ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/03/25

FRAPORT AG FRANKFURT AIRPORT SERVICES WORLDWIDE V. REPUBLIC OF THE PHILIPPINES (I)

DISSENTING OPINION OF MR. BERNARDO M. CREMADES (AWARD)

Tribunal:
Bernardo M. Cremades Sanz-Pastor (Appointed by the investor)

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Dissenting Opinion of Mr. Bernardo M. Cremades
(Award)

A. Introduction

1. The decision of the majority is based on the confidential shareholder agreements that the President obtained from the Claimant during the hearing. The significant provisions of these shareholder agreements appear in the quotations in paragraphs 319, 320 and 321 of the majority decision. Paragraph 319 refers to Article 2.02 of the Pooling Agreement that states ‘in case the Shareholders are unable to reach a common position’ then after consultations ‘the shareholders shall thereafter act upon the recommendations of [the Claimant].’ Paragraph 320 refers to Article 1.07 of the same agreement that states ‘[t]he Shareholders shall keep the terms and conditions of this Agreement strictly confidential...’ Paragraph 321 refers to Article 9 of the addendum that states that the Claimant ‘shall be the finance arranger for the Project and shall have the exclusive authority...’

If these are the significant sections of the secret shareholder agreement then my question is where is the breach of the Anti-Dummy Law, given the vast submission of documents in this arbitration, as part of the written evidence and after lengthy discovery battles? The majority of the arbitral tribunal understands that these contractual phrases constitute a violation of the Anti-Dummy Law. And even if they were, would these sections strip the Claimant’s investment of all treaty protection? The majority thinks so, but I do not, particularly given that the shareholding of the Claimant in PIATCO and related companies was legal under Philippine law (as the majority accepts). After the Supreme Court of the Philippines has declared the Terminal 3 Concession null and void, and given the way the government and especially the Attorney-General have acted, is there any possibility at all of demonstrating a violation of the Anti-Dummy Law? I do not believe so. Firstly, PIATCO has not been a dummy. Secondly because the declaration by the Supreme Court that the Terminal 3 Concession is null and void takes effect ex tunc and not ex nunc, so that the contract was never valid and had no effect. If this is the case, then PIATCO never held a public utility franchise and so the Anti-Dummy Law could not apply.

The majority also speaks of good faith in international arbitration. As I will explain, good faith applies to both the investor and the State Party.

B. The Philippines-Germany BIT

2. This is an arbitration pursuant to the Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and the Reciprocal Protection of Investments (hereafter «the Philippines-Germany BIT» or «the BIT»). Article 9 of the BIT provides for the Settlement of Disputes between a Contracting State and an Investor of another Contracting State. Article 9 provides that «all kinds of divergencies between a Contracting State and an Investor of the...»
other Contracting State concerning an investment)) shall first be addressed through negotiations, and if a settlement is not reached within six months, then the investor may submit the divergencies to arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, of March 18, 1965 done in Washington D.C.

The Claimant has commenced this arbitration pursuant to Article 9 of the Philippines-Germany BIT in relation to its investment in an international passenger terminal of Ninoy Aquino International Airport (Terminal 3).

3. On July 12, 1997 PIATCO entered into a Concession Agreement with the Republic of the Philippines for the construction and operation of Terminal 3. Further negotiations culminated in the Amended and Restated Concession Agreement of November 1998 (the original Concession Agreements and its subsequent amendments are collectively referred to as the «Terminal 3 Concession»). Fraport became a shareholder in PIATCO and various related Philippine companies in July 1999, and increased its shareholdings in May 2000 and again in 2001. The result of these successive investments was that Fraport owned 30% of the shares of PIATCO and 40% of the shareholding of three related companies (namely, Philippine Airport and Ground Services, Inc. («PAGS»), PAGS Terminal Holdings, Inc. («PTH») and PAGS Terminals, Inc. («PTI»)). The latest share purchase by Fraport occurred on September 5, 2001 with the purchase of 450,000 shares in PAGS for the amount of USD 14,700,000.

By 2002 the construction of Terminal 3 was virtually completed, and the Claimant and PIATCO wished to commence commercial operations. However, there was opposition to the Terminal 3 project within the Philippines which during 2002 reached the highest levels of government. These developments are fully described in section II.E of the Award.

By late 2002 the Respondent had decided that the Terminal 3 Concession granted to PIATCO was null and void. On November 29, 2002 the President of the Philippines declared publicly that «[t]he Solicitor General and the Justice Department have determined that all five agreements covering the NAIA [i.e. Ninoy Aquino International Airport] Terminal 3, most of which were contracted in the previous administration, are null and void». The President then said that the Terminal 3 Concession would henceforth not be honoured and declared: «I cannot honour contracts which the Executive Branch’s legal offices have declared null and void».

