Fraport AG Frankfurt Airport Services Worldwide v Philippines, Procedural order no 1, ICSID Case no ARB/11/12; IIC 551 (2012)

17 May 2012

Parties:	Fraport AG Frankfurt Airport Services Worldwide (Germany) Philippines
Date of Despatch:	17 May 2012
Arbitrators/Judges:	Piero Bernardini (President); Stanimir A Alexandrov (Claimant appointment); Albert Jan van den Berg (Respondent appointment)
OUP Reference:	IIC 551 (2012)

Decision – full text

I . Introduction and the 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 for the Promotion and Reciprocal Protection of Investments, which entered into force on February 1, 2000 (the "BIT") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated October 14, 1966 (the "ICSID Convention"). The dispute relates to the Ninoy Aquino International Airport Passenger Terminal III ("Terminal 3").

2 . The Claimant is Fraport AG Frankfurt Airport Services Worldwide and is hereinafter referred to as “Fraport” or “Claimant.”

3 . The Respondent is the Republic of the Philippines and is hereinafter referred to as “the Philippines” or “Respondent.”

4 . The Claimant and the Respondent are hereinafter collectively referred to as the “Parties.”

II . Procedural History

5 . This proceeding follows a dispute initiated in 2003 with the filing of Fraport’s first request for arbitration. Fraport’s request was registered on October 9, 2003 and was assigned ICSID Case No. ARB/03/25 (the “First Proceeding”). The arbitral tribunal of the First Proceeding (the “First Tribunal”) issued an Award on August 16, 2007 (the “Award”) together with the Dissenting Opinion of one of the arbitrators. In the Award, the majority of the tribunal dismissed Fraport’s claim on the ground that it lacked jurisdiction *ratione materiae* based on a finding that Claimant’s investment fell outside the BIT’s scope because it was not made in compliance with Philippine law.

6 . Fraport sought annulment of the Award, and on December 23, 2010, the *ad hoc* Committee issued its Decision (the “Annulment Decision”). The Committee decided to “annul the Award of 16 August 2007 in *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (ICSID Case No. ARB/03/25).”

7 . On March 30, 2011, ICSID received a Request for Arbitration of the same date (“the Request”) from Fraport against the Philippines.

8 . On April 27, 2011, the Secretary-General of ICSID registered the Request and assigned No. ARB/11/12 to the case. By letter of April 29, 2011, Respondent reserved its rights to raise jurisdictional, admissibility and substantive objections to Claimant’s filing a new dispute and the Centre’s decision to register the Request under a new ICSID case number.

9 . By letters of May 12 and 26, 2011, the Parties agreed on the number of arbitrators and the method of their appointment, *i.e.*, the Tribunal would consist of three arbitrators, one to be appointed by each party, and the third presiding arbitrator to be appointed by agreement of the Parties.

10 . The Tribunal was constituted on February 7, 2012 and 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 the Republic of Bulgaria, appointed by the Claimant on June 23, 2011; and Professor Albert Jan van den Berg, a national of the Netherlands, appointed by the Respondent on July 27, 2011.

11 . After consultation with the Parties, it was agreed that the First Session would be held in-person in Washington, DC on April 3, 2012. The Secretary of the Tribunal circulated a provisional agenda for the Session. On March 28, 2012, the Parties submitted their comments on the provisional agenda indicating the items on which they agreed and their respective positions regarding the items on which they disagreed. In a letter dated March 29, 2012, Respondent filed detailed comments on items 13, 14 and 15 of the provisional agenda, and asked the Tribunal to establish a preliminary phase to address threshold procedural issues. These issues concern the determination of the portions of the Award that Respondent submits to remain binding and the treatment of the records of the First Proceeding and ICC Case No. 12610/TE/MW/AVH/JEM/MLK (the “ICC Arbitration”).

12 . This ICC case was brought by the Philippine International Air Terminals Co., Inc. (“PIATCO”), a Philippine corporation, which was awarded the concession rights for the construction and operation of Terminal 3 by the Philippines on July 12, 1997.[1] In 2003, PIATCO initiated the ICC Arbitration against the Philippines for alleged breaches of the Terminal 3 Concession Agreements. The ICC tribunal issued a partial award on jurisdiction and liability on July 22, 2010, dismissing PIATCO’s claims and the Philippines’s counterclaims (“ICC Partial Award”).[2] On May 10, 2011, the ICC tribunal issued a final award directing PIATCO to pay the Philippines 25% of its reasonable costs of the ICC Arbitration (“ICC Final Award”).[3] Together, the ICC Partial Award and Final Award are referred to as the “ICC Awards”.

13 . After having heard the Parties at the First Session, the Tribunal decided to first examine the threshold procedural matters raised by Respondent in its comments of March 28 and 29, 2012 under the heading “Preliminary Phase”. By letter of April 4, 2012, the Tribunal invited the Parties to submit their observations on the following points:

— whether, and to what extent, the findings of fact and conclusions of law set forth in the original ICSID Award shall remain binding in this proceeding; and

— whether, and to what extent, the evidentiary record from the *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25) and *PIATCO v. Republic of the Philippines* (ICC Case No. 12610/TE/MW/AVH/JEM/MLK) arbitral proceedings—including all related documents, witness statements, expert reports, transcripts, or other evidence—shall be incorporated in the present proceeding. In this respect, the parties should also address the question of how to deal with witnesses and experts who have submitted a statement or a report in the first ICSID proceeding (ICSID Case No. ARB/03/25), and in particular the process that should be followed to produce them at the hearing.

