's lack of qualifications to perform the public relations services for which he was purportedly hired, and an allegedly extraordinarily high level of Project "soft costs",²³¹ are indicative of bribery, which should shift the burden of proof to Fraport to show that PIATCO did not procure these government approvals through bribery.²³²

2. The EPC Contract Schedule 7 Kickback Scheme

231. Under Schedule 7 of the EPC Contract between PIATCO and Takenaka, PIATCO's preferred subcontractors were provided the opportunity to match the lowest bid for a subcontract, in which case the contractor was required to use PIATCO's preferred subcontractor.²³³ Respondent explains that this provides the opportunity for inferior subcontractors to obtain subcontracts through corruption, as was the case with a GE subsidiary, which was found (according to charges filed by the US SEC) to have bribed a Philippine government official to obtain a subcontract for explosive detection devices.²³⁴

232. According to Respondent, subcontractors would underprice the works to be performed and kick back the difference between the cost and the amount budgeted under the EPC to PIATCO, which then used those funds to bribe Philippine officials.²³⁵ Respondent claims that Fraport can be held responsible for these schemes because two members of the four-

²³⁰ See Rej., paras. 349-363; C-Mem., paras. 324-342. The C-Mem. refers to this as the Second Liongson Scheme.

²³¹ C-Mem., Section II.F.5.b.

²³² Rej., paras. 314-317.

²³³ C-Mem., paras. 375-375. CBII-103, Schedule 7.

²³⁴ C-Mem., para. 382.

²³⁵ *Ibid.*, paras. 384-385.

person EPC Committee of PIATCO's board, which oversaw the EPC, were Fraport officials.²³⁶

233. Respondent focuses on Wintrack,²³⁷ a subcontractor responsible for clearing below-ground debris, pursuant to the work awarded through the Second Supplement to the ARCA. Wintrack was owned by the wife of Congressman (and, later, DOTC Secretary) Pantaleon Alvarez. According to Respondent, Wintrack greatly inflated its invoices, the cost of which was passed on the Philippine government, allegedly with the knowledge of Fraport.²³⁸

3. Improper Receipt of Funds by Fraport Officials

234. Respondent also alleges that three Fraport officials improperly received money in the course of the Terminal 3 Concession, which they deposited into offshore accounts.²³⁹

4. Fraport's Responses

235. Fraport rejects Respondent's allegations, arguing that Respondent's corruption claims are not credible or relevant and unsupported by evidence. In particular, Fraport makes the following overarching points:

- Respondent has not produced any evidence of bribery, relying solely on the inferences of its experts.²⁴⁰ Fraport strongly objects to Respondent's expert witness Juval Aviv, calling him a "complete fraud."²⁴¹
- Moreover, Respondent has not shown how allegedly corrupt officials were responsible for the five Government approvals that it specifically alleges were procured through bribery, given the number of other officials involved; ignores the other 33 Government approvals that PIATCO received; and has

²³⁶ Rej., para. 417. Fraport maintains that the Chengs "had the last word" on the EPC Committee (Rep., paras. 179, 260).

²³⁷ CBII-123, Contract between PIATCO and Wintrack, Oct. 20, 2000.

²³⁸ C-Mem., paras. 387-394.

²³⁹ *Ibid.*, paras. 305-396.

²⁴⁰ Rep., paras. 242-243, 254-255.

²⁴¹ Cl. PHB1, paras. 162-184. *See* Rep., paras. 201-223; Sur-Rej., paras. 162-184.

“wild inconsistencies” in the timing between the allegedly corrupt payments and the approvals allegedly procured thereby, including a number made after President Arroyo’s announcement that the Philippines would not honor the Concession Agreement.²⁴²

- The Philippines has not indicted or convicted a single Government official for receiving bribes in connection with the Terminal 3 concession, nor are there any ongoing investigations.²⁴³ The only indictment of Fraport officials (but not the Government officials involved) was in 2005 for signing the Third Supplement to the ARCA which was alleged to have been illegally advantageous to PIATCO.²⁴⁴ Moreover, every investigation into corruption with respect to the Terminal 3 Concession has been dismissed.²⁴⁵
- Respondent has not alleged any corruption with respect to the award of the Terminal 3 Concession or Fraport’s making of its investment.²⁴⁶
- Many of the witnesses relied upon by Respondent for its allegations have previously contradicted their statements or claimed no knowledge or any corruption on the part of Fraport.²⁴⁷
- Liongson, in fact, did provide public relations services.²⁴⁸
- The Wintrack contract was made more than 3 years after the award of the Project. Everyone involved in the Wintrack contract was exonerated.²⁴⁹
- Schedule 7 did not set forth a process for the awarding of contracts to sub-contractors, but only allowed Schedule 7 sub-contractors to be considered in the rating of the bids by Takenaka.²⁵⁰
- Respondent conflates PIATCO’s and Fraport’s actions.²⁵¹

²⁴² Sur-Rej., paras. 133-143 and Annex A.

²⁴³ Rep., paras. 187-191. Respondent argues in turn that, in a number of cases, corruption on the part of Philippine authorities – including Pantaleon Alvarez – prevented investigations and criminal charges from going forward (Rej., paras. 472-475).

²⁴⁴ Rep., paras. 235-246.

²⁴⁵ *Ibid.*, paras. 227-233.

²⁴⁶ *Ibid.*, paras. 198, 246-248; Sur-Rej., paras. 122-127.

²⁴⁷ Rep., paras. 254-255, 264-269, 271, 274-279. *But see* Rej., paras. 449-454 (defending Respondent’s witnesses).

²⁴⁸ Rep., paras. 252-253.

²⁴⁹ Cl. PHB2, para. 64.

²⁵⁰ *Id.*

- If Respondent’s allegations demonstrate any wrongdoing, the evidence shows that Fraport may have been the victim of an embezzlement scheme by the Chengs.²⁵²

5. Respondent’s Argument Relating to Fraport’s Ultimate Use of the Funds Put in the Project

236. Finally, in relation to bribery, fraud and corruption, Respondent argues that Fraport has not sufficiently substantiated the ultimate use of its claimed investment in the Terminal 3 Project, which also includes questionable payments and unexplained uses of funds.²⁵³

237. Respondent submits that Fraport failed to produce evidence that demonstrates “the ultimate use” of its investment, indicating further fraud and corruption.²⁵⁴ According to Respondent, Fraport cannot prove it spent US \$565 million on the Project and cannot evidence their use in the Project. In other words, according to Respondent, Fraport failed to establish any “legitimate purpose” for 93% of its payments.²⁵⁵ Soft costs in an amount of US \$123 million would be another indicator of fraud,²⁵⁶ as well as payment of US \$4 million to Datacenta, a consultant, for a contract of an unknown nature,²⁵⁷ which Respondent claims to be a sham for payments to President Estrada and the Zamoras family.²⁵⁸

238. Fraport considers that its investments have translated into an indirect economic interest in the concession agreements and the Terminal.

239. As for the outgoing payments, they are detailed in PricewaterhouseCoopers (“PwC”) five reports spanning both arbitrations. As of July 2012, Fraport’s financial contributions

²⁵¹ Sur-Rej., paras. 144-146; Cl. PHB1, paras. 206-207.

²⁵² Sur-Rej., paras. 149-161. *See also* Rep., paras. 249-251, 260-263.

²⁵³ C-Mem., Section II.F.5.

²⁵⁴ *Ibid.*, para. 397.

²⁵⁵ R. PHB1, para. 65. *See* Silverstone I (ICSID 2), paras. 53-55 and Silverstone II (ICSID 2), Annex 2.

²⁵⁶ C-Mem., para. 409.

²⁵⁷ *Ibid.*, paras. 410-413; R. PHB1, paras. 67-74.

²⁵⁸ R. PHB1, para. 69.

amount to US \$510,639,079 excluding interest. According to Fraport, Respondent does not dispute that Fraport made the payments that make up these contributions, such as payment to Takenaka (US \$192 million from Fraport²⁵⁹ and US \$83 million from PIATCO).²⁶⁰ Indeed, Respondent's own expert Mr. Silverstone confirmed the same amount of Fraport's nearly US \$400 million in outgoing payments as PwC.²⁶¹

240. Fraport contends that the "ultimate use" concept is a creation of the Philippines, is unsupported in the legal literature, and is fundamentally flawed. It argues that (i) Fraport's documentation is consistent with its role in the Project as a minority shareholder, lender and guarantor, but Fraport is not the Project company (PIATCO) or the construction company (Takenaka) and therefore cannot be expected to have in its possession documentation for every single expense those companies have incurred, (ii) the ultimate use of 88% (or US \$369.4 million) of Fraport's investment has been conclusively established: US \$266.7 was paid to the EPC contractors (as the value of the EPC Contract was US \$323 million) as documented by Interim Payment Certificates, (iii) Respondent was an active participant in the construction process.²⁶² As to soft costs, they typically range from a low of 20% to a high of 43%.²⁶³

241. According to Claimant, the size of Fraport's financial contributions, although substantial, has no bearing on whether Fraport has a legal or proven investment. Respondent insisted on a bifurcated arbitration and the precise value of the Terminal should be an issue for the quantum phase, not the jurisdiction and merits phase.²⁶⁴

²⁵⁹ PwC II (ICSID 2), Exh. PwC-15 "*Detailed flow of funds ultimately paid by Fraport for the Terminal 3 project.*"

²⁶⁰ Cl. PHB1, para. 58.

²⁶¹ Cl. Skeleton, Section II.B.

²⁶² *Ibid.*, Section II.B. Also noting that PIATCO and Respondent mutually engaged Japan Airport Consultants ("JAC") as the Quality Assurance Inspector ("QAI") to supervise the construction process and Respondent created PMO to deal with construction issues.

²⁶³ Niehuss (ICSID 1), para. 101.

²⁶⁴ Cl. Skeleton, Section II.B.4.

V.II SUMMARY OF FRAPORT'S CLAIMS AND RELIEFS

242. Fraport considers that the Arroyo's administration destroyed its investment in the Terminal 3 Project. More specifically, it claims that the Arroyo administration, with the action of Secretary Climaco, sought to remove the key fundamentals of the Project (Terminal 3 was to handle exclusively all international flights and all duty free operations at NAIA), to favor President Arroyo's "cronies," and more specifically Lucio Tan, through PAL and MASO that were to suffer financially from such an exclusivity. Failing to renegotiate the concession agreements, the Administration declared the Concession null and void, a decision endorsed by the Supreme Court. Since, it is argued that Respondent has failed to pay compensation.

243. Fraport claims that the Philippines has (i) unlawfully expropriated its investment in violation of Article 4(2) of the BIT on expropriation, (ii) failed to accord Fraport and its investment fair and equitable treatment under Article 2(1) of the BIT, (iii) subjected Fraport and its investments to arbitrary treatment in violation of Article 2(2) of the BIT, (iv) subjected Fraport and its investments to discriminatory treatment in violation of Article 2(2) of the BIT, (v) failed to afford Fraport full protection and security in violation of Article 4(1) of the BIT, and (vi) breached Article 3(5) of the BIT—the umbrella clause—in breaching the express terms of the concession agreements.

A. Fraport's Claims for Expropriation

1. The Alleged Acts of Expropriation

244. Fraport alleges that Respondent expropriated its investment in the Terminal 3 Project (*i.e.*, its economic interest in the concession agreements, in the Terminal 3 building and its loans and shares),²⁶⁵ in violation of Article 4(2) of the BIT, through the cumulative effects of following actions:

- President Arroyo's declaration that the Terminal 3 Concession would not be honored;

²⁶⁵ Cl. PHB1, para. 222.

- The DOJ's declaration that the 1997 Concession Agreement and the ARCA were void;
- The "coercion" applied to Fraport by Secretary Climaco and others to renegotiate the concession agreements;
- Respondent's alleged refusal to perform duties under the concession agreements necessary to bring Terminal 3 into commercial operation, such as installing immigration and customs facilities and requiring PAL and other carriers to move their international operations to Terminal 3;
- The Supreme Court's *Agan* decision nullifying the Terminal 3 concession; and
- The taking of physical possession of Terminal 3 by Philippine armed forces.²⁶⁶

245. Respondent acknowledges that its taking physical possession of Terminal 3 in December 2004 was an expropriation, but argues that none of the prior actions constituted an expropriation and that it did not expropriate either the concession agreements, which were legally declared null and void, or Fraport's investment in PIATCO²⁶⁷ which it retains as shareholder and creditor.²⁶⁸

2. Respondent's Defense of the Invalidation of the Terminal 3 Concession Agreements

246. The central portion of Respondent's substantive defense is its arguments that (i) its executive branch and judiciary properly determined that the Terminal 3 concession agreements were null and void *ab initio*, and (ii) Fraport was aware of these legal risks when it invested.

247. As noted above, the Government determined that the Terminal 3 Concession was void due to:

²⁶⁶ Mem., paras. 510-511; Cl. PHB1, para. 223.

²⁶⁷ C-Mem., paras. 1006-1023; Rej., paras. 675-683; R. PHB2, paras. 96-97.

²⁶⁸ R. PHB1, para. 176.

- deviations from the original Bid documents, combined with the failure to allow AEDC to match the terms of PIATCO’s bid, placed PIATCO in a more favorable position than other project bidders, in contravention of the BOT law;²⁶⁹ and
- the PAIRCARGO Consortium did not meet the financial qualifications at the time the Concession was awarded.

248. In the *Agan* decision, the Supreme Court additionally relied on the following grounds in finding the Terminal 3 concession to be void:

- Post-award modifications to the 1997 Concession Agreement provided financial advantages to PIATCO that were not available during the bidding process and required the Government to provide a “form of security” for loans to PIATCO. Therefore, the Agreement was void as contrary to public policy.
- The ARCA provided for a direct guarantee by the Government, in the event of PIATCO’s default, which was prohibited by the BOT law.

249. Respondent, relying on a legal opinion from former Associate Justice Vincente Mendoza,²⁷⁰ argues that the *Agan* decision (and the related conclusions by the DOJ), were proper applications of Philippine law. Consequently, because the Concession was null and void *ab initio* – that is, as a legal matter, *never existed* – it could not be expropriated.²⁷¹

250. Furthermore, Respondent argues that Fraport knew or should have known of the existence of the grounds for invalidating the Concession at the time it invested:

- Respondent claims that Fraport knew that PIATCO had “misrepresented its qualifications” and “was not financially qualified.”
- Respondent argues that Fraport should have been aware that the 1997 Concession Agreement and the ARCA both contained an illegal Government

²⁶⁹ Similarly, the ARCA and its Supplements were further void because they contained additional deviations from the original Bid documents.

²⁷⁰ RE-230.

²⁷¹ C-Mem., para. 1010.

guarantee in the event PIATCO defaults on its payments to the creditors financing the Terminal 3 Project.²⁷²

251. In response, Fraport takes issue with the reasoning in *Agan*, both as to the grounds for invalidating the Concession and as to the remedy of declaring the Concession void *ab initio*, relying on legal opinions from Professor Merlin Magallona.²⁷³ According to Professor Magallona:

- Negotiated contracts based on unsolicited BOT proposals (as is the case here) and amendments thereto are not required to conform to public bidding requirements.²⁷⁴
- The determination of whether the PAIRCARGO Consortium met the financial pre-qualification requirements to bid on the Concession is within the discretion of PBAC, which had already found that it did.²⁷⁵
- The BOT law does not prohibit certain Government guarantees; regardless, the concession agreements do not carry such guarantees.²⁷⁶

252. According to Fraport, as confirmed by Professor Odoni, the terms of the Concession Agreement, ARCA and the 3 Supplements were in line with modern airport practices and did not place unwarranted or excessive burden on the Government.²⁷⁷ None of the Governmental officials had considered that the ARCA was disadvantageous to the Government at the time of the execution or afterwards.

253. Fraport also argues that it did not have knowledge of the alleged BOT violations that served as grounds for voiding the Concession,²⁷⁸ and, moreover, it relied on multiple, repeated Government assurances of the legality of its investment and other expressions of

²⁷² *e.g.*, CBII-55, ARCA, Nov. 26, 1998, Section 4.04 (quoted in C-Mem., para. 98).

²⁷³ Magallona I (ICSID 1) (ICSID-9); Magallona II (ICSID 1) (ICSID-1053). The procedural and substantive issues alleged with respect to the *Agan* decision are discussed further in the context of “denial of justice” claims. *See infra* Section VII.B.3.

²⁷⁴ Magallona II (ICSID 1) (ICSID-1053), Section VI.

²⁷⁵ Magallona I (ICSID 1) (ICSID-9), paras. 42-49.

²⁷⁶ Magallona II (ICSID 1) (ICSID-1053), Sections IV-V.

²⁷⁷ Cl. Skeleton, Section III.B.3. *See* Odoni (ICSID 1), para. 39.

²⁷⁸ Rep., paras. 104-114, 131-133, 141-145.

approval, as detailed in Annex A to its Reply,²⁷⁹ including a Warranty of Legality in the ARCA.²⁸⁰

254. The other main issues of contention between the Parties related to the expropriation claims are set out below.

3. Failure to Pay Compensation

255. Fraport asserts that Respondent's failure to provide compensation for the physical taking of the Terminal is not in accordance with the BIT, as much as for the amount than for the delay in paying. Fraport was entitled to prompt compensation, the determination and the payment of which were to be made at the time of the taking. In addition, through the MFN clause in the BIT, it was entitled to "prompt, adequate and effective" compensation as included in the Danish BIT, "without due delay."²⁸¹

256. Fraport complains that it has only received a "small fraction" of the compensation to which it is due, US \$29 million to date.

257. In the event of a government taking, Philippine law provides for initial payment of the "proffered value" of the expropriated property. If the owner contests the amount of compensation, a court is supposed to determine the additional amount due, if any, within 60 days.

258. Fraport argues that the Philippines made significant efforts to avoid payment of the proffered value, refusing first to apply the correct law Act No. 8974 until the Supreme Court ruled in the *Gingoyon* decision²⁸² in December 2005 that Republic Act No. 8974

²⁷⁹ Rep., paras. 80-83.

²⁸⁰ CBII-55 (quoted in Mem., at para. 122, fn. 260); *see also generally* Niehuss I (ICSID 2).

²⁸¹ Rep., paras. 293-294.

²⁸² RE-663/ICSID-2459, *Republic v. Hon. Henrick F. Gingoyon and PIATCO G.R. No. 166429*, Dec. 19, 2005, "[...] as earlier established, this effort proved incomplete, as the 4 January 2005 *Order* did not correctly apply Rep. Act No. 8974 in several respects. Still, at least, the 4 January 2005 *Order* correctly reformed the most basic premise of the case that Rep. Act No. 8974 governs the expropriation proceedings" (p. 55).

was the correct law to apply. That decision further directed the expropriation court to determine just compensation within 60 days of the decision, *i.e.*, by March 17, 2006.

259. The Philippines are said to have only made a proffered value payment of US \$53 million to PIATCO in September 2006 (US \$29 million of which was transferred to Fraport) – 21 months after the acknowledged expropriation – after the ICC Tribunal threatened to require Respondent to return Terminal 3 to PIATCO in August 2006.²⁸³

260. Fraport also argues that Respondent has repeatedly and successfully sought to delay the proceedings in the expropriation court to determine the amount of compensation due.²⁸⁴ Despite findings by an independent board of commissioners appointed by the expropriation court that the replacement cost of Terminal 3 was approximately US \$376 million (excluding interest at 12%), the expropriation court unreasonably determined the value to be US \$175 million (with no interest due), yet ultimately awarded compensation of only US \$149 million in May 2011.²⁸⁵

261. Moreover, Respondent has continued to contest the amount and conditions of the payment of compensation to PIATCO,²⁸⁶ the Philippines placed US \$116 million in an escrow account in October 2011, which Fraport refers to as “shell game”²⁸⁷ because the holding banks are owned by Respondent and that the escrow agreements require approval of 3 conditions from Respondent’s executive branch before any money is released. The latest decision ordering payment of US \$300 million in August 2013 and confirmed in October 2013 will not be paid, as there is no final judgment of the Supreme Court yet.²⁸⁸

262. In any event, Fraport submits that the court unvalued the costs by excluding large parts of the facility, such as the shopping facilities, excluding other facilities and improvement by

²⁸³ Mem., paras. 328-331.

²⁸⁴ *Ibid.*, paras. 338-344.

²⁸⁵ *Ibid.*, paras. 345-364.

²⁸⁶ *Ibid.*, paras. 365-378; Cl. PHB1, para. 104; Cl. PHB2, para. 95.

²⁸⁷ Cl. PHB1, para. 106.

²⁸⁸ Cl. Skeleton, Section V.E; Cl. PHB2, para. 96.

PIATCO and Takenaka, deducting costs for alleged deterioration and depreciation, not including interest.²⁸⁹ The compensation model is also flawed as it is premised on a “replacement cost,”²⁹⁰ and fails to take into account (i) the investments made by Fraport and other participants in the construction, and (ii) the right acquired by PIATCO under the Concession to operate the Terminal and generate revenues.²⁹¹

263. Fraport further argues that the compensation required under Philippine law – which the Supreme Court has established in this case means payment of “replacement cost” – does not meet the BIT standard for compensation, requiring at the minimum the fair market value for the asset expropriated.²⁹²

264. Respondent responds that Fraport’s interests in PIATCO have not been deprived of all their value.²⁹³ It has made the proffered value as required by Philippine law, which is consistent with the requirements of international law, and that it maintains its commitment to pay compensation as required by its courts.²⁹⁴ Moreover, Respondent argues that PIATCO and others – but not it – are responsible for the delays in the expropriation proceedings, as set out at length in Annex E to its Counter-Memorial.²⁹⁵

4. Public Purpose

265. Fraport also argues that the expropriation was not for a public purpose; rather it was motivated by President Arroyo’s alleged interest in developing a different international airport (Clark; later, Diosdado Macapagal International Airport (“DMIA”)) in her home province that she had named after her father (the development of which was restricted per the Terminal 3 Concession Agreement), the effects of the Concession on allegedly favored

²⁸⁹ Cl. Skeleton, Section V.B.

²⁹⁰ Mem., paras. 334-337; Cl. PHB1, para. 98.

²⁹¹ Cl. Skeleton, Section V.B; Cl. PHB1, paras. 97-104.

²⁹² Mem., paras. 334-337.

²⁹³ R. PHB1, para. 177.

²⁹⁴ C-Mem., paras. 1042-1047.

²⁹⁵ *Ibid.*, para. 1048; *see also id.*, Annex E.

economic interests, such as PAL and the airport service operators, and Respondent's own financial considerations.²⁹⁶

266. For Respondent, Clark was a non-issue. Respondent argues that Fraport's investment in the Terminal 3 Project was a commercial failure, in particular that Takenaka ceased construction of Terminal 3 in November 2002 because of past-due invoices from PIATCO, rather than President Arroyo's decision not to honor the Concession.²⁹⁷

267. While commercial failure was not given as a reason for either the November 2002 decision not to honor the Concession or the May 2003 *Agan* decision declaring the Concession agreement null and void, Respondent argues (assuming the physical terminal was the only asset expropriated) that the public purpose of the expropriation was to obtain a needed terminal that PIATCO was unable to complete²⁹⁸, and was carried with due process.²⁹⁹

B. Unfair and Inequitable Treatment

268. Fraport alleges that Respondent has subjected Fraport's investments to unfair and inequitable treatment in violation of Article 2(1) of the BIT through (1) contravention of Fraport's legitimate expectations, (2) acting in bad faith, (3) denial of justice, and (4) acting without transparency.³⁰⁰

269. Respondent, as a general matter, argue that an investor who acts corruptly, in violation of host State law, and fails to honor its obligations is not protected by the FET standard.³⁰¹ It further contends that Fraport "chose an incompetent local partner with a bad reputation that

²⁹⁶ Mem., Section XXII.F.