4. In a decision dated May 5, 2003 in Agan et al. v. PIATCO (G.R. Nos 155001, 155547, and 155661) the Philippine Supreme Court found irregularities in the bidding and terms of the PIATCO Concession. The Supreme Court held:

«WHEREFORE, The 1997 Concession Agreement, the Amended and Restated Concession Agreement and the Supplements thereto are set aside for being null and void. »

The Supreme Court subsequently confirmed the finality of its decision on a motion for reconsideration. In December 2004 the Respondent sought and obtained a court order expropriating the Terminal 3 works. The same day the Respondent deployed 200 armed security personnel to take physical possession of Terminal 3.
5. The Claimant alleges numerous violations of the Philippines-Germany BIT arising from the annulment of the Terminal 3 Concession and the expropriation of Terminal 3. The Respondent alleges that this Tribunal does not have jurisdiction to determine this dispute because the Claimant does not have an investment within the meaning of the Philippines-Germany BIT.

Investment’ is defined in Article 1 of the Philippines-Germany BIT as follows:

For the purpose of this Agreement:

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

   (a) movable and immovable property as well as other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights;

   (b) shares of stocks and debentures of companies or interest in the property of such companies;

   (c) claims to money utilized for the purpose of creating an economic value or to any performance having an economic value;

   (d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will;

   (e) business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources;

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

6. The assets alleged by Fraport to constitute its investment within the meaning of the BIT (Claimant’s Memorial, paragraphs 35-37; Award paragraphs 115-117) are:

(i) Fraport’s shareholding in PIATCO and in the cascade of Philippine companies (namely PAGS, PTH and PTI) that had direct or indirect shareholdings in PIATCO. The primary asset at issue in this arbitration therefore is the shareholdings in Philippine companies; and

(ii) Loan and payment guarantees to PIATCO, the cascade companies, PIATCO lenders and constructors, and various expenses relating to the Terminal 3 Concession.

The Respondent states that Article 1(1) of the BIT contains a fundamental limitation in requiring an asset to be (‘accepted in accordance with the respective laws and regulations of either Contracting State‘) which incorporates compliance with internal law as part of the international law standard that must be applied as part of the BIT’s provisions. The Respondent argues that the Claimant breached Commonwealth Act No 108 entitled An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges (hereafter the <Anti-Dummy Law>) and for this reason its shareholdings fall outside the definition of ‘investment’ in Article 1(1) of the BIT.
7. Article 1(1) must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

**«Article 31 General rule of interpretation**

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

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended. »

The requirement that an investment be made in accordance with or in conformity with the laws of the Host State is a common provision in bilateral investment treaties. It has been considered, or at least referred to, in a number of awards (see, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001); *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7, Decision of March 21, 2007); *Inceysa Vallisoletana S.L v. Republic of El Salvador* (ICSID Case No. ARB/03/26, Award of August 2, 2006); *Tokios Tokeles v. Ukraine* (ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004)). The meaning of this requirement is a question of treaty interpretation, and not of precedent or analogy. The meaning must be determined in light of the terms, context, object and purpose of each bilateral investment treaty. The integrity of this interpretative process must not be compromised by the pronouncements of other arbitral tribunals in their interpretation of different treaties in wholly unrelated factual and legal contexts. Other awards or decisions are no more than illustrative of the implications of a standard form of treaty wording.

8. The object and purpose of the Philippines-Germany BIT is summarised in its title, namely, the promotion and reciprocal protection of investments. This object and purpose is confirmed by the preamble to the BIT, its content, and the second paragraph of the Instrument of Ratification of the Republic of the Philippines.
There are a number of other provisions within the context of Article 1 (as ‘context’ is defined in the Vienna Convention) including the following:

Article 2(1) of the BIT:

**«Article 2 Promotion and Acceptance»**

(1) Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1. Such investments shall be accorded fair and equitable treatment.

Article 11(5) of the Philippines-Germany BIT states that the attached Protocol forms an integral part of the BIT. Ad Article 2(a) and Ad Article 5(a) of the Protocol state:

**«(2) Ad Article 2»**

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

**«(5) Ad Article 5»**

(a) With respect to the Republic of the Philippines 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. It is further understood, that the transfer guarantee is not limited to the capital values of the investments that have been duly registered. The Republic of the Philippines will relax as soon as possible existing reporting requirements.

Finally, the third paragraph of the Instrument of Ratification states:

**«WHEREAS, the Agreement provides that the investment shall be in the areas allowed by and in accordance with the Constitutions, laws and regulations of each of the Contracting Parties»**

9. These provisions demonstrate an intention to restrict the protection of the BIT to investments 'accepted' (Article 1(1)), 'admitted' (Article 2(1) and Ad Article 5(a)) or 'allowed' (Ad Article 2, and the Philippine Instrument of Ratification) in accordance with the laws and regulations of the Contracting States, with Article 2 and the Philippine Instrument of Ratification adding express references to the Constitution of the Contracting Parties and Ad Article 2 referring specifically to 'the Constitution of the Republic of the Philippines'. There is, in my view, no difference in meaning intended in the terms accepted', 'admitted' or 'allowed', and although Ad Article 5 suggests a form of admittance on registration regime for foreign investments, it was common ground between the Parties that no such regime applied to the Claimant's shareholdings in this case.