²⁹⁷ C-Mem., Section II.G; Rej., Sections III.C.2-3, IV.C.

²⁹⁸ Rej., paras. 691-692; *see also* C-Mem., paras. 1024-1028.

²⁹⁹ R. PHB1, para. 181.

³⁰⁰ Claimant also alleges that many of these same actions constitute denial of full protection and security. *See* Mem., Section XXV. Respondent disagrees. *See* C-Mem., paras. 938-942.

³⁰¹ C-Mem., para. 908.

was engaged in corruption”³⁰² and that it made a series of bad business decision based on faulty assumptions.³⁰³

1. Legitimate Expectations

270. Fraport argues that Respondent contravened its legitimate expectations by “abruptly and unjustifiably” reversing its long-standing support for Fraport’s investment in the Terminal 3 Project³⁰⁴ and voiding the Concession when the Terminal was 98% complete.³⁰⁵ Fraport submits that its investment was sound and followed an extensive financial (with KPMG) and legal (with QT) due diligence.³⁰⁶

271. Among the bases that Fraport identifies for its expectation that the Government welcomed the investment and would “honor its commitments” and continue to support the Terminal 3 Project are:

- Representations by Philippine authorities that the requirements of the original bid process – including financial prequalification – had been duly observed;³⁰⁷
- The warranty of validity contained in the ARCA;³⁰⁸ and
- Memoranda of support from President Ramos and President Estrada.³⁰⁹

272. Respondent responds that Fraport’s expectations were not legitimate because it knew the Concession Agreement was legally defective.³¹⁰ Moreover, the ARCA warranty was invalid because of deficiencies in the process for approving it and because it was declared

³⁰² R. PHB1, para. 134.

³⁰³ *Ibid.*, paras. 143, 148-159.

³⁰⁴ Mem., para. 546.

³⁰⁵ Cl. PHB2, para. 70.

³⁰⁶ *Ibid.*, paras. 75-77, relying on Niehuss I (ICSID 2) and Niehuss II (ICSID 2).

³⁰⁷ Mem., paras. 96-100.

³⁰⁸ *Ibid.*, paras. 122-124.

³⁰⁹ *Ibid.*, paras. 131-134.

³¹⁰ R. PHB1, para. 127; R. PHB2, paras. 73-86.

void ab initio and, thus, like the rest of the ARCA never existed as a legal matter. Furthermore, Fraport could not rely on PBAC's representations because they were made to a third party, and not to its benefit, and, regardless, were made with allegedly-corrupt official Pantaleon Alvarez's involvement. Nor could it rely on the presidential memoranda, which were directed at the Terminal 3 Project in general, rather than PIATCO's Concession or Fraport's investment, and pre-dated knowledge of Fraport's alleged wrongdoing.³¹¹

2. Bad Faith

273. Fraport argues that Respondent has acted in bad faith by means of "coercion and harassment" of Fraport's officials and counsel, including:

- Fabricating charges of corruption against individuals associated with Fraport, when no Philippine official has been charged;
- Reviving of baseless ADL charges after many years' delay, in response to the annulment of the ICSID 1 Award in order to manufacture a defense for this arbitration;
- Persecuting Fraport's local arbitration counsel with charges based on statements made during the ICSID 1 arbitration;
- Attempting to coerce Fraport into renegotiating the terms of its investment, demanding to oust the Chengs, and pretending to negotiate with Fraport in good faith, via Secretary Climaco, while planning to seek the nullification of the Concession;
- Misusing police and prosecutorial resources to harass Fraport and manufacture a defense for this arbitration, rather than bona fide criminal investigations;
- Failing to pay compensation due for the expropriation of Terminal 3;

³¹¹ C-Mem., paras. 933-935; R. PHB1, paras. 127-132.

- Mischaracterizing the failure of its requests of Germany for mutual legal assistance to the ICSID 1 Tribunal, suggesting that Fraport was at fault and had something to hide.³¹²
- And generally, “misusing its sovereign power by prosecuting Fraport’s employees and international counsel for the express purpose of gaining an advantage in the arbitration as well as Philippine counsel.”³¹³

274. Fraport also claims that Respondent through Secretary Climaco treated Fraport unfairly and inequitably.³¹⁴

275. Respondent responds that:

- Its inability to achieve corruption convictions does not indicate that the charges were fabricated and, in particular, it was hampered from using the evidence available to it by confidentiality agreements from the first ICSID proceedings and the ICC arbitration.
- The timing of ADL charges was dictated by private complainants and, regardless, Fraport violated the ADL.
- The libel complaints were filed by private parties, whose actions cannot be attributed to Respondent.
- Respondent did not mislead German authorities in its requests for mutual legal assistance and, therefore, property characterized these requests to the ICSID 1 Tribunal.
- Fraport has not shown that Climaco was planning to seek nullification of the concession, nor that it was bullied into terminating its investment, which it lost because of its own illegality.
- Respondent has never denied its obligation to pay compensation due, once properly determined.³¹⁵

³¹² Mem., para. 549.

³¹³ Cl. PHB2, para. 235.

³¹⁴ *Ibid.*, paras. 79-87.

³¹⁵ C-Mem., paras. 914-917; R. PHB2, para. 87.

3. Denial of Justice

276. Fraport argues that the Supreme Court's decision in *Agan* constitutes a procedural and substantive denial of justice. It alleges that the proceedings suffered from the following procedural infirmities:

- The Court had no basis for its exercise of jurisdiction. According to Fraport, Section 2 of Rule 65 of the Philippine Rules of Court, relied upon by the *Agan* petitioners, provides for the court to prohibit further proceedings, which was not actually the relief sought (or ordered).
- Petitioners' allegations rested upon issues of fact, whereas Rules 65 may only be invoked to decide issues of law or grave abuses of discretion related to the lack of jurisdiction.
- The Supreme Court decided, improperly and without any legal basis, that it had original jurisdiction over the matter due to "extraordinary circumstances," when the validity of contracts are normally issues to be addressed at the trial court level.
- The Supreme Court improperly decided to waive requirements of standing, despite recognizing that the petitioners lacked standing to bring a case,
- President Arroyo publicly announced the decision not to honor the Terminal 3 Concession 10 days before oral arguments, thus improperly exerting political pressure on the judiciary.³¹⁶

277. Fraport further alleges that the *Agan* decision is substantively unjust for the following reasons:

- The Court improperly reversed the DOTC Prequalification, Bids, and Award Committee's earlier determination that PIATCO was qualified to be awarded the Terminal 3 Concession without extending it any deference, discussing the factual circumstances considered, or articulating a standard of judicial review to PBAC's fact finding or application of the law to those facts, which is inconsistent with the requirements of Philippine law.
- The Court failed to consider the doctrine of estoppel as applied to Fraport and PIATCO's reliance on the assurances of Philippine officials.³¹⁷

³¹⁶ Mem., para. 561; *see also* Mem., Section XVI.F. Cl. PHB1, para. 236.

278. Fraport further claims that failure to remit compensation for expropriation after nearly 11 years constitute a denial of justice.

279. Respondent responds both that Fraport's allegations fail to rise to the level of denial of justice and, regardless, the *Agan* proceedings and decision was proper, relying on Justice Mendoza's opinion.³¹⁸

4. Lack of Transparency

280. Fraport argues that Respondent has failed to act transparently in withdrawing its support for the Terminal 3 Project for improper and idiosyncratic reasons,³¹⁹ as well as by shifting its legal positions on the validity of the concession agreements in a manner that Fraport could not have predicted.³²⁰

281. Respondent responds that its withdrawal of support was due to the various legitimate grounds that formed the basis for the DOJ's position and the *Agan* decision. Similarly, Fraport should have known of the Government's interest in developing Clark Airport/DMIA, which was referenced in the original Bid documents, and improperly excluded the from Terminal 3 concession agreements.³²¹

C. Impairment by Arbitrary and Discriminatory Measures

282. Fraport alleges that Respondent's reversal of support for the Terminal 3 Concession and the changes of position in regard to the validity of the concession agreements,³²² followed by the *Agan* decision also constituted impairment through arbitrary measures in breach of Article 2(2) of the BIT.³²³ Fraport further alleges that the Government's reversal of

³¹⁷ Mem., para. 564.

³¹⁸ C-Mem., paras. 984-997; R. PHB1, paras. 160-166; R. PHB2, paras. 88-94.

³¹⁹ Mem., paras. 189-194, 199-200.

³²⁰ *Ibid.*, para. 569.

³²¹ C-Mem., para. 924.

³²² Cl. PHB2, para. 99.

³²³ Mem., paras. 581-588.

support – motivated in part by a preference for local interests, including PAL and MASO – and the digression from established procedural rules in *Agan* constituted impairment by discriminatory measures.³²⁴

283. It also alleges persecution and harassment by Respondent since the filing of the 2003 first ICSID request for arbitration.³²⁵

284. Respondent argues that the complained of acts were proper – and, therefore, not arbitrary or discriminatory, but grounded in law³²⁶ – for the same reasons discussed elsewhere. Likewise, Fraport has also not shown that it was discriminated against because of its status as a foreign investor.³²⁷

D. Failure to Afford Full Protection and Security

285. Fraport argues that Respondent had the objective obligation to afford full protection and security under Article 4(1) of the BIT, and not to invoke its own legislation to detract from such an obligation.³²⁸ Interference of the Executive with the Judiciary violates a State’s obligation. Such an obligation applies to non-physical harm, such as economic and legal protection, and to harm caused by the State itself.³²⁹

286. For Respondent, to the extent that full protection and security would differ from FET, it only applies to physical harm caused by a third party or to failure to provide legal protection through domestic courts.³³⁰ In this case, none of the acts complained of are due to any alleged failure by Respondent to exercise due diligence to protect Fraport’s investment against harm caused by a third party (domestic proceedings having been initiated by private parties). It further contends that Fraport does not complain that the

³²⁴ Mem., paras. 593-599.

³²⁵ Cl. PHB2, para. 103.

³²⁶ R. PHB1, para. 186; R. PHB1, paras. 167-171.

³²⁷ C-Mem., paras. 949-971; R. PHB1, para. 187.

³²⁸ Mem., para. 602.

³²⁹ Rep., paras. 432-435.

³³⁰ C-Mem., paras. 939-943.

Philippine judicial system was not available³³¹, and while it could have, it declined to participate in the *Agan* and the expropriation proceedings.

E. Breach of Umbrella Clause

287. Fraport further alleges that Respondent breached its obligation to honor the Terminal 3 concession agreements with PIATCO, which Fraport is entitled to see respected (as a shareholder of PIATCO and based on its interest in the concession agreements) through the umbrella clause under Article 3(5) of the BIT,³³² and should be estopped from denying the validity of the agreements.³³³

288. Respondent argues that Fraport may not invoke the umbrella clause, as it was not a party to the contracts at issue. Moreover, as a result of the *Agan* decision, there was no valid contract for Respondent to observe.³³⁴

289. As to estoppel, Respondent argues that it does not apply under either Philippine or international law.³³⁵ Regardless, Respondent argues that it did not induce Fraport's investment and that any reliance on governmental representations were not reasonable, because Fraport's due diligence did or should have put it on notice of the legal problems with the Terminal 3 Concession.³³⁶

³³¹ C-Mem., para. 942; R. PHB1, paras. 188-191.

³³² Cl. PHB1, para. 85.

³³³ Mem., Section XXVI.

³³⁴ C-Mem., Section III.I.

³³⁵ *Ibid.*, paras. 1075-1082.

³³⁶ *Ibid.*, paras. 1084-1094.

F. Compensation under Theories of Unjust Enrichment and *Quantum Meruit*

290. Fraport also argues that, in the event that the Tribunal determines that it did not suffer an unlawful expropriation, it should still be awarded compensation under the general principles of unjust enrichment and *quantum meruit*.³³⁷

291. Respondent replies that these are not grounds for recovery in international law and, regardless, Fraport's claims are precluded by its "unclean hands."³³⁸

V.III THE PHILIPPINES' COUNTERCLAIMS

292. Respondent makes twelve separate counterclaims against Fraport,³³⁹ many premised on the theory that the inability of Terminal 3 to become operational by the end of 2002 is attributable to Fraport (or PIATCO):

- Counterclaims Nos. 1 through 3 involve various costs associated with completing or remediating aspects of Terminal 3 in accordance with the original Bid documents.
- Counterclaim No. 4 is for lease payments and real-estate taxes for the land where Terminal 3 is located incurred by Respondent for which PIATCO would have been responsible upon the Terminal becoming operational.
- Counterclaim No. 5 is for the tax benefits that Fraport received from Terminal 3's Special Economic Zone status, which was intended to benefit only "legitimate investment."
- Counterclaim No. 6 is for all costs associated with administering PIATCO's bid and the Concession, including costs associated with challenges to PIATCO's pre-qualification.
- Counterclaims Nos. 7 and 8 are for lost revenue and other "economic and social opportunities" caused by the failure of the Terminal to become operational as of January 1999.

³³⁷ Mem., Section XXVII.

³³⁸ C-Mem., paras. 1097-1105.

³³⁹ *Ibid.*, Section IV.

- Counterclaims No. 9 through 11 are for set-offs against any Award rendered in favor of Fraport by (i) the amounts owed to Respondent under the above counterclaims, (ii) the amount of bribes paid by Fraport, any fines or penalties imposed by Philippine courts against Fraport, and the amount of Fraport’s “ill-gotten gains,” and (iii) the amount of compensation awarded to PIATCO by the Philippine expropriation court.
- Counterclaim No. 12 is a request for costs and legal expenses.

293. Respondent argues that the Parties consented to arbitrate the counterclaims under Article 9 of the BIT which refers to “all kinds of divergencies [...] concerning an investment,”³⁴⁰ and that that the close factual connection between the original claim and the counterclaims make them arising directly out of the subject matter of the dispute for the purpose of Arbitration Rule 40(1).³⁴¹

294. Fraport, in response, argues that the Tribunal lacks jurisdiction over these counterclaims, as it did not consent to arbitrate those counterclaims under the BIT which only extends to claims advanced by the investors.³⁴² It further submits that the counterclaims do not arise directly out of the subject-matter of the dispute, and arise only under Philippine law and not the BIT.³⁴³ It further considers that it is not the proper party against whom to bring the counterclaims, that certain of the counterclaims are not properly counterclaims, that Respondent is re-litigating claims it lost in the ICC arbitration against PIATCO, *and* that all of the counterclaims fail on the merits.³⁴⁴

³⁴⁰ R. PHB1, paras. 210-213.

³⁴¹ *Ibid.*, paras. 214-221.

³⁴² Rep., Section XIV.A; Cl. PHB1, paras. 245-250.

³⁴³ Cl. PHB1, para. 230.

³⁴⁴ Rep., Section XIV.B; Cl. PHB1, para. 251.

VI. JURISDICTION

A. Governing Law and Burden of Proof

295. Having duly considered the Parties' position regarding "governing law" and "burden of proof,"³⁴⁵ the following principles shall be applied by the Tribunal in order to determine whether it has jurisdiction, considering that only jurisdiction *ratione materiae*, not the one *ratione personae* or *ratione temporis*, is in dispute.

296. In this case, there is no disagreement between the Parties with respect to the nationality of the investor, or that, as a general matter, the BIT contains Respondent's consent to the submission of disputes over "investments" to ICSID arbitration. Respondent, however, objects that the Tribunal lacks jurisdiction over the dispute because Fraport allegedly acted unlawfully in making and implementing its investment.

297. The notion of "investment" is central to the determination of jurisdiction *ratione materiae*. Article 25(1) of the ICSID Convention provides:

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

In the absence of any definition of "investment" under the ICSID Convention, the BIT and international law, as the law governing the BIT, assume relevance to establish jurisdiction *ratione materiae*.

298. The BIT refers to "investment" in Article 1 (Definition of Terms) as follows:

For the purpose of this Agreement:

1. [T]he 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:

³⁴⁵ Mem., paras. 493-515; C-Mem., paras. 752-772; Rep., paras. 281-284; Rej., paras. 482-510.

- (a) movable and immovable property as well as other rights in rem, such as mortgages, liens, ledges, 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, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and goodwill;
- (e) business concessions conferred by law or under contract, including concessions to search for, extracts or exploit natural resources;

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

In addition, the Tribunal shall apply provisions of Philippine law to the extent the latter establishes conditions that are relevant for determining its jurisdiction, whether or not the BIT makes reference to such provisions.

299. Regarding burden of proof, in accordance with the well-established rule of *onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense.³⁴⁶ Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections. The Tribunal accepts that if Respondent adduces evidence sufficient to present a *prima facie* case, Claimant must produce rebuttal evidence,³⁴⁷ although Respondent retains the ultimate burden to prove its jurisdictional objections.

³⁴⁶ *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, Dec. 16, 2002, para. 177; *Temple of Preah Vihear*, Judgment of June 15, 1962, ICJ Reports at 15-16.

³⁴⁷ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, paras. 323-324, referred to by Respondent, C-Mem., paras. 766-768.

B. The “Investment” under the BIT

1. The Parties’ Positions

1.1 Respondent’s Position

300. The essence of Respondent’s jurisdictional objections is that the BIT contains an explicit or implicit requirement that the investor comply with the laws and regulations of the host State with respect to its investment and that Fraport failed to do so. The BIT is limited in its application to investments accepted in accordance with host State law. Since Claimant’s investment was made in violation of the Philippine ADL and because its investment was in an enterprise that had been awarded concession agreements in violation of the Philippine BOT law, its investment falls outside of the BIT’s protection also as a result of Fraport’s corruption and fraud.³⁴⁸

301. In essence, Respondent contends that Claimant’s investment was not “accepted” in accordance with the laws of the Philippines under Article 1(1) of the BIT. Article 1(1) defines an “investment” as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [...]” Therefore, according to Respondent in order to benefit from the BIT’s protection Claimant must demonstrate that its investment complied with Philippines law and regulations.³⁴⁹

302. According to Respondent, a legality restriction is provided by other provisions of the BIT.³⁵⁰ Thus, with regard to “Promotion and Acceptance” of investments, Article 2(1) provides that “[e]ach Contracting State shall promote as far as possible investments in its territory [...] and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1. [...]” Likewise, Article 3(3) provides that each Contracting State shall apply the most favored nation treatment regarding investments “which are made in accordance with the legislation of that Contracting State.”

³⁴⁸ C-Mem., para. 773; R. PHB1, para. 62.

³⁴⁹ *Ibid.*, para. 776.

³⁵⁰ *Ibid.*, para. 780.

303. When parties to the BIT wished to refer to registration requirements they did so specifically, as in Article 5(1) requiring the host State to guarantee free transfer of payment regarding investments “which have been duly registered by its appropriate government agencies if so required.” Additional references to legality requirements are contained in the Protocol to the BIT, which “forms an integral part” of the BIT,³⁵¹ while other Articles of the Protocol refer to registration requirements, which reference would be redundant if Article 1(1) only referred to a registration regime as suggested by Claimant.³⁵²
304. According to Respondent, even if the BIT did not expressly require that investments comply with host State law to qualify for treaty protection, the Tribunal should decline jurisdiction on account of illegality of the investment. It refers to the legal opinion of Professor Dolzer, who observes that the fundamental aim of the ICSID Convention “is to promote the rule of law in the area of foreign investment”³⁵³ so that “unlawful investment will not be enforced by an international tribunal even if the relevant BIT contains no clause on domestic conformity.”³⁵⁴ The same view is expressed by Professor Schreuer,³⁵⁵ another legal expert for Respondent.
305. In Respondent’s view, other tribunals have confirmed that claims based on illegal investments cannot be protected even in the absence of a specific clause of the relevant treaty requiring compliance with host State’s law. Reference is made by Respondent to *Phoenix Action v. Czech Republic*, holding that “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their law,” and to *Hamester v. Ghana* holding the same with reference to *Phoenix*.³⁵⁶ Fraport’s reference to *EDF International and others v. Argentina* is wrong since this case stands for

³⁵¹ C-Mem., para. 782.

³⁵² *Ibid.*, para. 784.

³⁵³ Dolzer II (ICSID 2), para. 97.

³⁵⁴ *Ibid.*, para. 78.

³⁵⁵ C-Mem., para. 802 and fn. 1747.

³⁵⁶ *Phoenix*, Award, para. 101; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case. No. ARB/07/24), Award, June 18, 2010 (“*Hamester*, Award”), paras. 123-124; both cited in C-Mem., paras. 803-804 and Rej., para. 579.

the opposite proposition by holding that “the requirement of not having engaged in a serious violation of the legal regime is a tacit condition inherent in every BIT [...]”³⁵⁷

306. Fraport’s argument that Article 1(1) does not create a legality requirement as it contains the word “accepted” rather than “made”³⁵⁸ is flawed as it assumes that an investment “made” in violation of host State law can nevertheless be “accepted in accordance with the respective laws and regulations” of that State.³⁵⁹ Contrary to Fraport’s view that the object and purpose of the BIT is “enshrined in its preamble,” having therefore regard to the promotion of investment with no new barriers to BIT protection,³⁶⁰ the promotion of investment in such object and purpose must consider the entirety of the BIT provisions.³⁶¹
307. In conclusion, since according to Respondent Article 1(1) requires covered investments to comply with host State law, the Tribunal should decline jurisdiction over Claimant’s claims because “Fraport’s investment was a violation of the Philippine Anti-Dummy Law and was an investment in an enterprise that obtained its concession in violation of the Philippine law.”³⁶²

1.2 Claimant’s Position

308. According to Claimant, contrary to Respondent’s afterthought argument contrived to evade its compensation obligations, the investments made by it meet at all times the requirements of the BIT, are legal under Philippine law and were accepted, indeed encouraged, by the Philippine Government.³⁶³
309. According to Article 31(1) of the Vienna Convention on the Law of Treaties (the “VCLT”), to which both Germany and the Philippines are parties, Article 1(1) of the BIT

³⁵⁷ C-Mem. paras. 805-806.

³⁵⁸ Rep., paras. 591-603.

³⁵⁹ *Ibid.*, para. 536.

³⁶⁰ *Ibid.*, para. 517.

³⁶¹ *Ibid.*, para. 567.

³⁶² C-Mem., para. 808.

³⁶³ Mem., para. 644.

must 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.”³⁶⁴

310. The ordinary meaning of the term “accepted,” when modified by “in accordance with the respective laws and regulations,” means permission to the Philippines to put in place laws and regulations to regulate its acceptance of assets as investments.³⁶⁵ This meaning is consistent with the object and purpose of the BIT, which is the encouragement and protection of investments, as made clear by the Preamble.³⁶⁶ It is also consistent with the context of the BIT, which provides for specific narrow reservation in the Protocol that did not apply to Claimant’s investment.³⁶⁷

311. Other articles of the BIT confirm that Ad Article 1(1) is concerned only with the admission of investments, such as Article 2(1) which was included at the instigation of the German Government to reflect that all investments that have been admitted are protected investments.³⁶⁸ Likewise, Article 5(a) of the Protocol expressly envisages an acceptance and registration regime by providing that “it is understood that duly registered investments are assets of any kind as defined in Article 1, admitted in accordance with Article 2(1) and reported to competent governmental agencies at the time the investment was made.”³⁶⁹

312. An acceptance regime is provided by other treaties concluded by the Philippines using the same wording of Article 1 of the BIT, such as the Italy-Philippines BIT.³⁷⁰ By contrast, other treaties concluded by the Philippines expressly provide for the requirement of compliance with Philippine law as a condition to jurisdiction.³⁷¹

³⁶⁴ Mem., para. 645.

³⁶⁵ *Ibid.*, para. 646; *see also* Rep., paras. 590-596.

³⁶⁶ Sur-Rej., para. 205.

³⁶⁷ Mem., para. 647; *see also* Rep., paras. 598-601 and Sur-Rej., paras. 208-212 for reference to the “context” of the BIT.

³⁶⁸ *Ibid.*, para. 649.

³⁶⁹ *Ibid.*, paras. 653-655.

³⁷⁰ *Ibid.*, para. 651.

³⁷¹ Such as the Philippine-Romania BIT, which omits the word “accepted”: Mem., paras. 656-657.

313. Also the *travaux préparatoires*, considered by Respondent to be “often unreliable,”³⁷² confirm that the treaty language of Article 1(1) was meant to be an admittance requirement, not a legality requirement, as shown by the exchange of Notes Verbale (*sic*) between the two Governments in the course of 1995.³⁷³
314. Respondent’s attempt to read into the BIT a legality requirement that is not there has been rejected by other tribunals, for example, in *EDF International and others v. Argentina* where the tribunal agreed with the claimant that where a BIT does not explicitly provide that an investment must be made “in accordance with the laws” of the host State no legality clause may be read into the treaty for purpose of admission of an investment.³⁷⁴
315. Neither of the cases referred to by Respondent dealt with provisions similar to or relevant for an interpretation of the meaning of Article 1(1) of the BIT.³⁷⁵
316. According to Claimant, the only possible requirement that may be imposed on an investor for purposes of jurisdiction is that its investment “is reported to competent governmental agencies” at the time it is made, as provided by Ad Article 5(a) of the BIT Protocol.³⁷⁶
317. Article 3(3) of the BIT imposes on the investors rather than the Contracting State an obligation of conformity with the host State’s legislation of investments made by them as a condition for an investor to be eligible for MFN treatment. According to Claimant, this position is instructive for two reasons. First, because it confirms the conscious use of the word “accepted” instead of “made” in Article 1(1), which is instrumental to its interpretation. Second, since the legality of the investment is required for the MFN protection this means that in any other respects protection of the treaty is granted if the

³⁷² C-Mem., para. 790.

³⁷³ Mem., para. 661; Rep., paras. 619-622; Sur-Rej., paras. 220-221.

³⁷⁴ Mem., para. 663; *EDF International S.A., SAUR International S.A. and Léon Participaciones S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, June 11, 2012 (CA-99) (“*EDF and others*, Award”), paras. 304-307.

³⁷⁵ Rep., paras. 609-611.

³⁷⁶ *Ibid.*, para. 586.

investment is accepted.³⁷⁷ Article 8 of the BIT provides confirming context when requiring conformity with host State’s legislation only for BIT protection of “investments made prior to its entry into force.”³⁷⁸

318. In conclusion, Claimant contends that an investment will not receive the BIT protection under Article 1(1) either if it was not accepted by the host State or if the State’s acceptance was not in accordance with its “respective laws and regulations.” This is not the case in the present dispute considering that Claimant’s investments “were accepted by the highest levels of the Philippine Government”³⁷⁹ and that such acceptance was in accordance with all relevant laws and regulations, considering that Respondent does not impose specific admittance or registration requirements on investments in shares or in the form of loans or guarantees.”³⁸⁰

2. The Tribunal’s Analysis

319. The overview of the Parties’ position regarding the issue of jurisdiction conducted so far, although not meant to be exhaustive of the respective arguments, is sufficient to evidence their fundamental disagreement on the scope of Article 1(1) of the BIT and the consequence for the Tribunal’s jurisdiction.

320. According to Claimant, Article 1(1) was intended by both parties to the Treaty to be an admittance clause, with the consequence that since its investments had complied with any registration or admission requirement under the laws and regulations of the Philippines, the Tribunal has jurisdiction to hear the case.³⁸¹ According to Respondent, Article 1(1) is a legality requirement, with the consequence that since Claimant’s investment were made in violations of the host State’s law the Tribunal lacks jurisdiction *ratione materiae* should such violation be established.

³⁷⁷ Rep., paras. 603-606.

³⁷⁸ *Ibid.*, para. 608.

³⁷⁹ *Ibid.*, para. 485.

³⁸⁰ *Ibid.*, paras. 623-625; Sur-Rej., para. 197.

³⁸¹ This is also because, according to Claimant, “the alleged anti-dummy violations – which even Respondent admitted were cured – are not factually related to Fraport obtaining its shares;” Sur-Rej., para. 248.

321. Turning to Article 1(1) of the BIT, which is at the core of the Parties' disagreement, the Tribunal's analysis must be conducted applying the rules for treaty interpretation under the VCLT. According to Article 31(1) of the VCLT

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.

322. Article 1(1) of the BIT provides, in relevant part, that "the term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State [...]"

323. Regarding the "ordinary meaning" of the term "accepted" in Article 1(1), the Tribunal concurs with Respondent's reference to the meaning of the term according to the Oxford Dictionary as "satisfactory," "acceptable" and "generally recognized as correct or valid."³⁸² However, any forms of acceptance, to be valid, must be "in accordance with the laws and regulations" of the host State and this supports the interpretation of Article 1(1) favoring the requirement that investments, to be accepted, must comply with the host State's law. In other words, the reading of the whole sentence in Article 1(1) legitimates the interpretation that is not the act of acceptance that has to conform to the host State's law but that the investment to be accepted must comply with such law.³⁸³

324. Regarding the "context," other provisions of the BIT confirm the legality requirement for an investment to be accorded the BIT protection. Thus, Article 2(1) provides that each Contracting State, in addition to promoting investments in its territory, shall admit them "in accordance with its Constitution, laws and regulations, as referred to in Article 1 paragraph 1." Once again, to admit investments in accordance with the Constitution, laws

³⁸² C-Mem., para. 778.

³⁸³ Particularly in the case, like the present one, where the host State has no specific rules governing the acceptance (in the sense of admission) of foreign investments.

and regulations may only be interpreted to mean that investments, to be admitted to the BIT protection, must conform to the host State's law.³⁸⁴

325. Reference to investments "made in accordance with" or "consistent with" the host State's legislation is made by Article 3(3) and Article 8 of the BIT, respectively to grant MFN treatment to investment and to extend the BIT protection also to investments made prior to the BIT entry into force. Requiring compliance with host State's law only limited to these two situations may be hardly reconciled with the repeated references in the BIT to the host State's law, pointing rather to a general requirement of compliance with such law for an investment to be accorded the BIT protection.

326. As mentioned by Respondent, investment registration is expressly required by the BIT in certain cases. This is the case of Article 5(1) for the "guarantee of free transfer of payments in connection with investments." This is also the case of Ad Article 5(a) of the Protocol defining, which are duly registered investments for the Philippines. In the Tribunal's view, nothing would have prevented the Contracting States from using the same language in Article 1(1), had they intended that provision to be an admittance clause.

327. The Tribunal also refers to the Philippines' Instrument of Ratification to the BIT, which the Tribunal considers both States to have accepted "as an instrument related to the treaty" in the Protocol of Exchange of the Instruments of Ratifications of the BIT, and which therefore constitutes part of the "context" under Article 31(2)(b) of the VCLT. With relative clarity, that Instrument of Ratification states that the "Agreement shall be in areas *allowed by and in accordance with the Constitution, laws and regulations of each of the Contracting Parties.*"³⁸⁵

328. Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international

³⁸⁴ Considering also that a State's Constitution does not normally regulates the process of admission of investments in its territory, as it is the case of the Philippine Constitution (CBII-6).

³⁸⁵ C-Mem., para. 785 (italics in the quote).

law, such as the “clean hands” doctrine³⁸⁶ or doctrines to the same effect.³⁸⁷ One of the first cases having ruled on this issue, *Inceysa v. El Salvador*, has held that “because Inceysa’s investment was made in a manner that was clearly illegal, it is not included in the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre.”³⁸⁸

329. Cognizant that the good faith interpretation of a treaty encompasses the principle of *effet utile*, however, the Tribunal does not regard it as appropriate to treat the term “accepted” as surplusage. Rather, recalling that the ordinary meaning of the term “accepted” includes “received,” the Tribunal considers that “accepted” refers to the point in time when the

³⁸⁶ “A party who asks for redress must present himself with clean hands,” American Commissioner Hassaurek, Ecuadorian-United States Claims Commission (1862), cited by Bing Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1953, p. 156.

³⁸⁷ Identified by Latin maxims such as “*ex injuria jus non oritur*,” “*nemo auditur propiam turpitudinem allegans*” or “*ex dolo malo non oritur action*.”

³⁸⁸ *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, Aug. 2, 2006, para. 257. A series of other cases have consistently applied the requirement of legality of investments and declined accordingly jurisdiction in case of investment made in violation of the host State’s law;

Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24), Award, Aug. 27, 2008, para. 139: “[...] the ECT should be interpreted in a manner consistent with the aim of encouraging respect of the rule of law. The Arbitral Tribunal concludes that the substantive provisions of the ECT cannot apply to investments that are made contrary to law”;

Phoenix, Award, para. 101: “States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host Stat and cannot be protected through an ICSID arbitral process. And it is the Tribunal’s view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT”;

Hamester, Award, paras. 123-124: “An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law (as elaborated, *e.g.* by the tribunal in *Phoenix*). These are general principles that exist independently of specific language to this effect in the Treaty”; and

SAUR International v. Argentine Republic (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, June 6, 2012 (“SAUR, Decision”), para. 306: “The requirement of not having engaged in a serious violation of the legal regime is a tacit condition, inherent in every BIT, since it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to reach that protection, has committed an unlawful action” [translated from the French original].

investment is received in the host State, or, in other words, at the time the investment is made.

330. This understanding is supported by the use of the term “*zugelassen sind*” in the German text of Article 1(1).³⁸⁹ As Claimant explained, “*zugelassen sind*” is the passive participle of the verb “*zulassen*,” meaning “to “accept” *or* “to admit.”³⁹⁰ Thus, the German text is, at the very least, consistent with the Tribunal’s view that Article 1(1) refers to the admission of the investment, a well-known concept in international investment law. Indeed, the English text of the BIT also does not clearly differentiate between acceptance and admission. While Article 2 of the BIT is entitled “Promotion and Acceptance,” the text of Article 2(1) refers instead to the “promot[ion]” and “admi[ssion]” of investments. In the German version of Article 2, the references to both “[a]cceptance” and “admi[ssion]” use forms of the verb “*zulassen*,” the same term used for “accepted” in Article 1(1).

331. For these reasons, the Tribunal disagrees with Claimant’s contentions that the phrase “accepted in accordance with the [host State’s] laws and regulations,” as used in Article 1(1), simply contemplates a potential regime for regulation of the admission of foreign investment. Rather, the Tribunal finds that the use of this phrase limits the scope of “investment” in the BIT to investments that were lawful under (*i.e.*, “in accordance with”) the host State’s laws and regulation *at the time the investments were made*.

332. The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.³⁹¹

³⁸⁹ The BIT provides that the German, Filipino, and English texts are all authentic versions of the treaty, although in the case of conflict, the English text prevails.

³⁹⁰ Rep., para. 591.

³⁹¹ See, e.g., *EDF and others*, Award (CA-99), para. 308: “La condition de ne pas commettre de violation grave de l’ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu’un État offre le bénéfice de la protection par un arbitrage d’investissement si l’investisseur, pour obtenir cette

333. In light of the foregoing analysis, the Tribunal concludes that Article 1(1) of the BIT requires that an investment comply with the laws of the host State at the time it is made in order to be accorded protection under the BIT. The Tribunal's assessment of Respondent's jurisdictional objections will therefore focus on the time of entry of Claimant's investment.

C. Respondent's Jurisdictional Objections

1. Introduction

334. Based on the foregoing conclusion regarding the requirement of legality of investments to found the Tribunal's jurisdiction *ratione materiae*, the Tribunal shall now proceed to analyze the Parties' arguments regarding Respondent's jurisdictional objections. Before doing so, the following issues have to be determined, namely

- (a) which of Claimant's "investments" are to be considered for jurisdictional purposes;
- (b) which are Respondent's jurisdictional objections.

335. Regarding issue (a), according to Claimant's most recent submission on the subject

Fraport's investments in the NAIA IPT 3 Project span a period of several years, from 1999 and ending in 2002-2203. A report prepared by PricewaterhouseCoopers ("PWC") and submitted with the Memorial set forth the investment made by Fraport per years. Fraport made several types of investments, as defined under Article 1 of the BIT. The BIT states that investments include "shares of stock and debentures of companies or interest in the property of such companies". Fraport's investments include (1) equity investments in PIATCO and in a "cascade" of Philippine companies that have ownership interests in PIATCO; (2) loans to PIATCO and the cascade companies; (3) payments to Takenaka and the Project lenders specifically for the construction of the Terminal (resulting, *inter alia*, in subrogation rights); and (4) services rendered. Fraport's investments also include Fraport's

protection, a *agi à l'encontre du droit*" (translated in Schreuer-Kriebaum-Binder I (ICSID 2), fn. 81 as "The condition of not committing a grave violation of the legal order is a tacit condition of any BIT, because in any event it is incomprehensible that a State would offer the benefit of protection through investment arbitration if the investor, in order to obtain such protection, has acted contrary to the law").

interest both in the concession and the Terminal building itself, as these constitute “interest in the property” of PIATCO.³⁹²

The list of investments indicated by Claimant being not disputed by Respondent, the Tribunal shall consider that Claimant’s investments are so identified.

336. Regarding issue (b), based on Respondent’s most recent submission on the subject, three objections are raised regarding jurisdiction and admissibility by reason of Fraport’s violation of Philippine law in the making and/or implementation of its investment:³⁹³

- (i) Fraport violated the Anti-Dummy Law³⁹⁴ (hereinafter “Jurisdictional Objection 1”);
- (ii) Fraport engaged in Corruption and Fraud³⁹⁵ (hereinafter “Jurisdictional Objection 2”);
- (iii) Fraport knew of PIATCO’s Misrepresentations to obtain the Concession Award³⁹⁶ (hereinafter “Jurisdictional Objection 3”).

337. At the jurisdictional level, the Tribunal’s analysis shall be limited to those of Respondent’s objections that relate to the period of time until when Fraport made initially its investments as identified above, *i.e.* “the equity investments in PIATCO and in a ‘cascade’ of

³⁹² Cl. PHB1, para. 56 (footnotes omitted).

³⁹³ R. PHB2, para. 2. The Tribunal notes that in an attachment to its PHB1 dated Mar. 3, 2014, Respondent worded its questions within the meaning of Article 48(3) of the ICSID Convention regarding jurisdiction and admissibility as follows:

- Question 1 Does the BIT require a covered investor to comply with host State law in making, acquiring, or implementing its investment? Does the ICSID Convention apply to disputes arising directly out of an investment made, acquired, or implemented unlawfully?
- Question 2 Did Fraport violate Philippine Nationality laws and/or the Anti-Dummy Law in making, acquiring, or implementing its investment in the Philippines?
- Question 3 Did Fraport make, acquire, or implement its investment by participating in corrupt and/or fraudulent schemes?
- Question 4 Was Fraport’s investment made, acquired, or implemented in reliance on a concession that was obtained by its local partner through fraudulent misrepresentations?
- Question 5 Does this ICSID Tribunal have jurisdiction over Fraport’s claims?
- Question 6 Are Fraport’s claims inadmissible?

Claimant’s questions to the Tribunal within the same meaning are set out in C. PHB1, Chapter IX.

³⁹⁴ R. PHB2, paras. 14-51.

³⁹⁵ *Ibid.*, paras. 52-66.

³⁹⁶ *Ibid.*, paras. 67-70.

Philippine companies that have ownership interests in PIATCO”³⁹⁷ as well as those of Fraport’s other investments that are contemporaneous with said equity investment³⁹⁸ or that derive indirectly from the initial “equity investment in PIATCO”³⁹⁹ (all these investments being hereinafter collectively referred to as “Initial Investment”). Due to the contemporaneity and interdependence of the individual investments, the Initial Investment is to be considered as a unit, despite its different components.

338. In the Tribunal’s view, the essence of Fraport’s investment was its interest in the Terminal 3 Concession. Indeed, the objective of Fraport’s Initial Investment in mid-1999 was to gain an interest in the Terminal 3 Concession initially and, later, to keep the Terminal 3 Project afloat. With its initial equity investments, Fraport obtained a bundle of rights in the Terminal 3 Concession (including in PIATCO, the concession company) which cannot be disentangled from each other. Fraport’s subsequent investments were all dependent upon and ancillary to these initial rights, which remained materially unchanged as a result of the later-in-time loans, payments, and so forth.

2. Jurisdictional Objection 1: Fraport Violated the Anti-Dummy Law

2.1 Introduction to the Anti-Dummy Law

339. The Philippine Constitution restricts operation of a public utility (which the Parties agree includes Terminal 3) to Philippine citizens or corporations established under Philippine law of which at least 60% of whose capital is owned by Philippine citizens. Specifically, Article XII, Section 11 provides that:

No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens. [...] The participation of foreign investors in the governing body of any public utility

³⁹⁷ Cl. PHB1, para. 56 under (1).

³⁹⁸ Such as “loans to PIATCO and the cascade companies,” *ibid.*, under (2).

³⁹⁹ Such as “Fraport’s interest both in the concession and the Terminal building itself,” deriving from the acquisition of an equity interest in PIATCO, *ibid.*, at the end.

enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.⁴⁰⁰

340. The Anti-Dummy Law⁴⁰¹ was originally enacted in 1936 and subsequently amended on multiple occasions. Formally titled “An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights Franchises or Privileges,” the ADL is designed to prevent circumvention of the constitutional and statutory nationality restrictions. Section 1 of the ADL establishes penalties for the violation of such nationality restrictions. Section 2 prohibits falsely simulating compliance with the minimum capital stock requirements.

2.2 The Parties’ Arguments

a) Respondent’s Position

341. According to Respondent, on July 6, 1999, Fraport made its investment in a manner that violated the ADL and the Philippine Constitution by acquiring shares in PIATCO and the “cascade companies” while simultaneously establishing binding arrangements designed to ensure that Fraport could intervene in the management, operation, administration and control of PIATCO and PTI. This, through a series of contemporary agreements, including the Pooling Agreement and other agreements with PIATCO’s other shareholders and an interest-free Loan Agreement with PAGS, one of PIATCO’s shareholders. This, despite warning by the Philippine law firm of Quisumbing Torres (“QT”) as early as January 1999 that “in view of the Anti-Dummy Law and provisions of the Philippine Constitution arrangements, other than mere equity investments between FAG [*i.e.*, Fraport] and the Company [*i.e.*, PIATCO], must be considered carefully.”⁴⁰²

342. Fraport’s top executives were fully aware that the manner in which Fraport was structuring its investment violated the ADL, as shown by a “Final Holding Report” of February 26, 1999, shared with its Supervisory Board. The Report detailed a plan to execute a series of

⁴⁰⁰ CBII-6, 1987 Constitution of the Philippines.

⁴⁰¹ CBII-4, Commonwealth Act No. 108, Oct. 30, 1936.

⁴⁰² C-Mem., para. 158.

agreements through which Fraport would have financial and operating control over the Terminal 3 Project, noting the availability of the Philippine shareholders of PIATCO to accept Fraport's advice as "binding" while admitting that this arrangement "cannot be enforced legally because of local laws."⁴⁰³

343. Despite knowing that its investment structure violated the Constitution and the ADL, Fraport proceeded to implement this unlawful scheme since the only way to ensure that the Project would be profitable was to secretly secure its management control.⁴⁰⁴ At least twelve agreements were executed to that effect, most on July 5-7, 1999.⁴⁰⁵ Due to the secret nature of the arrangements with the other shareholders of PIATCO, Respondent could not know whether Fraport's investment was consistent with Philippine law until most of the 1999 agreements were produced few weeks before the oral hearing in ICSID 1.⁴⁰⁶

344. The provisions of the Constitution and the ADL on nationality restrictions regarding public utility projects, like NAIA Terminal 3 Project, "are of great national significance as an expression of fundamental national economic and policy goals."⁴⁰⁷ The Constitutional nationality restrictions provide that (a) a foreign entity may not own more than 40% of a corporation authorized to operate a public utility, (b) a foreign investor may participate in the governing body of a public utility up to its proportionate share in capital and (c) all executive and managing officers of the corporation authorized to operate a public utility must be Philippine citizens.⁴⁰⁸

345. Section 2-A of the ADL contains two sets of prohibitions, one applicable only to Philippine entities and the other to "any person," including non-Philippine entities. The former entities that control a business reserved to corporations that are 60% owned by

⁴⁰³ C-Mem., paras. 159-160.

⁴⁰⁴ *Ibid.*, para. 812.

⁴⁰⁵ *Ibid.*, para. 163.

⁴⁰⁶ *Ibid.*, para. 821; *see also* para. 827.

⁴⁰⁷ *Ibid.*, para. 164, with reference to the enclosed Concepcion I (ICSID 2).

⁴⁰⁸ *Ibid.*, para. 165.

Philippine citizens are prohibited permitting or allowing an unqualified person from intervening “in the management operation, administration or control of the right or franchise” held by the corporation. The non-Philippine entities are prohibited “from intervening in the management, operation, administration, or control of a public utility” and any such person “who knowingly aids, assists, or abets in the planning, consummation or perpetration of any of the prohibited acts listed above is subject to criminal and civil sanctions.”⁴⁰⁹

346. The most significant of the 1999 shareholders agreements showing how Fraport intervened in PIATCO and PTI in violation of the ADL is the Pooling Agreement by which control over the Terminal 3 operations, maintenance and management was achieved by Fraport through a block voting arrangement providing that in case of failure to reach unanimity the shareholders were required to “act upon the recommendation of FAG” [*i.e.*, Fraport] in matters related to “the implementation of the O&M Agreement,” “the operation, maintenance and management of the Terminal” and “the conduct of commercial operations within the Terminal Complex in the ordinary course of business.”⁴¹⁰

347. Claimant’s reading of the reference in the Pooling Agreement that the other shareholders “shall thereafter act upon the recommendation of FAG” as non-binding⁴¹¹ is not credible, considering the mandatory character of the word “shall,” as confirmed by the Philippine Supreme Court.⁴¹² All the evidence shows that Fraport fully intended to control the votes of 51% of PIATCO by requiring Philippine shareholders to follow its binding vote, this being the only reasonable understanding of the effect of the Pooling Agreement.⁴¹³

348. Fraport’s Internal communications after signing the Pooling Agreement, including an email from Dr. Stiller to Fraport in October 2000, indicate Fraport’s knowledge that

⁴⁰⁹ C-Mem., paras. 166-167.