10. Ad Article 2 refers to a specific limitation in the Constitution of the Republic of the Philippines on the ownership of land by foreign investors. Article III of the Constitution of the Republic of the Philippines, entitled 'National Economy and Patrimony' defines in some detail the role of the State
in the economy, including resources inalienably owned by the State, reserved privileges for Filipino citizens and restrictions on the participation in the Philippine economy by foreign investors. Sections 2, 10 and 11 of Article XII read as follows:

«ARTICLE XII NATIONAL ECONOMY AND PATRIMONY

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation’s marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

Section 10. The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities.
Section 11. 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, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility 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.

These provisions of the Constitution prohibit ownership of natural resources, including land, by foreign investors; limit the participation of foreign investors in joint ventures relating to natural resources to no more than 40% of the capital (Section 2); prohibit the holding by foreign investors of any franchise for a public utility; and limit their participation in any Philippine corporation holding a public utility franchise to 40% of its capital, as well as limiting the participation of foreign investors in the management and governance of any public utility enterprise (Section 11).

Ad Article 2 of the BIT in making express reference to the limitation on the rights of foreign investors to own land in the Philippines reflects the terms of Article XII, Section 2 of the Constitution of the Republic of the Philippines.

11. Article 1(1) of the Philippines-Germany BIT defines an investment as an ‘asset’, and makes express reference to ‘shares’ as a class of asset included in the protection of the BIT. The Claimant’s claim in this arbitration is based primarily upon the treatment by the Respondent of its shareholdings in Philippine corporations. These shareholdings are an ‘asset’ and therefore an investment within the meaning of Article 1(1) of the BIT.

The Respondent submits that the Claimant’s shareholdings fall outside Article 1(1) because they were not accepted in accordance with the laws and regulations of the Philippines in that the Claimant’s investment breached the Anti-Dummy Law. I will deal with the Anti-Dummy Law later in this opinion. Assuming, however, that there was a breach of the Anti-Dummy Law, this would not deprive the Arbitral Tribunal of jurisdiction because the Claimant’s shareholdings in a Philippine corporation are still a «kind of asset accepted in accordance with the laws and regulations of the Philippines».

12. It is clear from the context of Article 1(1) that the word ‘asset’ is qualified by ‘accepted in accordance with the respective laws and regulations of either Contracting States’ because certain assets by law cannot be owned by foreign investors. In the case of the Philippines, a foreign investor that owned land, natural resources, a public utility franchise, or a shareholding in corporations exceeding the restrictions in the Constitution would possess an asset not accepted by law, and therefore would fall outside the protection of the BIT.

13. The Claimant’s shareholdings in PIATCO and the other Philippine corporations do not violate any Philippine law relating to the holding of this kind of asset. PIATCO was awarded a public utility
franchise (namely the Terminal 3 Concession), but at all times at least sixty percent of PIATCO’s capital was owned by Philippine citizens (including other Philippine corporations), and Fraport’s direct and indirect shareholding in PIATCO complied at all times with Philippine law.

The fact that the Claimant’s asset may have engaged in illegal conduct in the Philippines (allegedly, a breach of the Anti-Dummy Law) does not change the fact that its shareholdings are an asset accepted in accordance with Philippine law. The Respondent’s interpretation of Article 1(1) does not respect its ordinary meaning, nor its context, nor the object and purpose of the BIT. The Respondent proposes, in effect, that any illegal conduct by an investor shall deprive the investor to the protection of the BIT. This is not what Article 1 states.

Of course, any illegal behaviour by an investor is likely to have consequences. Criminal conduct can and should be punished within the domestic criminal justice system. Illegal conduct by the investor might well excuse or limit any liability of the State Party in an arbitration pursuant to the BIT, depending on the circumstances. It is also possible for the Contracting Parties to a BIT to exclude the jurisdiction of an arbitral tribunal for illegalities committed by the investor. Investor illegality is serious, and there are many means to address it. However, in my opinion, it is an artificial, decontextualised interpretation of Article 1(1) of the BIT that excludes the jurisdiction of this Arbitral Tribunal for an alleged breach of the Philippine Anti-Dummy Law, and an interpretation that does violence to the object and purpose of promoting and protecting investment in the Philippines.

C. The Anti-Dummy Law

15. The Respondent submits, and the majority of this Arbitral Tribunal accepts, that the Claimant has breached Section 2-A of the Anti-Dummy Law. Section 2-A is not drafted for easy interpretation, consisting of a single complex sentence with three provisos. Comprehension is assisted by breaking the text up as follows:

**((Section 2-A - Unlawful use, exploitation or enjoyment:**

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

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

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

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

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

16. The Claimant's actual shareholding in PIATCO never exceeded 30% of the total share capital. It also had an indirect shareholding in PIATCO through its shareholdings in PAGS, PTH and PTI. There is no doubt in this case that Fraport's direct and indirect shareholdings in PIATCO complied with Philippine law on foreign ownership (as accepted in the Award).