⁴¹⁰ *Ibid.*, para. 172, with reference to the Pooling Agreement (CBII-80/RE-34), Art. 2.02.

⁴¹¹ Rep., para. 173.

⁴¹² Rej., para. 246.

⁴¹³ *Ibid.*, para. 255.

according to QT “the pooling of voting rights of certain shareholders [...] is incompatible with the anti-dummy law.”⁴¹⁴

349. According to Dean Concepcion, the language of the Pooling Agreement requiring 51% of the share capital to vote as a block and upon Fraport’s recommendations and stating that nominees or representatives who do not comply with the Pooling Agreement are immediately replaced shows that “PIATCO [...] permitted Fraport to intervene in its management, administration and control and that Fraport did so in violation of Section 2-A.”⁴¹⁵

350. Both the ICC Tribunal and the ICSID 1 Tribunal reached the same conclusion.⁴¹⁶ Relying on a QT’s letter of June 14, 1999, produced for the first time in this arbitration, Fraport argues that the language of Article 2.02(2)(a) of the Pooling Agreement was suggested by the local counsel. However, in October 2000 and on May 30, 2001, QT communicated exactly the contrary.⁴¹⁷ The other agreements of July 1999 reinforce Fraport’s management and control of PIATCO in violation of Section 2-A of the ADL.⁴¹⁸

351. According to one of the agreements of July 7, 1999, the Memorandum of Agreement with FAG, PTI and PIATCO, Fraport was given the lead role in obtaining international financing for the Project. According to the First Addendum to the PIATCO’s Shareholders’ Agreement of July 6, 1999, this role was confirmed with “the exclusive authority to determine the financial arrangements for the Project,” including nomination of the company’s financial advisers.⁴¹⁹

⁴¹⁴ C-Mem., para. 178.

⁴¹⁵ *Ibid.*, paras. 179-180, referring to Concepcion I (ICSID 2), para. 64.

⁴¹⁶ *Ibid.*, paras. 181-182.

⁴¹⁷ *Ibid.*, para. 183.

⁴¹⁸ *Ibid.*, para. 185

⁴¹⁹ *Ibid.*, paras. 186-187.

352. Fraport thus was not merely a financial adviser or consultant but had a central role in the management, administration and control of PIATCO.⁴²⁰ This role as Finance Arranger was consistently recognized to Fraport by the other shareholders and PIATCO's President, Cheng Yong.
353. In addition to its role as finance arranger, Fraport infused further equity, loans and guarantees to finance the entire Project. The first loan was made to the Chengs on July 6, 1999 to permit them to increase the share subscription by lending US \$6.655.000 interest free, to be repaid out of dividends generated by the Project and secured by the shares in PIATCO.⁴²¹ Fraport provided PIATCO with over US \$50 million in loans, guaranteed another US\$ 165 million in loans and provided over US \$120 million in guarantees to the EPC contractors.⁴²²
354. Several legal opinions by QT and others confirmed that Fraport's role as Financial Arranger would violate the ADL. As indicated by Dean Concepcion, one of the indicators of dummyship is the fact that the foreign shareholder provides practically all the funds for the investment in a Philippine public utility with a local partner.⁴²³ As mentioned by Dean Concepcion, "the pervasive financial control over Terminal 3 Project that was willingly ceded to Fraport by PIATCO and the cascade companies shows that PIATCO and Fraport planned and executed a dummy relationship in violation of Section 2-A of the Anti-Dummy Law."⁴²⁴
355. Fraport was aware as early as 1999 that the Philippine Constitution required that all executives and managing officers of a public utility corporation or association must be Philippines and that the ADL prohibits all interventions into management, operation, administration and control of a public utility, except for technical personnel as authorized by the Secretary of Justice.

⁴²⁰ C-Mem., paras. 186-187.

⁴²¹ *Ibid.*, para. 191.

⁴²² *Ibid.*, para. 195.

⁴²³ *Ibid.*, paras. 189-190, 192-193.

⁴²⁴ *Ibid.*, para. 196, referring to Concepcion I (ICSID 2), para. 96.

356. Fraport argues that its role as financial arranger was later “clarified” by a Special Shareholders Meeting Resolution in June 2001 noting that Fraport’s role was to make recommendations to PIATCO regarding financing.⁴²⁵ Even if so, ADL violations cannot in any case be cured. As noted by a DOJ Opinion, an ADL violation exists where a foreign national provides “practically all the funding” for a project, as it occurred in the present case.⁴²⁶
357. Pursuant to July 6, 1999 Shareholders Agreement (the “PTI Shareholders Agreement”) Fraport and PTH became shareholders of a newly created company, PTI, which would serve as the Contractor-Operator for the Terminal 3 Project. Fraport would have actual control over the operation and management of the Terminal through PTI. The PTI Shareholders Agreement ensured that Fraport would have ultimate decision-making authority in relation to Terminal-operations, a role that was relinquished by PIATCO.⁴²⁷
358. The PTI Shareholders Agreement gave Fraport the authority to designate PTI Chairman and its Director in charge of finance, administration and commercial operation, the agreement permitting the Director of Finance to sign checks on behalf of PTI. In addition, Fraport placed foreign officials into key management positions. As noted by the minute of the PIATCO Board meeting of July 8, 1999, one of Fraport’s representatives was appointed as Director for Terminal Operations, Building Management & Personnel Affairs, another as Director of Finance, Administration and Commercial Operations. Messrs. Struck, Bauchspiess and Vogel had authority to sign banking documents on behalf of PIATCO.⁴²⁸
359. Fraport’s claim that PIATCO’s status as a company registered under the Philippine Economic Zone Authority (“PEZA”) law exempted PIATCO and PTI from the ADL prohibition of employment of foreign nationals is mistaken. The PEZA law cannot

⁴²⁵ Rep., para. 175.

⁴²⁶ Rej., para. 262.

⁴²⁷ *Ibid.*, paras. 207-209.

⁴²⁸ C-Mem., paras. 197-200.

derogate to the Constitution and its implementing regulations require compliance with nationality restrictions and the ADL.⁴²⁹

360. The PTI Shareholders Agreement provides that virtually all corporate decisions required a 75% vote of PTI's shareholders, granting therefore a veto power to Fraport. This was, in addition to the requirement that at least one director nominated by Fraport was necessary to approve a corporate act of PTI.⁴³⁰ All these arrangements as to PTI were held by lenders' counsel to be a violation of the ADL, requiring amendment of the supermajority provision. Violation of the ADL was confirmed also by Dean Concepcion: "Fraport planned and obtained ability to control PTI as terminal operator, and thereby violated the Anti-Dummy Law."⁴³¹

361. Under the Constitution, "the participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital." The ADL provides substantially the same.⁴³² The allowable participation by a foreign minority shareholding is based on the actual shareholders. As holder of a 25% share participation in PIATCO, Fraport was entitled to appoint two directors to the PIATCO's Board and one of PTI's designated directors to the same Board through its share participation to PTI. In May 2001, the number of PIATCO's directors was increased from eleven to thirteen and their allocation changed pursuant to the Second Addendum to PIATCO's Shareholders Agreement. Having increased its shareholding to 30%, Fraport could nominate four directors plus two thanks to its participation to PTI. The total of six was equal to 46,15% of PIATCO's Board, meaning that foreign investors controlled a majority of PIATCO's Board, seven out thirteen, since also Nissho Iwai was entitled to appoint one director. This

⁴²⁹ C-Mem., para. 274.

⁴³⁰ *Ibid.*, para. 210.

⁴³¹ Concepcion I (ICSID 2), para. 113.

⁴³² C-Mem., para. 215.

violated the Constitution and the ADL, as advised by QT.⁴³³ Violation was confirmed by lenders' counsel⁴³⁴ and Dean Concepcion.⁴³⁵

362. Fraport's contention that its representation on the PIATCO's Board has always been proportionate to its shareholding⁴³⁶ and the additional nomination rights through PTI lawful is wrong since it fails to account for Fraport's indirect appointment rights through PTI and contradicts the requirement under the Pooling Agreement that PTI's directors vote in accordance with Fraport's recommendations as to operations and management.⁴³⁷

363. It is not true that, as stated by Claimant, there cannot be a violation of Section 2-A of the ADL absent "an actual act of intervention in the management, administration, operation or control of a public utility that a Philippine national intentionally permitted." According to Dean Concepcion, this argument "is plainly contrary to the language of Section 2-A."⁴³⁸

364. Claimant's argument that the language of Section 2-A does not prohibit conduct by shareholders, fails to consider that Section 2-A "prohibits any person, *i.e.* including any non-Philippine citizen, from intervening in the management, operation, administration or control of a public utility" and that violations of the ADL "are not restricted to the means of alien control that are specifically mentioned in Section 2-A."⁴³⁹ Also Claimant's argument that it is not possible for a minority shareholder to intervene in the management, operation, administration or control of a public utility fails to consider that even where the equity ownership complies with the 40% limit on foreign shareholding the latter may enter into arrangements in violation of the ADL.⁴⁴⁰

⁴³³ C-Mem., paras. 215-218.

⁴³⁴ *Ibid.*, para. 219.

⁴³⁵ Concepcion I (ICSID 2), para. 123.

⁴³⁶ Rep., paras. 183-186.

⁴³⁷ Rej., paras. 285-287.

⁴³⁸ C-Mem., paras. 222-223.

⁴³⁹ Concepcion I (ICSID 2), paras. 33, 47.

⁴⁴⁰ *Ibid.*, paras. 49-51.

365. Fraport’s argument that it acted in good faith and with the benefit of Philippine legal counsel in structuring its investment and that it cured the ADL violations by amending the disputed shareholders agreement two years later, when most of its investments was made,⁴⁴¹ does not absolve it of liability for ADL violations. As explained by Dean Concepcion, under Philippine law there is no good faith defense to an ADL violation and the latter cannot be cured by subsequent action.⁴⁴²
366. Respondent asserts that an ADL violation arose at the moment that Fraport planned and executed the Pooling Agreement even if Fraport did not exercise its right of control under Section 2.02. As concluded by a DOJ Opinion, it is sufficient that a minority foreign shareholder places itself in a position to intervene in the management, operation, administration or control of an entity subject to nationality restrictions.⁴⁴³ Further, the planning of a violation of the ADL is prohibited by Section 2-A, as indicated by the language of that provision referring to “planning.”⁴⁴⁴
367. Regarding PTI, Fraport’s argument that the ADL does not apply to PTI since the latter is only a future operator⁴⁴⁵ is mistaken since the prohibition of the ADL apply from the time a corporation applies for the right to operate a public utility which, in the case of PTI, occurred when it applied to become contractor–operator for the Terminal 3 Project. Fraport was advised by QT that PTI was subject to the ADL.⁴⁴⁶
368. Any alleged advice of local counsel did not immunize Fraport from the ADL violations, contrary to Claimant’s contention that its “extensive communications with lawyers demonstrate its efforts to comply with the ADL and that the Pooling Agreement was drafted in consultation with QT.”⁴⁴⁷ Good faith is not a defense to any ADL violations

⁴⁴¹ Rep., Section V.

⁴⁴² Concepcion I (ICSID 2), paras. 18-21, 22-41; *see also* Rej., paras. 289-293.

⁴⁴³ Rej., para. 245.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Rep., para. 182.

⁴⁴⁶ Rej., para. 280.

⁴⁴⁷ Rep., para. 174.

since they are *mala prohibita* and do not require proof of malicious intent.⁴⁴⁸ Fraport's selective disclosure of requested documents and the incomplete nature of the record cast serious doubts on Fraport's claims that it followed advice from local counsel. Further, QT has rejected any suggestion that it drafted the Pooling Agreement, reconfirming in July 2001 that the Pooling Agreement had "Anti-Dummy implications and may be void under Philippine law."⁴⁴⁹

b) Claimant's Position

369. Fraport's acquisition of shares in PIATCO, PTI, PTH and PAGS was made in accordance with the foreign ownership restrictions under the Philippine Constitution which require that at least 60% of the capital of corporations engaged in the operation of a public utility be owned by Philippine nationals.⁴⁵⁰ At all relevant times Philippine nationals owned at least 60% of the shares in PIATCO, Fraport owning initially, in 1999, 25% and later on, since 2000, 30% of the shares in PIATCO.⁴⁵¹ As set forth in the Joint Legal Opinion of Justices Melo, Tuquero and Dean Pangalangan, PIATCO's shareholder structure was in full compliance with Philippine law.⁴⁵²

370. Being also a minority shareholder of the "cascade companies" that own shares in PIATCO, Fraport has economic participation in PIATCO greater than 40%. This however is not in violation of Philippine law since under the Control Test a public utility corporation is considered to be of Philippine nationality if its shares are at least 60% owned by Philippine nationals,⁴⁵³ all cascade companies in which Fraport had a minority interest counting as Philippine nationals.

⁴⁴⁸ Rej., paras. 294-296.

⁴⁴⁹ *Ibid.*, paras. 297-301.

⁴⁵⁰ Mem., para. 464.

⁴⁵¹ *Ibid.*, para. 465.

⁴⁵² Melo-Tuquero-Pangalangan I (ICSID 2), para. 11.

⁴⁵³ *Ibid.*

371. Fraport's investments are also in compliance with Section 2-A of the ADL. The majority of the ICSID 1 Tribunal held Fraport's investments to have been made in violation of the ADL based on a 1999 Shareholders Agreement, particularly Section 2.02 of the Pooling Agreement, although neither member of such majority was an expert in Philippine law, citing only one DOJ Opinion not even part of the record.⁴⁵⁴
372. To find a violation of Section 2-A of the ADL there must be an actual act of intervention in the management, administration, operation or control of a public utility that a Philippine national intentionally permitted.⁴⁵⁵ There is no evidence of such intervention. "Placing itself in a position to intervene," as stated by Dean Concepcion,⁴⁵⁶ is an impermissible extension of the requirement of actual intervention.⁴⁵⁷
373. Under Article 2.02 of the Pooling Agreement, Fraport had the right to make recommendations to PIATCO's other shareholders but recommendations are not obligatory, being only an "advice" or an "exhortation." Also the phrase "shall act upon" does not require the other shareholders to accept Fraport's recommendation but only "to take an action, to do something as opposed to not doing anything."⁴⁵⁸ The language of this provision of the Pooling Agreement was drafted in consultation with the local counsel QT.⁴⁵⁹ In an effort to ensure compliance with Philippine law, Fraport sought advice from local counsel in structuring and implementing various contractual arrangements.⁴⁶⁰
374. Under Philippine law, shareholders agreements do not bind the Board of Directors which must exercise independent judgment. Should the action decided under a shareholder

⁴⁵⁴ Mem., para. 472.

⁴⁵⁵ *Ibid.*, para. 475.

⁴⁵⁶ Concepcion I (ICSID 2), para. 11.

⁴⁵⁷ Sur-Rej., para. 80.

⁴⁵⁸ Mem., paras. 475-476, with reference to the Melo-Tuquero-Pangalangan I (ICSID 2); Rep., para. 173.

⁴⁵⁹ *Ibid.*, para. 477.

⁴⁶⁰ Rep., paras. 151-152; Sur-Rej., paras. 66-69, 75, 86.

agreement be illegal, such as a violation of the ADL under Philippine law, the directors should refrain from implementing it to avoid their responsibility.⁴⁶¹

375. The statutory requirement is that the intervention in violation of the ADL is committed by a non-qualifying national, as “an employee, officer or laborer,” this being the express language of the ADL. The term “shareholder” is nowhere mentioned in the provisions of the ADL. Fraport could not have violated the ADL in its capacity as a shareholder. The majority of the ICSID 1 Tribunal was not authorized to extend the application of a criminal law in violation of the principle of *nullum crimen sine lege*. Under Philippine law shareholders agreements are not binding on the Board of Directors, which is why the law incriminates an intervention by an “officer, employee or laborer,” not by a “shareholder.”⁴⁶²

376. The Pooling Agreement was entered into on July 6, 1999, simultaneously with Fraport’s initial acquisition of shares in PIATCO and the cascade companies. It was replaced by an August 23, 2001 Amended and Restated Pooling Agreement which would have governed PIATCO shareholders’ relations during the operative stage had the Government allowed the Project to proceed.⁴⁶³ Under Philippine law, as confirmed by the recent Supreme Court’s decision in the *Gamboa* Resolution, the amendment cures any prior violations, if any existed, if changes are made prior to the beginning of an investigation.⁴⁶⁴

377. None of Fraport’s signatories of the original 1999 Shareholders Agreements were ever charged of any ADL violation. Individuals who entered the scene after said Agreements had been revised in a manner that Respondent concedes made them compliant with the ADL were included as respondents in proceedings that have been pending for almost 10 years.⁴⁶⁵ None of the lenders’ counsel opinions referred to by Respondent was produced

⁴⁶¹ Melo-Tuquero-Pangalangan I (ICSID 2), para. 61.

⁴⁶² Mem., paras. 478-479, 482.

⁴⁶³ *Ibid.*, para. 483.

⁴⁶⁴ Rep., para. 160; Sur-Rej., paras. 99-100; Cl. PHB 2, paras. 33-35.

⁴⁶⁵ *Ibid.*, para. 154.

by it. It is not surprising that such opinions differed from those of Fraport's counsel since is known that lenders take conservative approaches on legal and business issues.⁴⁶⁶

378. Respondent's allegation that Fraport had management and control of the Terminal 3 Project in reliance on a contractual arrangement based on snippets of language is misplaced. As admitted by Respondent itself and witness statements. Fraport never exercised such control. Section 2-A of the ADL prohibits a foreigner to "intervene in the management, operation, administration or control" of a public utility while it is not prohibited to the foreigner to have some theoretical ability to intervene. Fraport never intervened and Respondent has repeatedly admitted that Fraport was not in control of PIATCO. Such control was exercised by the Chengs, not by Fraport,⁴⁶⁷ as confirmed by one of Respondent's witnesses, Mr. Lösch.⁴⁶⁸

379. There could not have been any control by Fraport during the operations of the NAIA Terminal 3 since due to Respondent's actions PIATCO was not allowed to operate the Terminal.⁴⁶⁹ There could be no malicious intent and no "planning" of a violation of the law when the person is soliciting and following advice provided by counsel.⁴⁷⁰

380. Fraport's role as Finance Arranger was within the permissible scope of Philippine law since it was to assist PIATCO in dealing with potential lenders and had nothing to do with the management, operation, administration or control of a corporation. Truly, Fraport provided substantial funds to the Terminal 3 Project but it did not exclusively bankroll the Project, the BOT law stating "the project proponents may obtain financing from foreign sources."⁴⁷¹ Messrs. Vogel and Struck acting as co-signatory to PIATCO bank accounts

⁴⁶⁶ Rep., para. 153; Sur-Rej., paras. 76-77.

⁴⁶⁷ Sur-Rej., para. 71.

⁴⁶⁸ *Ibid.*, para. 74; Mem., paras. 168-171.

⁴⁶⁹ Sur-Rej., para. 70.

⁴⁷⁰ Mem., para. 172.

⁴⁷¹ Sur-Rej., paras. 90-91.

jointly with the Chengs is not a management of bank accounts and is permitted by Philippine law.⁴⁷²

381. Contrary to what asserted by Respondent, the interest free loan did not provide Claimant with the right to vote the mortgaged shares.⁴⁷³ Fraport's exclusive authority under the First Addendum was clarified in the Special Shareholders' Resolution of June 15, 2011, determining that Fraport's role consisted only in "making recommendation with respect to the financing of the Project." Any possible violation was therefore cured.⁴⁷⁴

382. Also the role of Fraport's employees and representatives to PIACO's Board was consistent with Philippine law and common practice. By definition the position of all directors is non-executive and non-managerial. The position of Director of Finance in PIATCO is not equivalent to the Chief Financial Officer.⁴⁷⁵ No foreigners were appointed for the years 1999-2003 as corporate officers of PIATCO and if done it was done under the PEZA law.⁴⁷⁶

383. Respondent's assertion that under the PTI Shareholders Agreement Fraport planned and got the ability to control PTI as Terminal operator, thereby violating the ADL, is untenable since the contract with PIATCO (the Operations & Maintenance Agreement, *i.e.*, "O&M Agreement"⁴⁷⁷) never entered into force and the Terminal never experienced an in-service date. PTI should not be subject to nationality requirements before it assumed the status of facility operator.⁴⁷⁸

384. Fraport's representation on the PIATCO's Board has always been in proportion to its shareholding, as confirmed by the Joint Legal Opinion of Justices Melo, Tuquero and Dean

⁴⁷² Sur-Rej., para. 95.

⁴⁷³ Cl. PHB2, para. 28.

⁴⁷⁴ Mem., para. 175.

⁴⁷⁵ *Ibid.*, paras. 177-178

⁴⁷⁶ *Ibid.*, paras. 180-181.

⁴⁷⁷ CBII-189, O&M Agreement, July 27, 2001.

⁴⁷⁸ Mem., para. 182.

Pangalangan based on the review of the General Information Sheet filed by PIATCO with the SEC for years 1999-2003. Additional directors appointed by virtue of Fraport's shareholding in PTI do not count since the control test applies.⁴⁷⁹

385. The ADL violation is alleged only in this arbitration and is not supported by the facts and the Philippine jurisprudence. It is an invention for purpose of this dispute, as confirmed by the fact that both the Philippine Supreme Court's nullification of the Concession Agreement and the taking over of Terminal 3 had nothing to do with the alleged ADL violation.⁴⁸⁰

386. The theory on which the alleged violations are based, *i.e.* intervention under Section 2-A of the ADL, has never been pursued domestically. The reason that is given is that the DOJ prosecutors never had access to the same documents that Fraport was forced to produce in this arbitration. This is not true since the two agreements on which the ICSID 1 Tribunal and the ICC Tribunal respectively dismissed Fraport's and PIATCO's claims have been known to Respondent for years and the annulled award has been published.⁴⁸¹

387. Claimant further notes that the ADL is a law of 1936, implemented in connection with Article XII of the Constitution. It has been interpreted often inconsistently by numerous SEC and DOJ Opinions predating the BOT law and the 1991 Foreign Investment Act that govern foreign participation to the Philippine economy.⁴⁸²

2.3 The Tribunal's Analysis

388. As already mentioned,⁴⁸³ at the jurisdictional level the Tribunal's analysis shall be limited to examine whether there was a violation of the ADL at the time of Fraport's Initial Investment. As it has emerged from the review of the Parties' position, there are multiple

⁴⁷⁹ Mem., paras. 183-186.

⁴⁸⁰ Sur-Rej., para. 53.