The treatment of indirect shareholdings in Philippine law is governed by the 'Control' test, which has replaced the earlier 'Grandfather' test and brings the Anti-Dummy Law into line with the definition of a 'Philippine national' in the Foreign Investments Act of 1991. The 'Control' test treats actual voting power as the decisive characteristic of a Philippine corporation, as it treats a corporation in fact 60% owned by Philippine citizens as entirely Philippine. The Control test is not, as the majority suggests (paragraph 352) 'a misleading rubric' but a rule of Philippine law, with the virtue of simplicity, that states there can be no violation of the Anti-Dummy Law on the grounds of illegal control where 60% of the capital of the alleged dummy is in the hands of Philippine citizens (other possible breaches of the Anti-Dummy Law, such as the violation of the provision relating to the election of aliens to the Board, are not of relevance here).

Notwithstanding this clear rule of Philippine law, the majority accepts the Respondent's submission that the Anti-Dummy Law may still be violated by a foreign investor where 60% of actual voting control is in the hands of Philippine citizens.

The extensive analysis in the Award (paragraphs 357 to 382) devoted to the decision of the
State Prosecutor, the official responsible in Philippine law for the prosecution of Anti-Dummy Law crimes, seeks to demonstrate that the reliance on this official on the 'Control' test and his failure to examine other forms of control is explained by the fact that the State Prosecutor did not have access to the secret shareholder agreements. In fact the State Prosecutor applied the Control test and no other because, as he explained, this is the law of the Philippines. The State Prosecutor considered and rejected the position, now adopted by the majority of this Tribunal, that control might be identified in 'organisational structure' as old law that «can no longer be used in this case because the Foreign Investment Act already provided that the Control Test shall be used in determining the nationality of the corporation» (Resolution of the State Prosecutor dated December 27, 2006 in the matter of National Bureau of Investigation v. Cheng Yong & others, I.S. Nv 2006-817, page 13).

17. The Respondent submits that the «evidence shows that Fraport made a conscious decision before investing to evade nationality restrictions by use of contractual arrangements that it knew were not enforceable under local law)). The Respondent identifies the breach of the Anti-Dummy Law in Fraport's contractual and financial relationships with the other shareholders in PIATCO, including the agreement of July 6, 1999 between four PIATCO shareholders (Fraport, PAGS, PTI and Paircargo) referred to as the 'Pooling Agreement' or the 'FAG-Paircargo-PAGS-PTI Shareholders' Agreement', and particularly Article 2.02 of this Pooling Agreement (set out in paragraph 319 of the Award).

The confidential nature of the Pooling Agreement and other agreements is presented as evidence of criminality. Reference is also made to subsequent legal advice, both from Fraport lawyers and from a consortium of lenders. The subsequent amendment of the shareholder agreements (including the removal of the allegedly illegal agreements in Article 2.02 of the Pooling Agreement, including the requirement that in certain circumstances the shareholders 'shall... act upon the recommendations of FAG') is presented as evidence of the criminality of the previous agreements.

18. The purpose of the Anti-Dummy Law as its long title ('An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises and Privileges') states, is to punish the evasion of Philippine nationalisation requirements, such as those in Article III of the Constitution, through the use by foreigners of a Philippine entity that is a mere sham or 'dummy'. It is a criminal statute, and the offence created by Section 2-A is a serious felony punishable by imprisonment «for not less than five not more than fifteen years», fines, forfeit of «such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of this Act» and (in Section 3) dissolution of an offending corporate entity.

19. The Anti-Dummy Law criminalises the conduct of the dummy. Section 2-A creates an offence for a Philippine person or corporation in possession of a right, franchise, privilege, property or business expressed reserved by the Constitution or laws to citizens of the Philippines to allow itself to be used as a 'dummy' by foreigners in the ways particularised in Section 2-A. Section 2-A only indirectly provides for possible criminal liability by foreign investors in criminalising the conduct of a person who «knowingly aids, assists or abets in the planning consummation or perpetration of any of the acts herein above enumerated.» However, the guilt of an accomplice depends upon the commission of an offence by the Philippine principal i.e. proof of «any of the acts herein above enumerated».)
20. The Terminal 3 Concession was a public utility franchise. Pursuant to Article XII, Section 11 of the Philippine Constitution such a franchise could only be held by Philippine citizens or Philippine corporations «at least sixty percent of whose capital is owned by such citizens)). The Terminal 3 Concession was granted to PIATCO, a Philippine corporation sixty percent owned by Philippine interests.

_The Respondent has not demonstrated that PIATCO had violated the AntiDummy Law. If PIATCO did not breach the Anti-Dummy Law, then Fraport cannot have aided, assisted or abetted or otherwise participated in any offence._

21. The Respondent's extensive submissions on Fraport's knowledge of the Anti-Dummy Law, its alleged criminal purpose, the secrecy of the shareholder agreements and the role that the Philippine shareholders allegedly conceded to Fraport ignore the _sine qua non_ of its Anti-Dummy Law argument, namely, that PIATCO -the alleged dummy- has violated the Act.