⁴⁸¹ *Ibid.*, paras. 61-62.

⁴⁸² *Ibid.*, paras. 63, 68.

⁴⁸³ *Supra*, para. 333.

independent grounds relied upon by Respondent to establish ADL violations and a number of different defenses put forward by Claimant to deny that any such violations occurred.

389. In essence, the analysis shall have to examine whether Section 2-A of the ADL⁴⁸⁴

- (i) applied to PIATCO or PTI, as applicable prior to Terminal 3 becoming operational;
- (ii) applies to shareholder conduct;
- (iii) prohibits planning of a prohibited act;
- (iv) requires knowledge of the violation;
- (v) allows for the curing of any violation;
- (vi) provides for a “good faith” defense regarding any violation.

Each of the above questions shall be examined in turn, based on the provisions of Philippine law that are relevant for the determination of the Tribunal’s jurisdiction in light of Objection 1.⁴⁸⁵

⁴⁸⁴ The text of Section 2-A reads, in relevant part, as follows:

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, 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 laborer 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 [...] (emphases added).

⁴⁸⁵ The relevant provisions of Philippine law have been referred to in the Introduction to Anti-Dummy Law, *supra*, paras. 339-340. The examination of the above questions shall be mostly conducted on the basis of the legal opinions filed by each Party in support of the respective position. It bears noting that the first of such opinions was filed by Claimant with the Memorial in reply to the parts of the annulled Award dealing with the ADL violations. This has brought about an inversion in the sequence of legal opinions, those on behalf of Respondent replying to those filed by Claimant, not vice-versa as the burden of proof lying upon Respondent

a) Interpretation of the ADL

(i) *Whether the ADL Applied Prior to the Operation of Terminal 3*

390. According to Claimant, the ADL is not applicable to the Terminal 3 Project because the “construction and operation of a public utility are two distinct concepts that are subject to different rule.”⁴⁸⁶ Only the operation of a public utility is subject to constitutional nationality restrictions “because what constitutes a public utility activity is their use to serve the public.”⁴⁸⁷ Section 2-A only prohibits the intervention of a non-qualified third party “in the management operation, administration or control of a nationalized activity when the relevant right, franchise, privilege, property or business is actually enjoyed or exercised as the word “enjoyment” in Section 2-A does not contemplate mere possession but requires actual use of the restricted right, franchise, property or business.”⁴⁸⁸

391. According to Claimant, under a BOT scheme⁴⁸⁹ the mere act of building an infrastructure does not convert the project into a public utility so that the private contractor does not need a public utility franchise for that purpose. A franchise would be necessary only for the operation of the facilities “because what constitutes a public utility activity is their use to serve the public.”⁴⁹⁰ Only the operation of the facilities “would bring the private contractor within the ambit of the constitutional nationality restrictions.”⁴⁹¹

392. Still according to Claimant, PIATCO never engaged in the business of operating a public utility. It was only engaged in the construction of Terminal 3, which “is not an

would have demanded. Even if in its analysis the Tribunal shall follow the same order, this does not imply any change in the rules governing burden of proof, as indicated in the text (*supra*, para. 299).

⁴⁸⁶ Melo-Tuquero-Pangalangan II (ICSID 2), para. 75, relying on Philippine jurisprudence, specifically *Tata v. Garcia Jr.* of 1995 where the Supreme Court confirmed that “under the BOT scheme, the owner of the infrastructure facility must comply with the citizenship requirement of the Constitution on the operation of a public utility.”

⁴⁸⁷ *Ibid.*, paras. 68, 77.

⁴⁸⁸ *Ibid.*, para. 64 (emphasis added).

⁴⁸⁹ The Terminal 3 Project was a BOT project.

⁴⁹⁰ Melo-Tuquero-Pangalangan II (ICSID 2), para. 77.

⁴⁹¹ *Ibid.*, para. 78.

undertaking that subjects the corporation to the Anti-Dummy Law.”⁴⁹² Although PIATCO had the right to engage in the business of operating Terminal 3, a public utility, “it did not use its right, franchise, privilege, property or right to actually engage in the business for lack of operations.”⁴⁹³

393. Respondent’s assertion that under the Shareholders Agreement of July 9, 1999, Fraport “planned and obtained the ability to control PTI as terminal operator, and thereby violated the Anti-Dummy Law”⁴⁹⁴ is in Claimant’s view untenable under Philippine law. PTI’s role of facility operator under the BOT law was based on the O&M Agreement with PIATCO that never entered into force, so that PTI never became terminal operator, the in-service date for the Terminal having intervened after it was expropriated by Respondent.⁴⁹⁵

394. Respondent relies on the opinions of its legal experts, the former Chief Justice of the Philippine Supreme Court, Reynato Puno, and Dean Danilo Concepcion, who both confirm that “Fraport intervened in the management, operation, administration or control of PIATCO and PTI, public utility enterprises under Philippine law.”⁴⁹⁶

395. This conclusion is based on the Pooling Agreement under which the Philippine shareholders of PIATCO agreed to be bound by Fraport’s “recommendations” regarding the implementation of the O&M Agreement, the operation, maintenance and management of the Terminal complex, and the conduct of commercial operations within the Terminal complex in the ordinary course of business.⁴⁹⁷

⁴⁹² Melo-Tuquero-Pangalangan II (ICSID 2), para. 68.

⁴⁹³ *Ibid.*, para. 74.

⁴⁹⁴ C-Mem., para. 214 (quoting Concepcion I (ICSID 2), para. 116). Although Claimant’s defense regarding PTI is not expressly related to the question under consideration, it bears upon the concept of “operation” of Terminal 3 which is relevant for the applicability of the ADL.

⁴⁹⁵ Melo-Tuquero-Pangalangan II (ICSID 2), paras. 24, 27.

⁴⁹⁶ Rej., para. 238, with reference to Puno (ICSID 2), para. 7, and Concepcion II (ICSID 2), paras. 24, 27.

⁴⁹⁷ Rej., para. 243.

396. This conclusion equally applies to PTI, in view of the veto power and other forms of negative control obtained by Fraport over PTI's major corporate decisions.⁴⁹⁸
397. According to Respondent's legal expert Dean Concepcion, a potential operator of a public utility is required to comply with nationality restrictions and the ADL at the moment it applies for the right to operate, as held by a case cited in the Joint Legal Opinion of Justices Melo, Tuquero and Dean Pangalangan, *People v. Quasha*, where the Supreme Court declared that "the moment for determining whether a corporation is entitled to operate as a public utility is when it applies for a franchise, certificate or any other form of authorization for that purpose [...] and at that moment, the corporation must show that it has complied not only with the requirement of the Constitution as to the nationality of its capital [...]."⁴⁹⁹
398. PTI was subject to the ADL from the time it applied with the DOTC as early as June 18, 1999 seeking approval of its designation as facility operator of the new Terminal 3. The application was accepted on a non-objection basis by the DOTC on July 6, 1999, "provided that it complies with pertinent Philippine laws and the bidding guidelines for the NAIA IPT3 project."⁵⁰⁰ Thus, according to Respondent's legal expert, "PTI was already subject to nationality restrictions and the Anti-Dummy Law prior to Fraport's acts of intervention into PTI."⁵⁰¹
399. Even assuming that Terminal 3 would not be considered a public utility, and thus subject to constitutional nationality restrictions, Section 2-A of the ADL also applies to rights, franchises, privileges, property, and or businesses which are subject to *statutory* nationality restrictions. As Justice Puno points out, Section 2(b) of the BOT law establishes

⁴⁹⁸ Rej., para. 238 (under vi), with reference to Concepcion I (ICSID 2), paras. 109-116.

⁴⁹⁹ Concepcion II (ICSID 2), para. 105. The same Supreme Court's holding is quoted in Melo-Tuquero-Pangalangan II (ICSID 2), para. 81.

⁵⁰⁰ CBII-85, Letter from DOTC to PIATCO attorney, Avelino Sebastian, July 6, 1999.

⁵⁰¹ Concepcion II (ICSID 2), para. 106.

nationality requirements for project proponents, such as PIATCO.⁵⁰² PIATCO was accordingly subject to nationality restrictions beginning no later than the time it was awarded the concession. Therefore, the Tribunal considers that PIATCO held, at the time of Claimant's Initial Investment, "a right [...] [or] privilege, [...] the exercise or enjoyment of which is expressly reserved by [...] the laws to citizens of the Philippines [...]" and was thus subject to the ADL's prohibition on intervention by foreign citizens.⁵⁰³ In the Tribunal's view, the fact that Section 2(a) of the BOT law expressly authorizes the use of foreign financing and a foreign contractor in the construction phase of a BOT project confirms that statutory nationality restrictions are otherwise applicable during the construction phase, not simply that the law distinguishes between the construction and operations phases of a BOT project.

400. It follows from this conclusion that PIATCO was, in implementing the Terminal 3 BOT Project, actually enjoying and exercising its rights as a project proponent under the BOT law. Therefore, the Tribunal considers that intervention in the management, control, or administration of PIATCO by an unqualified person or entity would be prohibited by Section 2-A of the ADL, even under Claimant's view of the term "enjoyment."

(ii) Shareholder Conduct under the ADL

401. It is one of Claimant's defenses under Section 2-A that in order to find a violation of the ADL the type of act that a Philippine national intentionally must permit is the intervention by a non-qualifying national as an employee, officer or laborer in the "management, operation, administration or control of PIATCO." Without such intervention, "there cannot be a violation of the law."⁵⁰⁴

⁵⁰² Puno (ICSID 2), paras. 41-44. Section 2(b) reads, in relevant part: "[I]n case of an infrastructure or development facility whose operation requires a public utility franchise, the proponent must be Filipino or, if a corporation, must be duly registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos."

⁵⁰³ In light of the Tribunal's decision below not to address Respondent's allegations vis-à-vis PTI, it is unnecessary for the Tribunal to consider whether the ADL applied to PTI before its appointment as Terminal operator became effective.

⁵⁰⁴ Melo-Tuquero-Pangalangan I (ICSID 2), para. 28.

402. Claimant relies on its legal experts' opinion according to which Section 2-A does not extend to shareholder's conduct since only three categories of persons are identified in said Section by referring to intervention by an "officer, employee or laborer," while "[t]he term 'shareholder' is nowhere mentioned in Section 2-A."⁵⁰⁵
403. Still according to Claimant, there is no reason for the ADL to apply to foreign shareholders since by virtue of their minority status "they are already prevented from intervening in the management, operation, administration or control of the public utility, unless they are shown to be officers, employees and laborers."⁵⁰⁶
404. In Claimant's view, the scope of a statute may not be enlarged by interpreting it to apply to situations or persons not provided by the text, this being especially true with penal laws which are to be strictly construed.⁵⁰⁷ Dean Concepcion relies on the *Luzon* decision for the proposition that the judiciary may go beyond the words to give effect to the policy or purpose of the statute. This is not tenable since that decision does not address shareholders' conduct as such and has been superseded by the 1973 Constitution and the 1975 amendment of the ADL.⁵⁰⁸
405. Thus, based on the principle of restrictive interpretation of penal laws, contrary to Dean Concepcion's contention the ADL cannot apply to Fraport since "[s]hareholder conduct is not within the prohibition of intervention or participation in the management, operation, administration or control, provided in the Anti-Dummy Law."⁵⁰⁹
406. Respondent relies on the expert opinions of Dean Concepcion and Justice Puno to refute Claimant's contention that the ADL does not apply to shareholder conduct. The ADL is designed to prevent evasion of nationality restrictions by a foreign minority shareholder

⁵⁰⁵ Melo-Tuquero-Pangalangan I (ICSID 2), para. 49.

⁵⁰⁶ *Ibid.*, para. 53.

⁵⁰⁷ Melo-Tuquero-Pangalangan II (ICSID 2), paras. 53, 57.

⁵⁰⁸ *Ibid.*, paras. 55-56, referring to Concepcion I (ICSID 2), paras. 138-139.

⁵⁰⁹ *Ibid.*, para. 59. The opinion of another of Claimant's experts, Justice Vitug, supports this conclusion in reply to Respondent's expert Justice Puno (Vitug II (ICSID 2), paras. 21-28).

through means by which it may intervene in the management, operation, administration or control over a Philippine public utility. These means include the employment of aliens in various positions to dominate the operations through management, technical and other operating assistance and the provision of substantial amount of funding, as addressed by DOJ Opinions.⁵¹⁰

407. Respondent notes that the legislative purpose behind Section 2-A was to close all loopholes permitting evasion of the Constitutional nationality restrictions and the diminishment of effective Philippine control over national public utilities. Since this may happen also as a result of a minority shareholder conduct, the argument that there is no reason to apply Section 2-A to foreign minority shareholders is inconsistent with the language, purpose and interpretation of the ADL.⁵¹¹

408. According to Respondent's expert, the argument as set forth in the Joint Legal Opinion of Justices Melo, Tuquero and Dean Pangalangan that the power of the board of directors to control a corporation prevents a minority shareholder from intervening in the management, administration, operation or control of the corporation fails to consider that shareholders may make binding agreements addressing the manner by which they exercise their voting rights through directors appointed by them.⁵¹²

409. As contended by Respondent's expert, some of the agreements in this case expressly provided that their provisions prevailed over the Articles of Incorporation and the By-laws of the Company while permitting Fraport to nominate more than its proportionate share of directors of PIATCO. Accordingly, the assertion that an agreement among shareholders can never affect a board's control of a company is wrong.⁵¹³

410. It is not necessary for the Tribunal to decide whether it is necessary to utilize a "restrictive interpretation" or whether it is proper or permitted under Philippine and international law

⁵¹⁰ Concepcion I (ICSID 2), paras. 137, 139.

⁵¹¹ *Ibid.*, para. 141.

⁵¹² *Ibid.*, para. 143.

⁵¹³ *Ibid.*

to interpret the ADL in light of its purported purpose “to plug any loophole or close any avenue that an unscrupulous alien may resort to flout the law or defeat its purpose.” This is because the Tribunal considers that the language of the ADL is unambiguous on its face that it applies to intervention by “any person.” The inclusion of the clause, “whether as an officer, employee, or laborer,” appears to be an illustrative list of the diverse persons to whom this prohibition applies (that is, in this instance “whether” is used to mean “for example” or “including”).

411. The Tribunal’s reading is consistent with the Supreme Court’s recognition in *Luzon Stevedoring v. Anti-Dummy Board* that the ADL can be violated by minority shareholders. While the Tribunal recognizes that the Philippines appears to have liberalized its policy towards foreign investors subsequent to the 1972 *Luzon* decision, the Tribunal has been provided with only one other Philippine legal authority that addresses this issue, a 1984 DOJ Opinion⁵¹⁴ which also advised that intervention by a minority shareholder would violate the ADL.

412. For these reasons, the Tribunal considers that the ADL applies to intervention by “all” unqualified persons, including minority shareholders, and that the reference to “officers, employees and laborers” is non-exhaustive list of the categories of “persons” whose conduct may be in violation of the ADL.

(iii) *Whether the ADL Prohibits Planning a Prohibited Act without More*

413. According to Claimant’s experts, there would be no violation of the ADL “in case of an attempted or frustrated violation thereof.”⁵¹⁵ Philippine law does not impose liability “on the basis of intentions,” as they may be reflected by shareholder agreements granting rights to minority shareholders to give them a broad protection. However, “whether these rights are exercised is a separate issue.”⁵¹⁶

⁵¹⁴ CBII-5, DOJ Opinion No. 165, s. 1984, Nov. 2, 1984.

⁵¹⁵ Melo-Tuquero-Pangalangan I (ICSID 2), para. 38.

⁵¹⁶ *Ibid.*, para. 40.

414. In their view, “[p]lanning a violation of the law regardless of whether the violation was actually committed, as asserted in Dean Concepcion and Justice Puno’s opinions, does not constitute *per se* such violation.”⁵¹⁷ Placing itself in a position to intervene in the management, operation, administration or control of an entity subject to nationality restrictions when none of the prohibited acts are executed does not violate the ADL.⁵¹⁸ Mere planning is not a punishable offense, assuming *arguendo* that the Pooling Agreement amounted to a “planning,” the contrary view expressed by Dean Concepcion being contrary to the liberal construction of criminal statutes in favor of accused.⁵¹⁹
415. Always according to Claimant’s experts, even assuming that mere planning constitute an ADL violation, there is no evidence that Fraport “knowingly,” “consciously, intelligently, willfully or intentionally” engaged in such violation since it relied on the legal advice of its Philippine counsel when it concluded arrangements concerning Terminal 3.⁵²⁰ The plain reading of Section 2-A shows that there is a violation only when the prohibited acts “are consummated.”⁵²¹ All acts prohibited by Section 2-A, as enumerated therein, are “**consummated** acts.”⁵²²
416. Accepting Dean Concepcion’s opinion would lead to an absurd situation whereby one who “plans” to commit the offense is punished by the same penalty as the one who actually committed the offense while the ADL provides only a single penalty. Assuming *arguendo* that Fraport violated the ADL by merely planning or entering into the Pooling Agreement, Claimant’s experts assert that any supposed violation was cured when the Pooling Agreement was amended in 2001.⁵²³

⁵¹⁷ Concepcion I (ICSID 2), para. 9; Puno (ICSID 2), para. 6.

⁵¹⁸ Melo-Tuquero-Pangalangan III (ICSID 2), para. 33.

⁵¹⁹ *Ibid.*, para. 35.

⁵²⁰ *Ibid.*, para. 36 (emphasis in the text).

⁵²¹ *Ibid.*, para. 36-37.

⁵²² *Ibid.*, para. 41 (emphasis in the text).

⁵²³ *Ibid.*, paras. 42-45.

417. On the opposite side, both Dean Concepcion and Justice Puno, Respondent’s legal experts, express the view that Section 2-A of the ADL “prohibits even the planning of a violation of the law,” pointing to the language of this provision when providing punishment for “[a]ny person who knowingly aids, assists or abets in the planning, consummation or perpetration of any of the acts hereinabove enumerated.”⁵²⁴
418. In the present case, according to Dean Concepcion, Fraport not only planned to violate the ADL, it negotiated and executed agreements that enabled it to unlawfully intervene in PIATCO and PTI, as known to its highest corporate levels.⁵²⁵ As confirmed by a DOJ Opinion, a minority foreign shareholder could violate the ADL by “placing itself in a position to intervene in the management, operation, administration or control of an entity subject to nationality restrictions.”⁵²⁶
419. Dean Concepcion adds that so long as Fraport intended to execute shareholder agreements with full knowledge of their terms, it is irrelevant whether it believed it was in fact violating the ADL, such violations being illegal even in the absence of a malicious intent when offenses are penalized by special laws, such as the ADL.⁵²⁷
420. The Tribunal believes it sufficient to refer to the plain wording of Section 2-A to consider that “planning” may constitute *per se* a violation of the ADL. The relevant passage of the law is as follows:

[A]ny 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 [...] (emphasis added).

421. The structure of this provision clearly contemplates liability for aiding, assisting, or abetting in each of three separate types of activities: planning, consummation and

⁵²⁴ Concepcion II (ICSID 2), para. 9 (emphasis in the text). Likewise, Puno asserts that “[i]t is worthy to note that Section 2-A penalizes the mere planning of an ADL violation” (Puno (ICSID 2), para. 6).

⁵²⁵ Concepcion II (ICSID 2), para. 10.

⁵²⁶ *Ibid.*, para. 11, quoting DOJ Opinion No. 165, s. 1984, Nov. 2, 1984 (CBII-5).

⁵²⁷ *Ibid.*, paras. 18-21.

perpetration. In the Tribunal's view, nothing in the wording of the statute, or in prior judicial interpretations, indicates that liability for involvement in "planning" to allow a prohibited act of intervention is dependent on the "consummation" or "perpetration" of the object of such planning. The interpretation adopted by the Tribunal, contrary to Claimant's arguments, would not create criminal liability for "attempted dummyship," but simply gives effect to the statutory language prohibiting completed acts of aiding, assisting, and abetting in the planning of prohibited conduct.

422. As shown by the analysis of Fraport's contractual arrangements,⁵²⁸ "planning" was achieved by Fraport:

- in the case of PIATCO, by executing with the Philippine shareholders the Pooling Agreement of July 6, 1999 granting Fraport the power to intervene in the management, administration, operation and control of the Terminal, and
- in the case of PTI, by the PTI Shareholders Agreement of even date ensuring Fraport a power of control regarding PTI's future role as contractor-operator of the Terminal.

423. Fraport's planning of an unlawful intervention into the management, operation, administration or control of PIATCO and PTI is a violation of the ADL from the time of the planning.⁵²⁹ The relevant time was the date of execution of the Pooling Agreement and the PTI Shareholders Agreement, therefore contemporaneous with the making of Fraport's Initial Investment.

(iv) Whether a Violation Requires "Knowledge"

424. Claimant argues that it could not have violated the ADL because it sought the advice of local counsel in drafting the Pooling Agreement.⁵³⁰ In particular, Claimant argues that such efforts to comply with the ADL mean that it could not have "knowingly" violated the

⁵²⁸ *Infra*, paras. 442-468.

⁵²⁹ *Concepcion II* (ICSID 2), para. 9. For the "planning" of intervention as an independent criminal act under the ADL, see below.

⁵³⁰ Rep., para. 174.

ADL.⁵³¹ However, as explained below, the Tribunal finds that the requirement under Section 2-A of the ADL to have “knowingly” engaged in a prohibited act does not mean that a person must know that an act is prohibited to commit a violation—that is, it does not require intent to violate the law.

425. As explained in Dean Concepcion’s opinion, Philippine criminal law contains a class of criminal prohibitions, known as special laws, which have been enacted outside of the Revised Penal Code to serve public policy or regulatory purposes. The violation of special laws does not require malicious intent, or *mens rea*. Rather, in the words of a leading treatise, “it is sufficient that the offender has the intent to perpetrate the act prohibited by the special law. Intent to *commit* the crime and intent to *perpetrate* the act must be distinguished. A person may not have consciously intended to commit a crime; but he did intend to commit an act, and that act is, by the very nature of things, the crime itself.”⁵³² Such “intent to perpetrate the act” means only that that act was done freely and consciously.⁵³³

426. Claimant’s legal experts argue that special laws do not necessarily eliminate the requirement of *mens rea*, but that the intent required for a violation is a question of statutory construction.⁵³⁴

427. As neither Party points to a decision of a Philippine court on the issue, the Tribunal must construe the language of Section 2-A of the ADL itself, which prohibits “knowingly aid[ing], assist[ing], or abet[ting] in the planning, consummation or perpetration” of certain specified acts. The Tribunal considers this language to require that a person freely and consciously engages in an act which aids, assists, or abets in the planning or carrying out any of the specified acts, *not* that the person must have knowledge that what is being planned or carried out is prohibited by the ADL. Accordingly, it would be sufficient in

⁵³¹ Sur-Rej., para. 70.

⁵³² RE-1698, Luis B. Reyes, *The Revised Penal Code – Criminal Law, Book One*, 18th Ed. (2012), at 53 (quoted in Concepcion II (ICSID 2), para. 19).

⁵³³ Concepcion II (ICSID 2), para. 19.

⁵³⁴ Melo-Tuquero-Pangalangan III (ICSID 2), para. 29.

order to establish liability that a person freely and consciously engaged in an act which constituted aiding, assisting or abetting the planning or carrying out of a prohibited act. As made manifest by the Tribunal's analysis also of the other ADL violations, including "planning," it may be concluded that Claimant freely and consciously engaged in such an act.

(v) *Whether a Violation Can Be Cured*

428. The Tribunal recalls Claimant's position that even assuming *arguendo* that the Pooling Agreement violated the ADL, this agreement was amended in 2001 to eliminate Fraport's right of recommendation, thereby curing any violation that had existed. Because the issue before the Tribunal is the legality of Fraport's investment at the time it was made, the Tribunal considers that the 2001 amendment to the Pooling Agreement would be relevant as a defense to Respondent's jurisdictional objection only if, under Philippine law, such an amendment would retroactively eliminate any illegality that had existed.

429. Whether a violation of host State law at the time an investment is made can be cured after the fact—thus avoiding the consequences under the BIT—should be determined by reference to the law of the host State. If the law of the host State allows an investor to take subsequent action to cure the violation and thereby avoid liability, a tribunal must also take this fact into account when assessing compliance with the law. However, in this instance, the Tribunal does not consider that, under Philippine law, a violation of the ADL may be cured.

430. Claimant's argument that Philippine law allows it to cure an ADL violation prior to any enforcement proceedings relies on the explanation of the Supreme Court in *Gamboa* that "public utilities that fail to comply with the nationality requirement under Section 11, Article XII [of the Constitution] and the [Foreign Investment Act] can cure their deficiencies prior to the start of the administrative case or investigation."⁵³⁵ However, as Dean Concepcion points out, *Gamboa* involved a regulatory enforcement regime whereby the opportunity to cure was provided for in the underlying statute, which is not the case

⁵³⁵ Rep., para. 160 (quoting *Gamboa et al. v. Teves et al.*, G.R. No. 176579, p. 47 (CE-178)).

with the ADL.⁵³⁶ Nor are *Gamboa* or the cases cited therein inconsistent with Supreme Court's earlier holding in *Avengoza* that cessation of an ADL violation does not preclude criminal liability for the prior illegality.⁵³⁷ As Claimant has not offered another basis in Philippine law for its asserted right to cure an ADL violation, the Tribunal finds that Claimant would not have been allowed under Philippine law to cure an ADL violation by amending the offending agreement.

(vi) *Good Faith as a Defense*

431. Prior to making the Initial Investment Fraport had been advised by its Philippine Counsel, QT, regarding limitations imposed by the Philippine Constitution and the ADL to a foreign investor in the exercise of management or financial control over a public utility such as Terminal 3. Already in a Preliminary Due Diligence Report transmitted on January 11, 1999, QT had called Fraport's attention to such limitations by summarizing the relevant legal provisions as follows:

The operation and ownership of a public utility is reserved by the Philippine Constitution to Filipino citizen or to domestic corporations owned at least 60% by Filipinos. This means that foreign nationals can only own a maximum of 40% of the capital of a public utility. The operations of the Company generally fall within the term "public utility". Thus, the direct equity investment of FAG together with the equity in the Company presently held by foreign nationals cannot exceed 40% of the outstanding capital stock of the Company. At present, the Company is owned 75% by Philippine nationals and 25% by foreign nationals.

The Anti-Dummy Law prohibits foreign nationals from, among others, intervening in the management, operation, administration or control of a company engaged in a partially nationalized activity (*e.g.* a public utility) except as technical personnel with specific authority from the Secretary of the Department of Justice. Further the Philippine Constitution provides that all executive and management positions in a public utility must be occupied by Filipino citizens. However, foreign nationals are entitled to such number of directors in the board of a public utility in proportion to their actual and allowable equity in the Company. In view of the Anti-Dummy Law and the

⁵³⁶ Concepcion II (ICSID 2), paras. 31-34.

⁵³⁷ *Ibid.*, paras. 24-25, 35-38.

provision of the Philippine Constitution, arrangements other than mere equity investments between FAG and the Company, must be considered carefully.⁵³⁸

432. One month after QT had delivered its Report, Fraport received from PIATCO a Master Concession Concept Brief contemplating the relinquishment by PIATCO to Fraport of full executive and management control over the Terminal 3 Project and indicating how this would have been achieved:

A shareholders agreement will have to secure the actual control by FAG as may be allowed by Philippine laws. Actual control refers to full executive and management control by FAG.⁵³⁹

The reference made by PIATCO to actual control being ceded to FAG “as may be allowed by Philippine laws” was a reminder of the restrictions imposed by Philippine nationality laws. The reference to what “may be allowed by Philippine laws” was totally inconsistent with the ADL prohibiting a foreign investor to intervene in the management, operation, administration or control of a public utility.

433. Despite QT’s warning, Fraport proceeded to implement the shareholding structure contemplated by the Master Concession Concept Brief, as reflected by the Final Report submitted on February 26, 1999 to its Supervisory Board.⁵⁴⁰ The Final Report confirmed that Fraport would obtain and exercise management and control over the Terminal 3 Project, seeking the Board’s approval to invest in PIATCO.

434. It is worth reproducing the key passage of the Report since what stated therein reflects the manner by which Fraport’s Initial Investment was to be structured so as to secure management and control over the Project.

Under Philippine law, the share of non-Philippine capital in PIATCO may not exceed 40% [...] Within PIATCO, all shareholders will enter into a

⁵³⁸ CBII-57/RE-52, Quisumbing Torres Preliminary Due Diligence Report on PIATCO, Dec. 29, 1998, p. 94 (emphasis added).

⁵³⁹ CBII-58/RE-791, Master Concession Concept Brief attached to a letter from PIATCO to Fraport, Jan. 19, 1999; *infra*. fn. 559.

⁵⁴⁰ CBII-61/RE-54, Final Report, Holding Project, NAIA Terminal 3, Manila, Philippine, Feb. 26, 1999.

Shareholder Agreement that will also define the management appointments, voting rights and provisions for the acquisition and sale of shares. Another Shareholder Agreement between FAG, PAGS, Paircargo and PTI makes sure that the above-mentioned parties will hold a majority of 51% in PIATCO. It also establishes that FAG will be consulted in matters that represent its core competencies (retailing, terminal operation). PAGS and Paircargo are willing to accept the professional advice of FAG in abovementioned decisions as binding, which, however, cannot be enforced legally because of local laws. In order to reinforce this declaration of intent, the idea is for GlobeGround and FAG to conclude an additional agreement under German law making the provisions of the Shareholder Agreement binding on the mandate holders. After the afore-mentioned transactions, PIATCO will have only a passive role, while the main activities will be controlled by PTI as concessionaire for operations and center management.⁵⁴¹

435. Two aspects of the above quoted part of the Final Report are worth noting. First, reference to the acceptance by PIATCO's Philippine Shareholders of FAG's "professional advice" as "binding" in matters of its competence is consistent with what was subsequently provided by the Pooling Agreement regarding the acceptance of Fraport's recommendations by the other shareholders.⁵⁴² Second, recognition that the transfer to FAG of management and control of the Terminal operations "cannot be enforced legally because of local laws," coupled with the plan to "reinforce this declaration of intent" by concluding an additional agreement governed by German law to guarantee the binding nature of the provisions of the Shareholder Agreement,⁵⁴³ clearly evidences the full awareness of all parties, including Fraport and its Supervisory Board, of the illegality under Philippine law of the proposed transfer of control over the Project to Fraport, with PIATCO retaining only a "passive role."

436. The condition under Section 2-A whereby the intervention in the management, operation, administration or control of a public utility is made "knowingly" by the foreign investor was satisfied beyond any possible doubt.

⁵⁴¹ CBII-61/RE-54, Final Report, Holding Project, NAIA Terminal 3, Manila, Philippine, Feb. 26, 1999, p. 5 (emphasis added).

⁵⁴² *Infra*, para. 453.

⁵⁴³ This additional agreement "does not exist" according to one of Claimant's witnesses, Mrs. Döerte Ochs (Ochs (ICSID 2), para. 15). Obviously, what matters is that it was contemplated for the stated purpose.

437. The illegality of Fraport's Initial Investment for violation of the ADL is clearly established based on the unequivocal evidence provided by Respondent. It remains to be examined whether Fraport may invoke as a defense, as it has claimed, the extensive communications with its local counsel. According to Claimant, this would show the efforts it made to understand and comply with ADL, a law as to which inconsistent and contradictory opinions had been issued by the Philippine enforcement agencies.⁵⁴⁴ Fraport adds that in particular the Pooling Agreement was drafted in consultation with the Philippine counsel QT, so that there could be no planning of a violation of the ADL's prohibition to intervene in the management, operation, administration or control of a public utility.⁵⁴⁵
438. There is no clear evidence that the Pooling Agreement, in the text finally adopted, was drafted in consultation with QT. By letter of June 14, 1999, to PAGES, copied to Mr. Archer and Mrs. Ochs of Fraport, referring to Article 2.02(2)(a) of FAG-PAIRCARGO-PAGES-PTI Shareholders Agreement, the Pooling Agreement, QT suggested to amend it by adding at the beginning the words "*In view of FAG's unparalleled and proven expertise in international airport terminal operations, which the Shareholders expressly acknowledge*" and at the end the words "*The Shareholders shall act upon the recommendations of FAG.*"⁵⁴⁶ QT's advice regarding this provision is confirmed by Mrs. Ochs' written statement of August 9, 2012, enclosed with Claimant's Memorial.
439. In a letter of four days later, June 18, 1999, however, QT advised FAG, in the person of the same Mrs. Ochs, that they "are still of the opinion that a voting agreement which gives FAG control of the vote of a total of 51% of the outstanding capital stock of PIATCO would be violative of the Anti-Dummy Law," "criticizing a prior draft to that effect but approving a draft of June 3, 1999⁵⁴⁷ providing only that "FAG will be consulted and FAG may make recommendations" in respect of certain matters specified in said agreement."⁵⁴⁸

⁵⁴⁴ Rep., para. 152.

⁵⁴⁵ *Ibid.*, para. 174.

⁵⁴⁶ CE-114, Letter from QT, June 14, 1999.

⁵⁴⁷ RE-1423, Draft Pooling Agreement, June 3, 1999.

⁵⁴⁸ RE-1430, Quisumbing Torres' Letter to Doerte Ochs, June 18, 1999, pp. 1-2 (underlined in the text).

Strange enough, Mrs. Ochs, although the destinee of QT's letter of June 18, 1999, does not refer to it in her Witness Statement. In the presence of two conflicting legal opinions, signed by the same lawyers on behalf of QT the Tribunal shall assume that the later in time replaced the previous one so that Fraport should have relied on the June 18, 1999 advice, the latter having been delivered sufficiently in advance of the date on which the Pooling Agreement was executed to be implemented.

440. The Tribunal does not need to examine Respondent's reply that the ADL is a special law, violations of which are "*mala prohibita*," are unlawful from the moment of commission and do not require proof of malicious intent.⁵⁴⁹ The evidence in the file, particularly the Final Report submitted to Fraport's Supervisory Board, clearly shows that Fraport was fully aware at the time of its Initial Investment of the illegality under the ADL of any contractual arrangements permitting it to intervene in the management, operation, administration or control of a public utility such as Terminal 3.⁵⁵⁰

441. There is therefore no room for "good faith," "absence of intent" or a similar defense by Fraport. Fraport's interest in entering into the Project was so great that the decision was made to approve the proposed transaction despite the risk resulting from the failure to comply with the Philippine Constitution and the ADL. A risk that had been well-understood since March 1999 by a member of Fraport's Supervisory Board, Mr. Werner Schmidt, who had warned the Board that "the summary of the agreements contains the statement that a decisive voting right of FAG would violate the anti-dummy law of the Philippines. Consequently, FAG cannot legally enforce its intended leadership in this consortium. This, however, is the most important prerequisite for the entire transaction."⁵⁵¹

⁵⁴⁹ Rej., para. 296, quoting Concepcion II (ICSID 2), paras. 23, 56.

⁵⁵⁰ CBII-61/RE-54, Final Report, Holding Project, NAIA Terminal 3, Manila, Philippine, Feb. 26, 1999.

⁵⁵¹ CBII-62/RE-97, Comments on Investing in the Consortium for the Construction and Operation of Terminal 3 in Manila, Philippines, Mar. 7, 1999, p. 3.

b) Assessment of Fraport's Alleged ADL Violation

442. Having determined that the ADL was applicable to PIATCO prior to Terminal 3 becoming operational; that shareholder conduct may violate the ADL; that involvement in the planning of an act prohibited by the ADL, without more, is sufficient to give rise to criminal liability; that liability does not require knowledge that an action violated the ADL; and that a violation cannot be cured by cessation of the offending act, the Tribunal now turns to the specific violations alleged by Respondent. To recall, to establish the type of violation of Section 2-A of the ADL alleged by Respondent, the following elements must be shown:

- (i) A person or entity possess a right to engage in an activity subject to nationality restrictions;
- (ii) Such person or entity permit—or engage in planning to permit—an unqualified person to intervene in the management, operation, administration, or control of that nationalized activity; and
- (iii) A person aids, assists, or abets in the planning or carrying out of such an intervention.

443. In this case, the Tribunal has already found that PIATCO possessed a right to engage in an activity subject to nationality restrictions—namely, function as a project proponent for a public utility under the BOT law. Because it is argued that Fraport (or its officials) were both the person(s) who were unlawfully permitted (or planned to be permitted) to intervene *and* the person(s) who aided, assisted, or abetted in planning or carrying out such intervention, the decisive issue for both the second and third elements is whether a prohibited intervention was planned or carried out.

444. Having carefully reviewed the Parties' position as summarized above⁵⁵² and as shall be further detailed, the Tribunal has come to the conclusion that by executing a series of agreements with PIATCO's Philippine shareholders concurrently with its Initial Investment, Fraport ensured itself a power of intervention in the management, operation, administration and control of PIATCO and PTI in violation of the ADL. The analysis shall

⁵⁵² *Supra*, paras. 341-387.

be based essentially on the Pooling Agreement regarding PIATCO and PTI and on the PTI Shareholders Agreement regarding PTI.

445. The Pooling Agreement⁵⁵³ is the most important of the series of agreements entered into by Fraport with the Philippine shareholders of PIATCO at the time of its Initial Investment. As recorded by the Fourth Whereas Clause, the parties to the Pooling Agreement (therein referred to as “the Shareholders”) at the time owned an aggregate of fifty-one percent (51%) of the capital stock of PIATCO, Fraport (at the time called “FAG”) owning 25% of that capital. The most significant provisions of the Pooling Agreement for the present analysis are Articles 1.05, 2.01, 2.02 and 2.06.

446. Article 1.05 provides that throughout the life of the Pooling Agreement “the Shareholders shall maintain their respective percentages of ownership of capital stock” and “shall not sell any of their shares of stock, or permit the dilution of their percentage of ownership [...] without the prior written consent of all the Shareholders.”

447. The key provisions at issue are contained in Articles 2.01 and 2.02. Article 2.01 commits the Shareholders and their nominees to PIATCO’s Board of Directors to vote as a single block, as follows:

2.01 Without prejudice to Article 2.05,⁵⁵⁴ the Shareholders, through their representatives at any stockholders’ meeting of the Corporation and through their nominee directors at any meeting of the Corporation’s board of directors, shall, at all times, vote as a block and have a common vote on every matter for which their vote is required or permitted to be taken by law or by the Articles of Incorporation or By-laws of the Corporation.

448. Article 2.02 sets out the process for determining the Shareholders’ joint position, beginning with by meeting in advance of any votes with the objective of achieving unanimity. If the Shareholders cannot reach agreement, Article 2.02(2) provides that:

⁵⁵³ CBII-80/RE-34, FAG-PAICARGO-PAGS-PTI Shareholders’ Agreement, July 6, 1999.

⁵⁵⁴ Under Article 2.05 the Shareholders confirm that “where the operations and maintenance of the Terminal Complex, in general, are involved [...] Article 2.02 shall apply.”

2.02 The Shareholders or their directors' vote shall be determined in accordance with the following rules:

- (1) Within a reasonable time prior to the date set for a stockholders' or board meeting, the Shareholders shall have their own preliminary meeting for the purpose of extensive discussions and deliberations on the matters to be put to a vote. During the preliminary meeting, the Shareholders shall thoroughly discuss all the possible consequences of an affirmative and of a negative vote, with a view to arriving at a unanimous vote. The position of each Shareholder during the preliminary meeting shall be given equal weight (*i.e.*, FAG, PAIRCARGO, PAGES and PTI shall have one vote each).
- (2) In case the Shareholders are unable to reach a common position,
 - (a) The Shareholders shall consult FAG and FAG may make recommendations in relation to any of the following matters (which matters fall within FAG's area of expertise and competence):
 - (i) the implementation of the O&M Agreement, as executed;
 - (ii) the operation, maintenance and management of the Terminal Complex;
 - (iii) the conduct of commercial operations within the Terminal Complex in the ordinary course of business.

The Shareholders shall thereafter act upon the recommendations of FAG.

- (b) In all other matters not covered by (a) above the issue shall be submitted to the respective boards of directors of the Shareholders for further independent deliberations. If the position taken by the boards of directors is not unanimous, unless the Shareholders thereafter agree to postpone any action on the matter, the issue shall be submitted for resolution by three (3) arbitrators appointed under and acting pursuant to the Rules of Arbitration of the International Chamber of Commerce. Arbitration shall be for the purpose of determining the course of action most favorable to the interests of the Shareholders and most consistent with Article 1.

449. The Pooling Agreement thus provides for two approaches to disagreements among the Shareholders: If the operations and management of the terminal complex is implicated, Fraport is allowed to make "recommendations" and the other shareholders "shall thereafter act upon" Fraport's recommendations. On other issues, if the Shareholders' boards of directors do not reach agreement, the issue will be resolved by arbitration.

450. Under Article 2.06 the shareholders took the further engagement to make sure that their respective nominees in the board of directors and representatives in all stockholders meeting be present at all respective meetings, be fully informed of the terms of the Agreement and of the vote reached by the Shareholders' vote strictly in accordance with

the Shareholders' decisions and are immediately replaced should they not comply with the Agreement.

451. By the combination of the above provisions the parties to the Pooling Agreement established a block voting arrangement for its entire duration, ensuring at the same time that their respective nominees in the board of directors and representatives in the shareholders' meetings vote in conformity with the decisions previously reached by the shareholders under sanction of being replaced in case of non-compliance. It is now to be examined to what extent the described voting and other arrangements ensured Fraport's management, operation, administration and control over Terminal 3 operations in violation of the ADL.

452. Articles 1.05, 2.01, 2.02(1) and 2.06 have raised no controversy between the Parties nor do they raise questions from the Tribunal in view of their unequivocal language and purpose. This is not the case of Article 2.02(2)(a) which, after providing that the Shareholders shall consult FAG in case of inability to reach a common position in the preliminary meeting held under Article 2.02(1), concludes by stating that "FAG may make recommendations" in relation to certain enumerated matters and that "the Shareholders shall thereafter act upon the recommendations of FAG."

453. The Parties' position regarding the interpretation of the last sentences of Article 20.02(2)(a) has been mentioned before⁵⁵⁵ and shall not be repeated here. While "recommendation" stands for "something that is recommended, such as a course of action,"⁵⁵⁶ having as such no binding force on the destinee, the expression "act upon" means "to regulate one's behavior in accordance"⁵⁵⁷ so that the destinee of the

⁵⁵⁵ *Supra*, paras. 346-347 for Respondent and para. 373 for Claimant.

⁵⁵⁶ Collins English Dictionary, Third Edition.

⁵⁵⁷ *Ibid.*

recommendation has to perform what is recommended, the immediately preceding verb “shall” confirming the mandatory nature of the provision.⁵⁵⁸

454. The matters covered by Fraport’s recommendations under Article 2.02(2)(a) of the Pooling Agreement related to critical aspects of the Terminal 3 Project:

- (i) The implementation of the O&M [*i.e.*, Operation and Maintenance] Agreement, as executed;
- (ii) The operation, maintenance and management of the Terminal Complex;
- (iii) The conduct of commercial operations within the Terminal Complex in the ordinary course of business.”

The authority so granted to Fraport placed it in the position to “intervene in the management, operation, administration or control” of a nationalized activity in violation of Section 2-A of the ADL.

455. That the above is the correct reading of the last sentence of Article 2.02(2)(a) is confirmed by the evidence in the file showing clearly that the intent was to give Fraport actual control over the Terminal 3 Project in view of PIATCO’s lack of experience in operating airport terminals. The Master Concession Concept Brief of January 19, 1999, contemplated that “[a] shareholders agreement will have to secure the actual control by FAG as may be allowed by Philippine laws. Actual control refers to full executive management control by

⁵⁵⁸ This was also the conclusion of the Tribunal in ICSID 1 Award (CBII-409), paras. 351, 398: “Even if the shareholders do not agree, Fraport’s view is controlling with respect to the matters itemized in Article 2.02(2). In short, for those items, Fraport secures *managerial* control in violation of the ADL [...] Fraport concluded that the only plausible way for its equity investment to prove profitable was to arrange secretly for management and control on the project in a way which the investor knew were not in accordance with the law of the Philippine. This was accomplished by Article 2.02 of the FAG-Paircargo- PAGES-PTI Shareholders’ Agreement of July 6, 1999 which allowed Fraport (or FAG as it was then known) to have a casting and controlling vote over matters which fell within its areas of expertise and competence.” Likewise, according to the ICC Tribunal in *Philippine International Air Terminals Co., Inc. v. The Government of the Republic of the Philippines* (ICC Case No. 12610/TE/MW/AVH/JEM/MLK), Partial Award, July 22, 2010 (CBII-414), para. 538: “The words of the concluding part of Article 2.02(2)(a) are perfectly clear. There is a requirement that ‘the shareholders shall thereafter act upon the recommendations of FAG.’ It is, in the Tribunal’s opinion, undoubtedly the intention of the parties as expressed in the Pooling Agreement that in relation to the three matters mentioned in Article 2.02(2)(a) the position of Fraport will prevail in the event the parties are not unanimous.”

FAG.”⁵⁵⁹ As previously noted,⁵⁶⁰ the inconsistency between this last statement and the prudent reference to what “may be allowed by Philippine laws” is manifest, Philippine law on the matter not allowing Fraport any measure of control.