The majority decision is based on the shareholder agreements between Fraport and the other PIATCO shareholders that allegedly gave Fraport illegal control of PIATCO. However, PIATCO was not itself a party to these agreements, and the Respondent did not demonstrate -and conceded it could not do so- that Fraport exercised any of its allegedly illegal powers of control or, more importantly, that PIATCO permitted and allowed Fraport to exploit or enjoy the Terminal 3 Concession by being used as a dummy.

For example, notwithstanding the emphasis given to Article 2.02 of the Pooling Agreement, and the massive discovery and disclosure of documents in this arbitration, there is no evidence that Fraport sought to exercise the powers in Article 2.02 on any occasion, or that the other shareholders accepted any purported exercise of this power, or any decision or action of PIATCO was in any manner influenced by the provisions of the Pooling Agreement. The Respondent conceded that Fraport never exercised these allegedly illegal powers (hearing transcript page 2528; Award paragraph 291). **Accordingly, PIATCO never permitted itself to be used as a dummy and there was never any violation of the Anti-Dummy Law.**

22. The majority states that «[i]t is clear from the texts of the ADL, as confirmed by the QT due diligence report, that it was managerial control which was the concern of the Constitution and the ADL» (paragraph 352, emphasis original). 'Managerial control' is not an expression that appears in the AntiDummy Law. The Anti-Dummy Law does not criminalise Fraport for possessing 'managerial control' of PIATCO, rather it criminalises PIATCO if PIATCO has in any manner permitted or allowed Fraport «to acquire, use, exploit or enjoy a...franchise i.e. the Terminal 3 Concession]...to intervene in the management, operation, administration or control thereof [i.e. the Terminal 3 Concession], whether as an officer, employee or laborer therein...».

For this reason, the mere execution of the Pooling Agreement cannot of itself be a violation of the Anti-Dummy Law.

23. _The Respondent's submission, and regretfully, the decision of the majority, confuse a perceived recklessness by Fraport towards its obligations under Philippine law with the violation of a criminal statute. I do not share the interpretation of the documents that led the majority to the conclusion that Fraport «was consistently aware that the way it was structuring its investment in_
the Philippines was in violation of the ADL and accordingly sought to keep those arrangements secret» (Award, paragraph 332) but in any event this is a conclusion of no more than an illegal intent.

Further, the finding of criminal intent relies heavily on legal advice provided to the Claimant by its Philippine lawyers, Quisumbing Torres. This legal advice was obtained by the Respondent indirectly, and not through disclosure in the discovery process in the arbitration. When the subject of the legal advice is a serious criminal offence then the double violations of professional secret and the privilege against self-incrimination is problematic. It is particularly problematic when combined with the peculiar form of legal reasoning adopted by the majority (see, for example, Award paragraphs 323, 327, 329, 332, 355 and 356) that infers a crime from the Claimant's legal advice, rather than from a careful examination of its actions in light of the text of the Anti-Dummy Law.

I also would not be prepared to construe a confidential clause in a shareholders agreement, such as Article 1.07 of the Pooling Agreement referred to in paragraph 320 of the Award, as evidence of criminal intent.

24. As a final point, the majority approach by equating the execution of shareholder agreements with an illegal managerial control, fixes the illegality at the moment the shareholders executed the agreements (i.e. July 1999). If the execution of the shareholders agreements was the commission of the offence, what then are the legal consequences of the repeal of certain provisions (such as Article 2.02 of the Pooling Agreement) of the shareholder agreements at the suggestion of the Senior Lenders in 2001? If the entry of the investment is the critical moment to determine legality (Award, paragraphs 315 and 395) in what way was Fraport's investment of a further JSD14,700,000 in PAGS in September 2001, after the amendment of the offending sections of the shareholder agreements, tainted with any illegality?

25. The Anti-Dummy Law also requires that the dummy in fact holds a public utility franchise. The dummy in this case is PIATCO, and the franchise is the Terminal 3 Concession. However, the Philippine Supreme Court in Agan v. PIATCO, on an application supported by the Respondent State, has found that the grant of the Terminal 3 Concession to PIATCO in 1997 was null and void. The Supreme Court denied reconsideration and the nullity of the Terminal 3 Concession is now res judicata in Philippine law.

The expropriation of the Terminal 3 Concession as a result of this Supreme Court decision is the basis of this arbitration.

As a matter of Philippine law, the Terminal 3 Concession was null and void when granted in 1997. Is it possible for PIATCO to be guilty of a criminal offence by acting as a dummy for Fraport to enjoy this franchise some time after Fraport first invested in this project in July 1999? This question has both a substantive and a procedural dimension.

26. On a substantive level, the Respondent has not demonstrated to the Tribunal that, as a matter of Philippine law, a corporation might breach the Anti-Dummy Law when the public utility franchise -a key element of the criminal offence- is null and void. As a matter of principle, in the interpretation of a criminal offence carrying penalties of up to fifteen years imprisonment, the subject matter of the offence should exist as a matter of law at the time the alleged offence was
27. As a final point, I refer again to the decision of the Philippine State Prosecutor dated December 27, 2006 in respect of a complaint against PIATCO for a breach of the Anti-Dummy Law (Resolution of the State Prosecutor dated December 27, 2006 in the matter of National Bureau of Investigation v. Cheng Yong & others, I.S. No 2006-817). The State Prosecutor is the official responsible in Philippine law to decide whether a prosecution should be made under the Anti-Dummy Law. In his lengthy and reasoned rejection of grounds for prosecution, the State Prosecutor stated (page 13):

(Finally, what the law prohibits is the granting of a franchise or the operation of a public utility by a corporation already in existence without the required proportion of Filipino capital as held by the Supreme Court in a long line of cases. Thus, if there is no grant of a franchise, as in this case where the government itself denies the existence of a public utility franchise in favor of PIATCO, then a non-holder of a franchise will result to the absurd and unfair situation where a non-holder like PIATCO is prosecuted for an offense which may only be committed by a holder of a franchise. This could not have been the intention of the Anti-Dummy Law. We certainly cannot prosecute the individuals who clearly have not committed or could not possibly have committed the crimes penalized by the Anti-Dummy Law.) (emphasis added)

D. Procedural Good Faith

28. Article 26 of the Vienna Convention provides:

«Pacta sunt servanda
Every treaty in force is binding upon the parties to it and must be performed by them in good faith. »

The Respondent must perform the Philippines-Germany BIT in good faith, and this includes its obligation under Article 9 to arbitrate its divergencies with a German investor such as Fraport. The principle of good faith in international law precedes and transcends Article 26 of the Vienna Convention. It extends, for example, to the abuse of rights, the improper use of internal law by State parties (a matter addressed in Article 27 of the Vienna Convention), and the principle that a State cannot adopt inconsistent positions in respect of the same state of facts (an application in the international sphere of the principle known in Anglo-Saxon
29. The investor-State dispute resolution provision in Article 9 of the Philippines-Germany BIT constitutes an open offer of arbitration to the investors from the other State. The investor’s acceptance of that offer, and so the formation of the arbitration agreement, does not arise until the investor commences arbitration (Lanco International, Inc. v. Argentine Republic (ICSID Case No. ARB/97/6, Preliminary decision on jurisdiction of December 8, 1998)). The standing offer of the State parties must be made and maintained in good faith, and when accepted, the arbitration must be conducted in good faith.

As already noted, the requirement that an investment be made in accordance with or in conformity with the laws of the Host State is a common provision in bilateral investment treaties. At the same time, the abuse of its own law by State parties is a perennial problem in investment and international commercial arbitration. Indeed, the generic purpose of investment treaties of providing juridical security and certainty presupposes the need to control the Host State’s use of its law for its own convenience. International investors and contractors have a long experience of the ingenuity of State parties in the use of their legislative, executive and judicial powers to escape their responsibilities, including their obligation to arbitrate. Investment arbitration requires a mutual respect for the law of the Host State, by both the investor and the Host State itself.

The misuse by the State party of its own law is the subject of the substantive provisions of bilateral investment treaties such as the requirements of fair and equitable treatment, and that there is no expropriation without compensation. It is also the subject of obligations of public international law such as denial of justice. However, the misuse of a State party of its own law can take procedural forms, and therefore effects the formation of the arbitration agreement and the jurisdiction of the arbitral tribunal. In the context of an arbitration agreement arising from a bilateral investment treaty, such as Article 9 of the Philippines-Germany BIT, the formation and performance of the arbitration agreement is governed by good faith, derived from both Article 26 of the Vienna Convention and fundamental principles of procedure.

30. The epitome of the abuse of law is its inconsistency or arbitrariness. Where rules are applied to one person, and not to another, or at one time and not another, or at the discretion of one official or another, or recognised and enforced by one organ of the State and ignored by another, then there is an inconsistency contrary to the nature of law. As regards the formation of an arbitration agreement, the principle of good faith or estoppel prevents the State from taking a legal position that is inconsistent with its internal law, or the position it has previously taken with the investor regarding the proper application of its internal law.

31. On July 12, 1997 the Respondent granted the Terminal 3 Concession to PIATCO, and in December 2001 negotiations began between the Claimant and the Respondent to bring Terminal 3 into commercial operation. Over the next year, political opposition to the Terminal 3 Concession intensified. The following is a short summary of the position of the Respondent (or state organs for which the Respondent is responsible in international law) in relation to the validity of the Terminal
3 Concession from this point:

(a) **November 29, 2002:** President of the Philippines publicly declares that the Solicitor General and Department of Justice have advised that the Terminal 3 Concession is null and void and will not be honoured by the government (Award, paragraphs 190-192);

(b) **May 5, 2003:** Philippine Supreme Court sets aside the Terminal 3 Concession as being null and void (Award, paragraphs 207-218);

(c) **January 21, 2004:** Philippine Supreme Court denies with finality motions for reconsideration of its May 5, 2003 decisions setting aside the PIATCO Concession as null and void;