456. Claimant refers to the different language of Article 2.05 providing that in case of lack of unanimity regarding matters falling within PAGS’s or PAIRCARGO’s competence the Shareholders undertake to vote strictly in accordance with the position taken respectively by PAGS or PAIRCARGO to infer that there is no similar undertaking regarding Fraport’s recommendations. The Tribunal notes that this provision confirms the binding nature of Fraport’s recommendation right. In general, this provision unambiguously directs the Shareholders to vote in accordance with the position of PAGS or PAIRCARGO, respectively, when an issue directly affects the business operations of either at the terminal. However, Article 2.05 is deemed not to apply when the operations and maintenance of the terminal complex is at issue, in which case Article 2.02 applies. Yet, this exception would be meaningless unless Fraport’s recommendation was binding, as there would be little reason for Fraport to recommend how PAGS and PAIRCARGO vote when their own business operations were implicated, unless they were bound by that recommendation.⁵⁶¹

457. Evidence on the record suggesting that the Shareholders considered Fraport’s recommendations to be binding confirms the Tribunal’s finding. For example, in a letter to Cheng Yong dated July 6, 2001, Mr. Bernd Struck of Fraport referred to the proposed revisions to the Pooling Agreement as “waiv[ing] the binding nature of its recommendation rights.”⁵⁶²

⁵⁵⁹ CBII-58/RE-791, Master Concession Concept Brief attached to a letter from PIATCO to Fraport, Jan. 19, 1999, p. 4 (emphasis added).

⁵⁶⁰ *Supra*, para. 432.

⁵⁶¹ The Tribunal does not find much probative value in the difference between the language used in Article 2.02(2)(a) and Article 2.05 to describe different parties’ rights to decide the common position of the Shareholders, as it could just as likely indicate artful drafting as a substantive difference.

⁵⁶² RE-1485, Letter from Bernd Struck to Cheng Yong, July 6, 2001. Other evidence on the record, despite pre-dating the conclusion of the Pooling Agreement, suggests that Fraport’s recommendation right was intended to be binding. For example, Fraport’s Final Holding Report, NAIA Terminal 3, Feb. 26, 1999 (CBII-61/RE-54), states

458. Fraport's Supervisory Board was in agreement that control of the Project was required. A resolution of March 1999 mentions Fraport's opportunity to "assume the leadership in the PIATCO's consortium" by becoming "responsible for the planning, building and operation of the new terminal."⁵⁶³ The Resolution followed a Final Holding Report that had been submitted to the Supervisory Board which clearly shows that the highest level of Fraport's decision-making authority had been made aware that the control of a Philippine public utility by a foreign minority shareholder was contrary to Philippine law⁵⁶⁴ but that it had accepted to run the related risk.
459. The foregoing analysis is sufficient to conclude for the ADL violation by Fraport at the time of its Initial Investment. Other grounds of violation may be added. An additional one is the role given to Fraport as Financial Arranger for the Terminal 3 Project. The First Addendum to the PIATCO Shareholders Agreement dated July 6, 1999, in addition to conferring to Fraport this role specifies that Fraport "shall have exclusive authority to determine the financial arrangements for the project... including the nomination of the Company's financial advisers [...]." The role was therefore not just to act as a financial advisor but to take decisions binding on the Company regarding all financial aspects of the Project in lieu of PIATCO's Board of Directors, thus adding another essential "intervention in the management, operations, administrations or control" of PIATCO, in violation of Section 2-A of the ADL.
460. No ADL violation is to be found regarding Fraport's appointment of directors in PIATCO's Board of Directors in excess of its proportionate share participation, as alleged by Respondent. At the time of its Initial Investment, in fact, no directors had been appointed by Fraport in PIATCO's Board.

that "PAGS and Paircargo are willing to accept the professional advice of [Fraport] in the above mentioned decisions as binding, which, however, cannot be enforced legally because of local laws" (p. 5).

⁵⁶³ CBII-64/ICSID-1098, Minutes of Meeting of the FAG Supervisory Board, Mar. 12, 1999.

⁵⁶⁴ CBII-61/RE-54, Fraport's Final Holding Report, NAIA Terminal 3, Feb. 26, 1999: "PAGS and Paircargo are willing to accept the professional advice of FAG in the above mentioned decisions as binding, which, however, cannot be enforced legally because of local laws" (p. 5; emphasis added).

461. On the contrary, Fraport placed many persons of its own choice into managerial positions in PIATCO and PTI. In a PIATCO's Board meeting of July 8, 1999, Mr. Hans-Arthur Vogel, a German national, was entrusted with financial matters as PIATCO'S and PTI's Director of Finance. The minutes of that Board meeting note that Fraport's Stephan Bauchspiess, also a German national, was appointed as PIATCO's Director for Terminal Operations, Building Managements & Personnel Affairs having authority, together with Hans-Arthur Vogel, to sign banking documents on behalf of PIATCO.⁵⁶⁵
462. These appointments were in contravention of the Philippine Constitution and the ADL. The Constitution provides in Article XIII, para. 11, that "all the executive and managing officers of a corporation or association must be citizens of the Philippines." Section 2-A of the ADL prohibits all interventions in the "management, operation, administration or control" of a public utility, "except for technical personnel whose employment has been authorized by the Secretary of Justice." DOJ Opinions confirm that this prohibition applies to aliens in any position at a public utility. As stated by the Supreme Court, the purpose of this prohibition is to prevent a minority shareholder's exercise of control through the employment of aliens.⁵⁶⁶
463. Fraport's appointment of persons in various positions in PIATCO and PTI was neither authorized by the Secretary of Justice nor fell under the PEZA law. The latter could not derogate from the provision of the Constitution preventing foreign nationals from holding executive and managing officers position in Philippine public utilities.⁵⁶⁷ These appointments placed even more Fraport in the position to intervene in the management, operation, administration and control of PIATCO and PTI, in violation of Section 2-A of the ADL.

⁵⁶⁵ RE-380, Minutes of the Organizational Meeting of the Board of Directors of PIATCO, July 8, 1999.

⁵⁶⁶ Concepcion I (ICSID 2), paras. 99-100.

⁵⁶⁷ *Ibid.*, para. 85.

464. A further violation of Section 2-A results from arrangements agreed under the PTI Shareholders' Agreement of July 6, 1999.⁵⁶⁸ Pursuant to this Agreement, Fraport and PTH became shareholders of a newly formed company, PTI, created to enter into the O&M Agreement with PIATCO for the operation and maintenance of the Terminal Complex and to serve as contractor-operator under said agreement.⁵⁶⁹ Under the PTI Shareholders Agreement, Fraport was granted authority to designate PTI's Chairman and the director in charge of finance, administration and commercial operations, permitting Fraport-appointed directors to sign checks on behalf of PTI.⁵⁷⁰ More than that, the Agreement gave Fraport ultimate decision-making power in relation to Terminal 3 operations, as stated by the last Whereas Clause:

“WHEREAS, PTH Inc. acknowledges the unparalleled and proven expertise of FAG international airport terminal operations and undertakes to respect FAG's decision or position in relation to the performance of the contractor-operator's obligations under the O&M Agreement.”

465. It is to be recalled in this connection that the implementation of the O&M Agreement was one of the three matters on which Fraport had ultimate control through binding recommendations under the Pooling Agreement.⁵⁷¹ Ultimate control over PTI's role as contractor-operator of the Terminal 3 was accordingly granted to Fraport, PIATCO relinquishing to the latter the control over the Terminal operations. This is a further confirmation of Fraport's “intervention in the management, operation, administration or control” of a Philippine public utility, in contravention to Section 2-A of the ADL.

466. A Supervisory Board's resolution dated March 12, 1999, approved the acquisition of a participation in PIATCO and PTI.⁵⁷²

⁵⁶⁸ CBII-81/RE-35, PTI Shareholder Agreement between PTH and FAG, July 6, 1999.

⁵⁶⁹ *Ibid.*, Second Whereas Clause.

⁵⁷⁰ *Ibid.*, paras. 2.2, 4.1, 5.8.

⁵⁷¹ *Supra*, para. 454.

⁵⁷² CBII-64/RE-792, Minutes of Meeting of the FAG Supervisory Board, Mar. 12, 1999, p. 3. The Resolution was approved with four dissenting votes, one of which was by Mr. Schmidt who declined “assuming responsibility for this transaction” (*Ibid.*, p. 3).

467. Based on the foregoing analysis and after due and thorough consideration of the Parties' arguments and the evidence on the record, the Tribunal finds that Fraport violated the ADL when making its Initial Investment, the latter being consequently excluded as investment protected by the BIT because of its illegality. The illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty. As it has been held, "*States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their own law.*"⁵⁷³ Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement.

468. The Tribunal therefore considers that there is no legal dispute arising out of, or a divergence concerning, an "investment" and, moreover, that Respondent has not consented to the arbitration of Claimant's claims with respect to its investment. Accordingly, the Tribunal holds that it lacks jurisdiction over Claimant's claims pursuant Article 25(1) of the ICSID Convention and Article 9 of the BIT. It also follows that the Tribunal lacks jurisdiction over Respondent's counterclaims in view of their necessary connection with the subject matter of the dispute pursuant to Article 46 of the ICSID Convention.⁵⁷⁴ The Tribunal notes that the request of an award of costs cannot properly be considered a counterclaim. Therefore, the dismissal of the counterclaims does not affect the Tribunal's discretion to allocate costs.

3. Jurisdictional Objection 2: There is no Jurisdiction and all of Fraport's Claims are Inadmissible as a Result of Fraport's Corruption and Fraud

469. Also in this case the analysis shall be limited to examine whether the facts on which Jurisdictional Objection 2 is founded intervened at the time of Fraport's Initial Investment. Specifically, the Tribunal shall review Respondent's submissions and underlying evidence to determine whether, as alleged by Respondent, Fraport was aware of and actively engaged in corruption and fraud when making its Initial Investment.

⁵⁷³ *Phoenix*, Award; *see also SAUR*, Decision.

⁵⁷⁴ This connection is recognized by Respondent, its counterclaims being raised "to the extent there is any jurisdiction over these proceedings" (C-Mem., para. 1171).

470. The reading of Respondent's submissions on the subject reveals that the alleged "corruption and fraud" relate to a phase of the implementation of the NAIA Terminal Project after the time of Fraport's Initial Investment.

471. According to Respondent's first submission, Fraport and PIATCO engaged in a range of illicit activities which included:

- Hiring a "consultant" to bribe officials to issue the Government approvals that PIATCO needed in order to begin drawing down its long-term loans;
- Engaging in an elaborate kickback scheme of overbilling the Government, which permitted PIATCO's management and allies to profit from sub-standard work; and
- Laundering funds allegedly paid as project expenses in order to conceal their actual destinations and uses.⁵⁷⁵

472. The only part of this Chapter of the Counter-Memorial dealing with facts predating Fraport's Initial Investment is the alleged awareness by Fraport of a US \$4 million payment made by PIATCO to Datacenta to an offshore bank account in Hong-Kong⁵⁷⁶ pursuant to a consultancy Agreement signed by PIATCO sometime in 1997.⁵⁷⁷ The allegation is that Fraport was aware of this payment which was included in PIATCO's project costs of February 7, 2002,⁵⁷⁸ as to which however neither Fraport nor PIATCO have produced evidence proving the propriety of the contract and related payment.⁵⁷⁹

473. In the Rejoinder, under the heading "Fraport Knowingly Participated in Corruption, Fraud and Money Laundering in Violation of Philippine Law and International Public Policy,"⁵⁸⁰

⁵⁷⁵ C-Mem., para. 275. The quoted passage is at the beginning of the chapter of the C-Mem. entitled "Fraport was Aware of and Actively Engaged in Bribery, Fraud and Corruption in the Implementation of the NAIA Terminal 3 Project." No attempt is made by Respondent here and subsequently to distinguish between bribery, fraud and corruption, three obviously different offenses.

⁵⁷⁶ C-Mem., para. 412.

⁵⁷⁷ RE-326, Agreement for the Provision of Consultancy Services in relation to tax and efficiency planning in respect of Terminal III between PIATCO and Datacenta Ltd., Aug. 22, 1997 (the "Datacenta Agreement").

⁵⁷⁸ CBII-242/RE-519, PIATCO's Financial Presentation, Feb. 7, 2002.

⁵⁷⁹ C-Mem., para. 413.

⁵⁸⁰ Where "Money Laundering" replaces "Bribery," without any distinction again between these various offenses.

Respondent substantially refers to the same factual circumstances described in the Counter-Memorial, which would demonstrate Fraport's knowledge of illicit activities relating to the Terminal 3 Project. All such activities, assuming they had actually been put in place, intervened after the time of Fraport's Initial Investment.⁵⁸¹

474. A drastic change in Respondent's contention regarding Fraport's alleged engagement in corruption and fraud is to be found in its Post-Hearing Submission in reply to Fraport's defense that "the allegations of corruption and wrongdoing almost exclusively involve alleged events years after Fraport's equity investment in July 1999 and do not relate to the pre-investment stage."⁵⁸² To reply to this somewhat new argument, Respondent asserts that, contrary to the position in the arbitration case relied upon by Claimant,⁵⁸³ "in this case, by contrast, the corruption and fraud directly relate to the making and implementation of Claimant's investments."⁵⁸⁴

475. By drawing a distinction between the "making" and the "implementation" by Fraport of its investment, Respondent attempts to overcome the absence of proof, as alleged by Claimant, regarding Fraport being engaged in corruption and fraud also at the time of its Initial Investment. Respondent first contends that the *prima facie* evidence it has presented in support of its allegation shifts the burden of proof onto the Claimant,⁵⁸⁵ to then assert that in case of payments to Government officials direct evidence is not required, circumstantial evidence being sufficient, the latter consisting of "*indicia*" or "red flags" in the case of corruption.⁵⁸⁶

476. The only evidence proffered by Respondent relating to the period prior to Fraport's Initial Investment is once again the Datacenta Agreement, the date of which is now indicated to

⁵⁸¹ Rej., paras. 307-481.

⁵⁸² Cl. Skeleton, p. 33 (under 1(a)).

⁵⁸³ *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation* (ICSID Case No. ARB/10/11), Decision on Jurisdiction, Aug. 19, 2013, para. 446, quoted in Cl. Skeleton, fn. 165.

⁵⁸⁴ R. PHB1, para. 62.

⁵⁸⁵ *Ibid.*, para. 64.

⁵⁸⁶ *Ibid.*, para. 63.

be August 22, 1997.⁵⁸⁷ The assumptions made by Respondent in this regard may be summarized as follows:

- The payments made to Datacenta, an entity without experience, were made for unspecified services and were exorbitant, which is indicative of corruption;⁵⁸⁸
- “The evidence thus reflects that the basis for awarding the concession was a corrupt bait-and-switch involving Security Bank which was connected to President Estrada and the Zamoras, and the PIATCO made corrupt payments to these officials through sham consulting payments to Datacenta among other companies,” PIATCO’s Concession being “thus unlawful”;⁵⁸⁹
- Regardless of what Fraport knew of PIATCO’s corruption, its investment is unlawful and not protected by the BIT.⁵⁹⁰
- Fraport knew before it invested that PIATCO “was not transparent enough,” KPMG Due Diligence Report dated January 20, 1999, having informed Fraport of the payment of US \$6.5 million to Datacenta and that “PIATCO’s books and records contained some major accounts that need to be adjusted to maintain consistency and propriety of financing statement presentation.”⁵⁹¹

All other factual circumstances relied upon by Respondent relate to a period of time subsequent to Fraport’s Initial Investment.

477. Claimant replies that despite all power and resources to investigate its allegations of corruption, Respondent has been unable to proffer direct evidence of corruption. As held by other investment treaty tribunals, evidence of corruption must be clear and convincing.⁵⁹² In its view, it is unreasonable to contend that it is the allegedly corrupt

⁵⁸⁷ R. PHB1, para. 67.

⁵⁸⁸ *Ibid.*, paras. 68-69.

⁵⁸⁹ *Ibid.*, para. 69. *See also* R. PHB2, para. 54.

⁵⁹⁰ *Ibid.* *See also* R. PHB2, para. 55.

⁵⁹¹ R. PHB1, para. 70, referring to KPMG Due Diligence Report, Jan. 20, 1999, p. 4 (CBII-59/RE-358). However, no mention is made in this Report of any payment to Datacenta. R. PHB2, para. 55, refers instead to KPMG Audit Report, Jan. 4, 1999 (RE-1768), which allegedly mentions payment by PIATCO to Datacenta of US\$ 6.5 million (however, no such mention is contained in pages 58 and 146 of KPMG Report) while Annex H to the Rejoinder (“*Timeline of Warnings for Fraport’s Failed Investment Chronology*”) contains a “warning” in that regard (under No. 87).

⁵⁹² Cl. PHB2, paras. 47-48, quoting *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award, Oct. 8, 2009 (RL-160), para. 221.

party that has to prove its innocence, having on its part amply met its burden of production by filing 100.000 plus pages of documents, including documents seized by the German prosecutor, in response to 21 requests granted by the Tribunal relating to corruption allegations. Further, testimony was produced by it, confirming the contemporaneous documentary evidence that Fraport understood that PIATCO, as customary in the industry, was hiring a consultant.⁵⁹³

478. With specific reference to Respondent's allegation that it invested in a corrupt enterprise, Fraport notes how extraordinary is this statement, made in the absence of any evidence and based on events pre-dating its investment. The 1997 Agreement between Datacenta and PIATCO, relied upon by Respondent for its allegations of corruption, has nothing to do with its investment, having been signed more than two years before.⁵⁹⁴

479. The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport.

480. The assumptions made regarding in particular the Datacenta Agreement⁵⁹⁵ are not supported by evidence. There is a leap in the logic in alleging Fraport's corruption regarding events having taken place much before the time it made the Initial Investment or regarding payments to Datacenta made by PIATCO after the Concession had been obtained and still ongoing in March-June 1999⁵⁹⁶ as "being the basis for awarding the

⁵⁹³ Cl. PHB2, paras. 50-51.

⁵⁹⁴ *Ibid.*, para. 63.

⁵⁹⁵ *Supra*, para. 476.

⁵⁹⁶ RE-218, Silverstone II (ICC), paras. 54-55, quoted in R. PHB1, fn. 158. Silverstone's Report regarding Datacenta concludes that "[d]ue to the lack of supporting documentation we do not know the source of funds used for these transaction, the end use of these funds, or exactly how much was paid to Datacenta" (*ibid.*, para. 55).

concession.”⁵⁹⁷ Even assuming that Fraport knew of payment to Datacenta through PIATCO’s project costs of February 7, 2002, this document is over two and a-half years after Fraport’s Initial Investment. There is no basis in conflating PIATCO with Fraport and asserting that even if Fraport did not know of PIATCO’s corruption, assuming such corruption is proven (which is not regarding the concession award), its investment “is unlawful and not protected by the BIT.”⁵⁹⁸

481. The analysis conducted above permits the Tribunal to conclude that Jurisdictional Objection 2 is to be dismissed, as it is hereby dismissed, due to Respondent’s failure to provide clear and convincing evidence that Fraport was aware of and engaged in corruption and fraud regarding Terminal 3 Project when it made its Initial Investment.

4. Jurisdictional Objection 3: Fraport Knew of PIATCO’s Misrepresentations to Obtain the Concession Award

4.1 Respondent’s Position

482. According to Respondent, PIATCO made material misrepresentations regarding its identity and financial qualifications and obtained the concession by deceit. Neither at the time of the bid nor after PIATCO was incorporated did PAIRCARGO & Associates, PAGES and Security Bank meet the 30% minimum amount of equity required to undertake the Terminal 3 Project.⁵⁹⁹ When PIATCO was incorporated on February 17, 1997, for the purpose of constructing and operating Terminal 3, Security Bank was not among the shareholders. On July 9, 1997, the DOTC, relying on these false misrepresentations, issued a “Notice of Award” in favor of PIATCO.⁶⁰⁰

⁵⁹⁷ R. PHB1, para. 69.

⁵⁹⁸ *Ibid.* Respondent’s assertion is based on the award in *Alasdair Ross Anderson et al. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3) of May 19, 2010 (RL-109), para. 52, which, in the passage quoted by Respondent, does not refer to the lack of knowledge of corruption as non-exempting from liability but rather to the fact that the BIT requirement that investments must be “in accordance with the [...] law” has no regard to “knowledge of the law” or “intention to follow the law” (which, the Tribunal notes, is an application of the old maxim according to which “*ignorantia legis non excusat*”).

⁵⁹⁹ C-Mem., para. 53.

⁶⁰⁰ *Ibid.*, para. 57.

483. The KPMG due diligence report on PIATCO conducted for Fraport in January 1999 explained that PIATCO did not meet the 30% equity requirement of PhP 3.9 billion, its equity being deficient by PhP 2.1. Billion also because of depreciation of the Peso relative to the U.S. dollar, the currency of the Concession. The lack of sufficient project equity was raised also by the legal due diligence conducted for Fraport at the time by QT. Due to PIATCO's inability to provide the necessary equity, Fraport had to carry the project's equity by funding equity subscription.⁶⁰¹
484. PAIRCARGO & Associates also materially misrepresented in the financial proposal the availability of loan facilities while no loan was ever available to PIATCO from any bank. The lack of PIATCO's creditworthiness was reported to Fraport in KPMG report and put to Fraport's Supervisory Board in January 1999 by one of its members, Mr. Werner Schmidt, as a situation that "increases the risks of the project."⁶⁰²
485. Being aware of its lack of financial qualifications, PAIRCARGO wrote to PBAC on September 10, 1996, requesting permission for each member of the Consortium to commit to infuse the required capital to meet the minimum amount of equity. PBAC replied by allowing that the total financial capability of all members of the Consortium be established by the respective audited financial statements.⁶⁰³
486. According to Respondent, PBAC's administrative decision, whatever its genesis, was unlawful since it altered the terms of the Bid and violated the BOT law considering also that Security Bank was no longer part of the Consortium when the latter had won the award. Also the *Agan* court found that the PAIRCARGO & Associates' pre-qualification was unlawful because not complying with the net worth restrictions imposed by the General Banking Act.⁶⁰⁴

⁶⁰¹ C-Mem., para. 59.

⁶⁰² *Ibid.*, paras. 60-63.

⁶⁰³ *Ibid.*, para. 64.

⁶⁰⁴ *Ibid.*, paras. 65-68.

487. According to Respondent, also the project costs and revenues were misleadingly estimated and the proposed annual guaranteed payment to the Government was based on unrealistically high assumed figures.⁶⁰⁵ PAIRCARGO & Associates were awarded the Concession contrary to the BOT law since the sole basis for choosing among the bids presented was the annual guaranteed payment, which was in contradiction with the BOT law criterion for selecting the winner.⁶⁰⁶
488. In sum, according to Respondent, PAIRCARGO & Associates was awarded the Concession contrary to the BOT law and other Philippine law, based on misrepresentations of the real identity due to Security Bank's withdrawal, its financial ability and the ability to manage and operate an international terminal. Fraport was informed by KPMG due diligence report and Fraport's Supervisory Board by Mr. Schmidt.⁶⁰⁷
489. According to Respondent, Fraport was aware at the time it made its investments that PIATCO had misrepresented its qualifications to be a Terminal 3 concessionaire and that both lenders and Fraport's consultants questioned the legality of the concession award to PIATCO. In spite of such awareness of PIATCO's fraud, Fraport chose to proceed by investing in PIATCO and extending to it unsecured bridge loans.⁶⁰⁸
490. The lenders' concerns about PIATCO led them to impose conditions on their loans of which Fraport became aware before investing in PIATCO, including assumption by Fraport of full executive management and control of the Project and of the necessary financing.⁶⁰⁹ The evidence shows that Fraport entered the Project and made its investment aware of PIATCO's misrepresentations to obtain the Concession and yet decided to cover them up by investing in PIATCO.⁶¹⁰

⁶⁰⁵ C-Mem., paras. 69-71.