(d) **September 17, 2003:** The Claimant initiates this arbitration with its Request for Arbitration alleging that the nullification of the Terminal Concession amounts to an expropriation of Fraport's investment in PIATCO and related companies, unfair and inequitable treatment, and a denial of justice by the Philippine judicial system. In its Counter-Memorial dated December 20, 2004 the Respondent particularised many irregularities in the bidding and award process for the Terminal 3 Concession, and specifically defended the Supreme Court's decision to declare the Terminal 3 Concession null and void *ab initio* (Counter-Memorial paragraph 294);

(e) **December 21, 2004:** Respondent files an *ex parte* petition before the Regional Trial Court and obtains an *ex parte* Writ of Possession of Terminal 3 on the same date. Both the Respondent’s petition and the decision of the Court refer to the Supreme Court decision declaring the Terminal 3 Concession null and void (Award, paragraphs 237 et seq.);

(f) **December 27, 2006:** The State Prosecutor rejects the initiation of an Anti-Dummy Law Prosecution against PIATCO and its shareholders on various grounds, including the non-existence of a public utility franchise as required by the Anti-Dummy Law.

32. The Respondent has consistently taken the position that the Terminal 3 Concession was void *ab initio*. The Philippine President has publicly taken this position. The Supreme Court has confirmed this position. The State Prosecutor has acted on this position. The Supreme Court of the Philippines, the highest court in the country, has declared the Terminal 3 Concession void *ab initio* and confirmed the finality of this decision on a motion for reconsideration, so the question is *res judicata* as a matter of Philippine law.

The Respondent cannot in good faith take a position in this arbitration -namely that PIATCO held a valid public utility franchise- that is (i) contrary to its own internal lawm and (ii) contrary to the position its officials have consistently and publicly taken over a period of four years. Yet this is exactly the position that the Respondent has taken in pursuing the Anti-Dummy Law violation as an objection to jurisdiction. **The Respondent is this arbitration escapes from its agreement to arbitrate by asserting the criminal control of a franchise that for four years it has insisted does not exist.**

In my view, this defence must be rejected on the grounds of procedural bad faith.

33. There is a further disturbing element to the Respondent's behaviour regarding the State
Prosecutor's decision of December 27, 2006 not to prosecute PIATCO and its shareholders for violations of the Anti-Dummy Law. The Respondent: (i) misrepresented the content of this decision to the Arbitral Tribunal; (ii) misrepresented to the Arbitral Tribunal the material available to the Special Prosecutor when he made this decision; and (iii) publicly insinuated that the Special Prosecutor should change his decision because it might damage the State's position in this arbitration.

34. The Respondent's apparent attitude that its internal law may be manipulated for own convenience shows a disdain for the rule of law and is the epitome of bad faith.

E. Conclusions:

35. For these reasons, I consider that this Arbitral Tribunal has jurisdiction over this dispute, and in particular:

1. The Claimant's shareholdings in Philippine companies constitute an 'investment' within the meaning of Article 1(1) of the BIT;

2. These shareholdings are a 'kind of asset accepted in accordance with the respective laws and regulations of [the Philippines]', irrespective of whether the Claimant is guilty of any breach of the Philippine Anti-Dummy Law;

3. The Respondent has not demonstrated that PIATCO as the public utility holder is guilty of any breach of the Anti-Dummy Law, and if PIATCO is not guilty of any breach then Fraport cannot be guilty as an accomplice;

4. This Arbitral Tribunal must apply the current Philippine law relating to the Anti-Dummy Law. Philippine law applies the 'Control' Test to determine the legality of the shareholding of a foreign investor in a public utility franchise holder, and does not criminalise managerial control by the foreign investor. Fraport's shareholding at all times complied with the 'Control' test, and in any event it was conceded that Fraport never exercised any of the allegedly illegal powers under the shareholders agreements;

5. As a matter of Philippine law, the Terminal 3 Concession was null and void ab initio, and therefore a violation by PIATCO or Fraport of the Anti-Dummy Law is legally impossible on the grounds of the non-existence of a public utility franchise;

6. The Respondent's Anti-Dummy Law submission is premised on the validity of the public utility franchise, and therefore is an argument against its own internal law;

7. The Respondent's Anti-Dummy Law submission violates the good faith required of a party in investment arbitration in (i) being contrary to its own law; (ii) being contrary to the consistent position of its senior officials in their dealings with the Claimant, with the public and in the exercise of their official duties; (iii) that the actions of its officials have been misrepresented to and manipulated before this Arbitral Tribunal.

The Respondent presented the 'secret shareholder agreements' as the 'smoking gun' of the ADL crime. There has certainly been plenty of smoke in this arbitration. However, if the
actions of the Claimant, PIATCO and the Respondent, the terms of the ADL and Philippine law, are studied carefully, then the smoke disperses and reveals that there is no bullet, no victim and no crime.

F. Final Observations: Illegality and Jurisdiction

36. An investor that contravenes the law of the Host State of the investment must expect to suffer the consequences prescribed by law. Foreign investment occurs within a sophisticated legal framework of foreign ownership, tax, antitrust, administrative, labour, environmental and other regulations as well as the law relating to obligations arising directly from contractual relations. An investor that breaches any law or regulation bears the consequences, in the appropriate forum and in accordance with the applicable rules.