⁶⁰⁶ *Ibid.*, paras. 72-73.

⁶⁰⁷ *Ibid.*, paras. 74-81; Rej., paras. 181-193.

⁶⁰⁸ C-Mem., paras. 82-83.

⁶⁰⁹ *Ibid.*, paras. 84-86.

⁶¹⁰ *Ibid.*, paras. 88-92; Rej., paras. 196-200.

491. Respondent asserts also that the Concession contained direct Government guarantee for project debts which was known to Fraport⁶¹¹ but which was expressly prohibited for unsolicited proposal by the BOT law.⁶¹² The presence of this guarantee renders the Concession Agreement invalid, as confirmed by the Philippine Supreme Court which by the *Agan* decision concluded that the inclusion of such a guarantee in an unsolicited proposal “is fatal to the proposal [...] and renders the entire contract void.”⁶¹³
492. In addition, Respondent contends that the Concession Agreement was not approved by the ICC, but merely noted,⁶¹⁴ and that it contained changes with respect to the draft agreement attached to the Bid documents that were grossly disadvantageous to the Government.⁶¹⁵
493. In conclusion, according to Respondent, Fraport cannot claim the BIT protection since it made its investments unlawfully having knowingly invested in an enterprise that obtained its concession unlawfully. Since its investment was thus not accepted in accordance with Philippine law, the BIT does not provide a basis for jurisdiction in this case.⁶¹⁶

4.2 Claimant’s Position

494. Claimant asserts that it reasonably relied on assurances and other actions by the Philippine Government repeatedly approving the Project. According to Respondent, it should have instead understood the concession to be “invalid” even through the Government itself always acted as if it were a fully legal and binding agreement.⁶¹⁷

⁶¹¹ C-Mem., para. 93.

⁶¹² *Ibid.*, paras. 94-97; Rej., paras. 167-168.

⁶¹³ CBII-378/RE-609, *Agan* Resolution denying PIATCO’s Motion for Reconsideration, Jan. 21, 2004, pp. 36-39, referred to in C-Mem., para. 103. *See* Rej., paras. 203-205.

⁶¹⁴ C-Mem., paras. 126-129; Rej., paras. 169-180.

⁶¹⁵ C-Mem., paras. 112-113.

⁶¹⁶ *Ibid.*, para. 773.

⁶¹⁷ Rep., para. 80.

495. As shown by Claimant, Respondent had “an unbroken 6-year history of administrative, executive, legislative and judicial support at the time” it decided to invest, the termination of the concession over three years thereafter being unexpected.⁶¹⁸
496. It is by reason of the lack of financial ability and technical expertise of PIATCO’s shareholders, the Chengs, that made the involvement of an experienced and financially strong partner like Fraport an opportunity for the Project.⁶¹⁹ The risk Fraport assumed in making its investment was part of the business risk and is no defense under the BIT to Respondent’s liability for expropriating the investment.⁶²⁰
497. According to Claimant, the changes to the original Bid Documents and the original Concession Agreement criticized by Respondent were reasonable and in many cases favorable to Respondent.⁶²¹
498. Respondent’s assertion that Claimant was aware when it invested in PIATCO that the Concession and the ARCA contained a direct governmental guarantee is not supported by contemporaneous documents. QT’s preliminary due diligence report does not raise this issue despite referring to the ARCA provision mentioned by Respondent. Whether that provision resulted in a governmental guarantee in breach of the BOT law is a matter of contractual interpretation and construction of the law. Respondent’s Central Bank confirmed the absence of a Government guarantee.⁶²²
499. Respondent’s assertion that the concession agreements were not properly approved because the internal bureaucratic process had not been completed is contradicted by the fact that they were consistently implemented, such as by Respondent’s accepting concession payments from PIATCO. It was Respondent’s responsibility to secure the

⁶¹⁸ Rep., para. 81, referring to the chart under Annex A summarizing various governmental approvals in support of the Terminal 3 project.

⁶¹⁹ *Ibid.*, para. 84.

⁶²⁰ *Ibid.*, para. 86.

⁶²¹ Mem., paras. 120-130; Rep., para. 87.

⁶²² Rep., paras. 104-106.

approval process completion, so that no blame may be shifted to Fraport for Respondent officials' wrongdoing,⁶²³ the Supreme Court's decision in *Agan* being a misapplication of the law.⁶²⁴

500. To argue that the Concession was not properly awarded to PIATCO, Respondent focuses on narrow and technical issues, such as how the net worth of a proponent should be accounted, an issue which was determined by PBAC in the absence of rules in the BOT law. Fraport was entitled to rely on the record that the PAIRCARGO Consortium had been properly pre-qualified, as confirmed by multiple agencies and officials.⁶²⁵ PIATCO's projected costs and revenues were not misleading, the passenger traffic forecast being realistic as shown by the 2011 handling of 11.8 million of passengers despite an unfinished Terminal.⁶²⁶

501. There is plenty of evidence that the award of the Concession to PIATCO was endorsed at the highest level of the administration, even while AEDC pursued the court challenge, including by a memorandum to President Ramos of the Chief Presidential Legal Counsel.⁶²⁷

502. According to Claimant, Respondent should be estopped from denying the validity of the concession agreements since it not only guaranteed their legality but actively endorsed such legality until Terminal 3 was virtually finished. The three elements of estoppel under international law are present in this case: (i) a statement of fact which is clear and unambiguous; (ii) the statement is voluntary, unconditional and authorized; (iii) there was reliance in good faith on the statement.⁶²⁸

⁶²³ Rep., paras. 115-117.

⁶²⁴ *Ibid.*, paras. 124-128.

⁶²⁵ *Ibid.*, paras. 128-133.

⁶²⁶ *Ibid.*, paras. 134-138.

⁶²⁷ *Ibid.*, para. 145.

⁶²⁸ *Ibid.*, paras. 551-582.

4.3 The Tribunal's Analysis

503. Also in this case, the analysis shall be limited to factual circumstances relating to the period of time culminating with Fraport's Initial Investment, facts that have intervened subsequently having no bearing for purposes of jurisdiction.⁶²⁹

504. At the outset, the Tribunal notes that Respondent's contention that the Concession⁶³⁰ was not properly awarded to PIATCO assumes that the alleged irregularities, even illegalities, in the process leading to the granting of the Concession concerned solely the PAIRCARGO Consortium, later on its successor PIATCO, while Respondent was not accountable having no power to prevent the same. The other assumption by Respondent is that Fraport was aware of such irregularities or even illegalities when it made its Initial Investment. Both assumptions do not withstand scrutiny, as it shall be shown hereafter.

505. One of Respondent's contentions is that the PAIRCARGO Consortium falsely misrepresented its financial and technical qualifications, deceiving PBAC in qualifying and eventually awarding the Concession, and that PIATCO had misrepresented its qualifications to be the Terminal 3 concessionaire.⁶³¹

506. It is not the purpose of the present analysis to establish whether Respondent is right in alleging that the Concession was obtained by deceit by reason of these misrepresentations but only whether and to what extent Fraport was aware of such misrepresentations, assuming they are true, when it made its Initial Investment. It is on record that the Pre-qualification Bids and Awards Committee ("PBAC"), the Philippine competent authority, pre-qualified the PAIRCARGO Consortium on September 26, 1996⁶³² and that only more

⁶²⁹ This explains why the Tribunal's analysis does not consider various Respondent's arguments and related evidence.

⁶³⁰ The Concession was granted under a Concession Agreement signed on July 12, 1997 between the Government and PIATCO, amended on November 1998 by the Amended and Restated Concession Agreement ("ARCA"). *See supra* para. 95.

⁶³¹ Respondent evidently conflates the PAIRCARGO Consortium with PIATCO, the latter having been incorporated by the former to be then granted the Concession.

⁶³² Respondent asserts that "PBAC prequalified unlawfully Paircargo & Associated" mentioning that "there is substantive evidence that PBAC members, Pantaleon Alvarez and Wilfredo Trinidad, were corrupted" (C-Mem., para. 66). The fact remains that, as mentioned by Respondent, only with the Supreme Court's decision in *Agan v.*

than seven years later, on January 21, 2004, the pre-qualification was found unlawful by the Philippine Supreme Court. Thus, based on the record of this proceeding what Fraport knew at the time of its Initial Investment was that the PAIRCARGO Consortium, *i.e.* PIATCO, had been pre-qualified and that such pre-qualification had not been challenged by any competent Philippine authority.

507. PIATCO's lack of financial and technical qualifications to construct and operate the Terminal 3 was known and had been the main worry of prospective lenders to the Project. Fraport had been made aware of the lack of PIATCO's financial qualifications, this being the main reason for its proposed involvement in the Terminal 3 Project. Fraport had been so informed by KPMG due diligence report on PIATCO of January 20, 1999 ("KPMG Report").⁶³³ Having noted the shortfall in required equity contribution and the insufficiency of cash balance for 1999, the KPMG Report mentions "the possible outcome of prospective investor's entity to the Company thereby bringing in fresh funds."⁶³⁴ Despite the indicated shortfall and some reservations regarding revenue projections (that "may be overstated"), the KPMG Report's overall assessment is that the "[p]roject appears to be an attractive investment considering that the financial projections by themselves appear reasonable."⁶³⁵

508. A Preliminary Due Diligence Report on PIATCO dated December 29, 1998, was transmitted to Fraport by QT on January 11, 1999 ("QT Report").⁶³⁶ The QT Report describes in detail the regulatory environment of the proposed acquisition by Fraport of an interest in PIATCO (defined as the "Company") as holder of a "public utility" in the Philippines, including the Foreign Investment Act of 1991, as amended, and the Anti-Dummy Law.

PIATCO the pre-qualification of Paircargo & Associates was found "unlawful because it did not take into account the restrictions imposed by the General Banking Act" (*ibid.*, para. 68).

⁶³³ CBII-59/RE-358, KPMG Amended Summary and Overall Assessment for Due Diligence Report on PIATCO, Jan. 20, 1999.

⁶³⁴ *Ibid.*, pp. 3-4.

⁶³⁵ *Ibid.*, p. 6.

⁶³⁶ CBII-57/RE-52, Quisumbing Torres Legal Due Diligence Report on Philippine International Air Terminals Co., Inc., Dec. 29, 1998.

509. The Preliminary Executive Summary of QT Report indicates issues of concern, among which, Fraport's attention is specifically called to the ADL,⁶³⁷ to the status of approval of the Concession Agreement and the ARCA⁶³⁸ and the financial exposure of a new shareholder.⁶³⁹ No mention is made in the QT Report of issues raised by Respondent regarding the Concession having been obtained by misrepresentations. Whether or not this was due to these issues not being part of the "Disclosure Material" (as defined therein) on which the QT Report is based is irrelevant, what matters being that no knowledge of the issues in question may be imputed to Fraport by reason of the QT Report.
510. Respondent indicates as a further reason of illegality the presence in Section 4.04(c)(iv) of the Concession Agreement and the ARCA of a direct Government guarantee in violation of the BOT law in the case of unsolicited BOT projects.⁶⁴⁰ Whether Fraport was aware of the clause in the Concession Agreement and the ARCA regarding the alleged Government guarantee or of the 1998 communications between PIATCO and its potential lenders allegedly relating to Section 4.04⁶⁴¹ remains unproven.
511. According to Respondent, the lenders' correspondence in late 1998 and early 1999 would have raised "concerns about the provisions in the Concession Agreement and Section 4.04(c) of the ARCA." Fraport would have been aware of the content of such correspondence since during that period "it was meeting and discussing almost every aspect of the project with lenders and PIATCO."⁶⁴² More particularly, Fraport's awareness would be based on a memorandum raising the problem that "a direct buy-out between the GRP and the Senior Lenders might constitute a direct guarantee" would have been shared also with Fraport's bankers, KfW and that, as mentioned in a letter of May 7, 1999, from

⁶³⁷ *Supra*, para. 431.

⁶³⁸ CBII-57, *see* Preliminary Executive Summary, paras. 3 and 4, pp. 88-89. This issue has been considered earlier (*supra*, para. 498).

⁶³⁹ *Ibid.*, paras. 10-13, p. 9.

⁶⁴⁰ As mentioned by Claimant, the Philippine Central Bank confirmed in a letter to PIATCO of Aug. 2, 2001 that Section 4.04 does not constitute a Government guarantee (Rep., para. 106). *See supra*, fn. 56.

⁶⁴¹ Rep., para. 104.

⁶⁴² C-Mem., para. 108.

PIATCO to the ADB, “FAG is currently discussing with KfW regarding the finance plan.”⁶⁴³ Despite Respondent’s efforts to link together these various passages, there is no clear evidence that Fraport was aware of the problem of a direct Government guarantee at the time of its Initial Investment. The QT Report does not raise concerns regarding the Government guarantee allegedly provided by the Concession Agreement and the ARCA.

512. Respondent further contends that Fraport was aware that the 1997 Concession Agreement had not been approved by the ICC “but merely noted,” that the ARCA had been conditionally approved and that the DOTC signers may not have had authority to sign the agreements.⁶⁴⁴

513. At the time of its Initial Investment, Fraport was aware that the process of approval of the ARCA was still under way. As mentioned by the QT Report,

The Company and the GRP has [sic] executed an Amendment and Restated Concession Agreement. However, we understand that the ICC/NEDA has not yet approved this Amended and Restated Concession Agreement. The BOT Law requires that unsolicited proposals shall be submitted to the ICC upon official endorsement by the head of the concerned agency. The ICC shall approve the project scope in accordance with the guidelines of the BOT Law. Although the Original Concession Agreement has been submitted to and noted by the ICC/NEDA, the Amended and Restated Concession has not been approved by the ICC/NEDA. However, we understand that the Amended and Restated Concession Agreement has already been endorsed by the DOTC/MIAA to the ICC/NEDA. The Company should pursue the application for approval of the Amended and Restated Concession Agreement with the ICC/NEDA.⁶⁴⁵

514. The NEDA Board approved the ARCA by Resolution of August 19, 1999, mentioning that such approval “is with the understanding that the credit agreement between the

⁶⁴³ C-Mem., para. 110, referring to PIATCO’s letter to the ADB in fn. 215 (at the end).

⁶⁴⁴ *Ibid.*, paras. 129, 138 and 146.

⁶⁴⁵ CBII-57/RE-52, QT Report, para. 3, pp. 88-89.

concessionaire and the senior lenders shall be subject to the approval and monitoring of the Bangko Sentral un Philiponas” [*i.e.*, the Philippine Central Bank].⁶⁴⁶

515. Regarding authority to sign the Concession Agreement, the QT Report advised Fraport as follows:

Although the authority of the DOTC Secretary to sign the Concession Agreement on behalf of the GRP may be presumed, to avoid issue it is advisable to obtain a certification signed by the President of the Republic of the Philippines attesting to the authority of the signatories to the Concession Agreement to sign the Concession Agreement on behalf of the GRP.⁶⁴⁷

516. It is not the scope of this analysis to go through the intricacies of the Philippine administrative process of approval of Government agreements such as the Concession Agreement or the ARCA. This, particularly in view of the thoroughly divergent opinions on the subject expressed by experts of both Parties. What matters for purposes of the present analysis is that, at the time of its Initial Investment, Fraport was aware that the approval process was ongoing and that nothing led to believe that there would have been problems in completing the process.

517. The following remarks are meant to be dispositive of the issues raised by Respondent in Jurisdictional Objection 3. Respondent supported the Terminal 3 Project from the very beginning, as shown by President Ramos Memorandum in October 1997 to various Departments and Authorities directing the Project to be “fast tracked.”⁶⁴⁸ President Estrada confirmed the Philippine Government commitment “to the fulfilment of all its obligations under the Concession Agreement dated July 12, 1997 (as amended and restated on November 26, 1998) with the Philippine International Air Terminal Co.,” directing all pertinent Government agencies and officers to engage their full cooperation “in ensuring into completion of the said project within the timetable set.”⁶⁴⁹ In the Philippine press

⁶⁴⁶ CBII-89/RE-382, NEDA Board Resolution No. 9 (s. 1999), Aug. 19, 1999, p. 7.

⁶⁴⁷ CBII-57/RE-52, QT Report, para. 3, p. 89.

⁶⁴⁸ CBII-48, Memorandum from President Ramos, Oct. 11, 1997, CM1088.

⁶⁴⁹ CBII-60, Memorandum from President Estrada, Feb. 12, 1999, CM1274.

Respondent praised Fraport's participation in the project as a partner "known the world over for efficiency in airport management."⁶⁵⁰

518. For over five years, until November 2002,⁶⁵¹ Respondent supported the Project without raising any objections to the validity of the Concessions Agreement, rather encouraging Fraport to continue investing in the Project.⁶⁵² Many Government Officials' actions confirmed or approved during the same period the legality of the award of the concession to PIATCO and the related contracts.⁶⁵³ In reliance on the Government's support of the Project, Fraport invested in the Project in July 1999 and continued to invest thereafter. On its side, the Government showed to consider the Concession valid by accepting payment of the annual contribution provided thereunder.

519. In light of the above analysis and after careful review of the Parties' arguments and the related evidence, the Tribunal concludes that Jurisdictional Objection 3 is to be dismissed for lack of evidence of Fraport's knowledge at the time of its Initial Investment of Respondent's alleged misrepresentations by PIATCO to obtain the Concession.

VII. COSTS

A. The Parties' Positions

520. The Parties filed simultaneous submissions on costs on May 2, 2014, and simultaneous reply submissions on costs on May 19, 2014.

521. In its submission on costs, Claimant argued that Respondent should be held accountable in bearing the total arbitration costs incurred by Claimant, including legal fees and expenses, in the total amount of EU 5.028.962,32, US \$12,386,291.80 and GBP 148,309.62. Claimant made its claim on the basis of (i) Respondent's insertion of preliminary phase

⁶⁵⁰ CBII-96, Press release from President Estrada, Jan. 17, 2000, CM1276-78.

⁶⁵¹ CBII-339/ICSID-195, when President Macapagal Arroyo declared in a public speech on Nov. 29, 2002, that her Administration would not honor the Terminal 3 Concession Agreement.

⁶⁵² Rep., para. 3.

⁶⁵³ *Ibid.*, Annex A.

submission in the proceeding; (ii) abuse of evidence exchange by Respondent through the request to Claimant to produce more than 110.000 pages and the submission of a great number of witness statements and facts exhibits; (iii) Respondent's *ad hominem* and baseless attacks on Fraport; (iv) Respondent's generation of immense record to obfuscate the legally relevant facts; and (iv) the injection of irrelevant issues by Respondent.

522. In its submission on costs, Respondent requested that Claimant bear all costs incurred by Respondent in this arbitration proceeding, which includes a total of US \$11,908,679.26 of legal fees, and a total of US \$3,254,138.68 of costs and expenses (through April 2, 2014) including fees of Respondent's experts and consultants (US \$1,740,153.22).⁶⁵⁴ Respondent made its claim on the basis of (i) the reasonability of its request for costs; (ii) the alleged illegality engaged by Fraport; and (iii) the exacerbation of its costs as a result of Fraport's procedural misconduct.

523. In its reply submission on costs, Claimant opposed Respondent's request for costs and rebutted Respondent's basis for its request.

524. In its reply submission on costs, Respondent requested that the Tribunal reject Claimant's application for cost, and further updated its arbitration costs incurred with a total of US \$11,910,321.79 of legal fees, and a total of US \$3,465,667.34 of costs and expenses including an updated amount of fees of Respondent's experts and consultants (US \$1,740,204.70).

B. The Tribunal's Analysis

525. The Tribunal has the power to order costs under Article 61(2) of the ICSID Convention, which provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of

⁶⁵⁴ A breakdown of costs by Respondent's experts and consultants is provided in the Annex to Respondent's submission on costs dated May 2, 2014.

the facilities of the Centre shall be paid. Such decision shall form part of the award.

It is recognized that in awarding costs the Tribunal enjoys broad discretion, subject to the exercise of discretion being explained, as required by Article 48(3) providing that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”⁶⁵⁵

526. The Tribunal notes that while the traditional position in investment arbitration has been that the parties bear their own legal costs and share equally the costs of the arbitration, there have been a number of cases which have departed from this principle and have awarded costs on a “loser pays” basis. The Tribunal finds that, in the circumstances of this particular arbitration, the application of the “loser pays” principle is appropriate to a certain extent. The Tribunal does not believe that either Party’s procedural conduct should be an additional basis for awarding costs, the complexity of the case and the sensitivity of many of the issues involved explaining the extraordinary amount of the evidence produced, part of which had already been filed in the prior ICSID and ICC cases.

527. The outcome of the case has been in Respondent’s favor, the Tribunal having accepted one of the three jurisdictional objections raised by Respondent, resulting in the lack of jurisdiction over Claimant’s claims. The Tribunal’s lack of jurisdiction regarding Claimant’s claims has determined the lack of jurisdiction also regarding Respondent’s counterclaims due to the latter’s connection with the subject matter of the dispute. However, dealing with Respondent’s counterclaims has not required significant developments and production of evidence by either Party.

528. In view of the outcome of the case, the Tribunal considers appropriate that Claimant reimburse Respondent for part of the latter’s fees and costs in the amount of US \$5 million. The Tribunal additionally considers appropriate that each Party shall bear in full all other legal fees and costs it has incurred and equally share the fees and expenses of the Tribunal and the costs of the ICSID Secretariat.

⁶⁵⁵ Schreuer, *The ICSID Convention – A Commentary*, 2nd edition 2009, p. 1235, paras. 42-43.

529. The fees and expenses of the Tribunal and the ICSID's administrative fees and expenses are the following (in US \$):⁶⁵⁶

Arbitrators' fees and expenses:

Prof. Piero Bernardini:	407,830.90
Mr. Stanimir A. Alexandrov:	375,727.22
Prof. Albert Jan van den Berg:	298,388.81
ICSID's administrative fees:	96,000
ICSID's expenses (estimated): ⁶⁵⁷	164,000

VIII. TRIBUNAL'S DECISION

530. For the reasons set forth above, the Tribunal decides as follows:

1. Claimant's claims are dismissed for lack of jurisdiction of the Centre and competence of the Tribunal.
2. Claimant shall pay Respondent US \$5 million as part of the latter's fees and costs.
3. Each Party shall bear in full all other legal fees and costs it has incurred and equally share the fees and expenses of the Tribunal and the costs of the ICSID Secretariat.

⁶⁵⁶ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account as soon as the account is finalized.

⁶⁵⁷ On December 1, 2014, the Hearing related expenses (US \$149,942) and other expenses were estimated to amount to US \$164,000. This amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Award. The remaining balance will be reimbursed to the Parties in proportion to the payments advanced to ICSID.



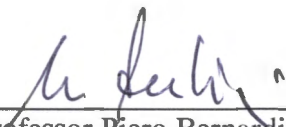
Mr. Stanimir A. Alexandrov
Arbitrator

Date: December 8, 2014



Professor Albert Jan van den Berg
Arbitrator

Date: 04-DEC-2014



Professor Piero Bernardini
President of the Tribunal

Date: December 1, 2014