The principle of legality in investment arbitration, like the principles of *pacta sunt servanda* and good faith, applies equally to both Parties. Indeed, the very purpose of investment arbitration is to determine the legality of the conduct of the Host State and the investor under the applicable law.

As I have said, it is not uncommon for BITs to include in the definition of investment some reference to domestic law and regulation similar to the language of the Philippines-Germany BIT. The purpose of these provisions is not to condition the right to arbitrate on the minute compliance by the investor at all times and in all respects with the domestic law and regulation of the Host State. It was not the intention, for example, that a Host State might escape responsibility for unfair or expropriatory acts because the investor did not comply with domestic regulation relating to the expression of corporate names. Such an argument has been raised before an international arbitral tribunal and was properly rejected because «to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty» see *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004, paragraphs 83-86.

37. The legality of the investment in investment arbitration has its analogy in international commercial arbitration in the validity of the contract. If the applicable law does not insist on the separability of the arbitration agreement from the main contract, then respondents quickly seek to subvert the arbitral process by challenging the validity of the main contract. Similarly, the phrase 'according to the laws and regulations of the Host State' might provide the Achilles Heel of investment arbitration if jurisdiction depends on the Claimant passing a full legal compliance audit.

If the legality of the Claimant's conduct is a jurisdictional issue, and the legality of the Respondent's conduct a merits issue, then the Respondent Host State is placed in a powerful position. In the Biblical phrase, the Tribunal must first examine the speck in the eye of the investor and defer, and maybe never address, a beam in the eye of the Host State. Such an approach does not respect fundamental principles of procedure.

38. As a matter of principle, therefore, the legality of the investor's conduct is a merits issue. The
inquiry at the jurisdictional phase required by the phrase «in accordance with the laws and regulations of the Host State» is limited to determining whether the type of asset is legal in domestic law. For the reasons already explained, I consider that the proper interpretation of Article 1(1) of the Philippines-Germany BIT in accordance with the principles of the Vienna Convention produces exactly this result.

39. It is important to emphasise that there is no question of an Arbitral Tribunal passing over or treating lightly any illegal conduct by the investor. The question is the proper time and context to consider and evaluate the proof and consequences of illegality. In many cases, legal action will also be possible in competent domestic tribunals. There is no question of impunity for the foreign investor. The foreign investor that commits a crime should go to jail or suffer the other penalties prescribed by law.

However, it is equally mistaken to adopt an interpretation of a standard phrase in investment instruments in a manner capable of leaving an investor without a remedy, and a Host State secure and immune in a gross violation of a Bilateral Investment Treaty.

40. I referred to the Tokios Tokeles v. Ukraine case as an example of a State's reliance on a trivial breach of local law to challenge the jurisdiction of the arbitral tribunal. What of an example at the other extreme, of an investor that has engaged in systematic fraud or corruption? The recent award in Inceysa Vallisoletana S.L. v. Republic of El Salvador (ICSID Case No. ARB/03/26, Award of August 2, 2006) involved systematic fraud in securing a contract with the Republic of El Salvador, for the operation of vehicle inspection stations, and the tribunal held that there was no jurisdiction on a number of grounds, including that the investment was not made in accordance with the laws of El Salvador.

As a matter of principle, even in such an extreme case the proper question is whether the kind of asset is legal under domestic law and, if so, the tribunal has jurisdiction and should move on to consider the merits. In a case of gross illegality the Host State will almost certainly have a defence on the merits, and the claim will be dismissed.

In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim. Both good faith and international public policy were important in Inceysa Vallisoletana S.L. v. Republic of El Salvador. International public policy barred the claims in World Duty Free v. The Republic of Kenya (ICSID Case No. ARB/00/07, Award of October 4, 2006). Alternatively, illegality might have consequences for jurisdiction peculiar to the circumstances of a particular dispute, as for example, where the illegality connects the dispute to events before the treaty entered into force, and therefore deprives the tribunal of jurisdiction rationae temporis (Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Award of February 7, 2005.)

As a final point, I refer to the practice of the casual use of citations from other awards without regard to their original contexts. Awards have been cited as if they were authorities or precedents on, for example, the significance of illegal conduct by the investor that bear no similarity to the case at issue. Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001) concerned the proper separation of contract from treaty claims. Empresas Lucchetti, S.A. and Lucchetti Peru,
S.A. v. Republic of Peru, (ICSID Case No. ARB/03/4, Award of February 7, 2005) concerned the date when a dispute had arisen, and the effect on this determination of certain decisions of the Peruvian courts, for the purposes of jurisdiction rationae temporis under the Chile-Peru BIT. Inceysa Vallisooltena S.L. v. Republic of El Salvador (ICSID Case No. ARB/03/26, Award of August 2, 2006) is also not relevant to the arbitration before us, as it involved a concession solicited and obtained by fraud, where the documentary evidence of the fraud was overwhelming.

41. For these reasons, I consider that the decision of the majority in this arbitration is not only contrary to the terms of Article 1(1) of the Philippines-Germany BIT, but it is also fundamentally wrong in its approach to illegality as a matter of principle.