14 . The Minutes of the First Session were transmitted to the Parties on April 17, 2012.

15 . As requested by the Tribunal, Respondent filed its Preliminary Phase Submission on April 18, 2012 and Claimant filed its Observations Regarding the Two Preliminary Phase Questions Outlined by the Tribunal on May 2, 2012.

III . Parties' Positions

16 . In its Submission, Respondent asserts that (i) the parts of the Award that were not challenged or that were not the basis for annulment are binding on the Parties, notwithstanding the holistic language used by the Committee; (ii) the determinations reached in the ICC Partial Award are binding on the Parties considering the nexus between PIATCO and Fraport; and (iii) the Tribunal should admit the records of the First Proceeding as well as those of the ICC Arbitration and restrict cross-examination to the witnesses or experts who submit new evidence.

17 . In its Observations, Claimant replies that (i) the annulment of the Award in its entirety deprives it of any legal effect; (ii) the *Amco I* case[4] relied on by Respondent was a partial annulment on its face, contrary to the present instance; (iii) the review of the Committee's decision requested by Respondent would amount to an impermissible appeal; (iv) the Committee had to annul the entirety of the Award as Fraport had been denied the right to be heard on the only issue disposed of the Award; (v) the Tribunal is bound to resolve Fraport's claims independently pursuant to the ICSID Convention; (vi) as a result, the findings of the First Proceeding are not *res judicata* and those of the ICC Arbitration are not binding; and (vi) there should not be restrictions on the submission of witness statements and expert reports from the First Proceeding, nor on the opportunity to cross-examine those witnesses or experts.

A . The Question of the Binding Effect of the Award

1 . Respondent's Position

18 . Respondent submits that as part of the determination of its own jurisdiction, the Tribunal has the authority to interpret the Annulment Decision and to decide whether there are determinations set forth in the Award that remain binding between the Parties. This conclusion is based on the principle of finality of awards (Article 53 of the ICSID Convention) and the principle of judicial economy to limit re-litigation of the same dispute.[5]

19 . In support of its argument, Respondent notes that the Committee rejected all but one of Fraport's arguments for annulment, namely the serious departure from a fundamental rule of procedure due to the First Tribunal's failure to allow the Parties to be heard with respect to the resolution by a Philippine Chief State Prosecutor to dismiss complaints against Fraport (the "Prosecutor's Resolution")[6] for its alleged violations of Section 2-A of Commonwealth Act No. 108 (the "Anti-Dummy Law" or "ADL") and associated record of evidence. Respondent submits that the scope of such annulment is necessarily limited to only those parts of the Award "tainted by an alleged procedural violation."[7]

20 . More specifically, the Philippines advance the argument that by adding the words "for all of the reasons set out in Part IV B of [the Committee's] Decision" to the conclusion "the Award must be annulled in its entirety," the Committee intended to qualify its annulment of the Award "in its entirety" as being limited only to those parts of the Award affected by "all the reasons set out in Part IV B."[8]

21 . This position, says Respondent, is all the more evident from the language used by the Committee, such as: "[T]here can be no concern as to the [First] Tribunal's process up to and including receipt of the Prosecutor's Resolution,"[9] and "the [First] Tribunal's treatment of the parties following receipt of the Prosecutor's Resolution did constitute a serious departure from the fundamental rule of procedure entitling the parties to be heard."[10]

22 . The natural conclusion to be drawn, according to Respondent, is that when the Committee stated that the "Award" was annulled in its entirety, it was referring to Section VII of the Award, *i.e.*, the *dispositif*, captioned "AWARD," and not the entire decision of the First Tribunal.[11] In support of this position, Respondent relies on the reasoning of the tribunal in the *Amco II* case,[12] which would have faced a similar interpretative issue, as well as on the expert opinion of Professor Dolzer.[13]

23 . Furthermore, with the support of Professor Schreuer's expert opinion, Respondent submits that the Committee had no authority to annul the portions of the Award for which Fraport's annulment requests proved unfounded or that had not been challenged and that, as a result, these portions were *res judicata*.[14]

2 . Claimant's Position

24 . Claimant contends that the Award is completely void since it was annulled in its entirety by the Committee and that no qualifications were stated in the *dispositif* or elsewhere in its decision. Indeed, the Committee was entitled to annul the Award in whole or in part pursuant to Article 52(3) of the ICSID Convention and purposefully chose to use the words "in its entirety" to convey the idea that no part of the Award should be salvaged.pursuant to Article 52(3) of the ICSID Convention and purposefully chose to use the words "in its entirety" to convey the idea that no part of the Award should be salvaged.pursuant to Article 52(3) of the ICSID Convention and purposefully chose to use the words "in its entirety" to convey the idea that no part of the Award should be salvaged.[15]

25 . Fraport further explains that Respondent's reliance on *Amco I*, Annulment Decision, and its application by analogy to the present case was erroneous, as the *ad hoc* Committee in *Amco I* had expressly qualified its annulment decision, leaving parts of the original *Amco I*, Award,[16] undisturbed.[17]

26 . Claimant argues that Respondent is actually requesting a review and interpretation of the Annulment Decision that amounts to an appeal, which is strictly forbidden under Article 53 of the ICSID Convention. The only permissible course of action is to litigate the dispute *de novo*, not to dissect the Committee's decision.[18]

27 . Claimant states that, as the wording used suggests, the Committee did in fact mean to annul the Award in its entirety because the fundamental flaw identified pertained to the issue of the First Tribunal's jurisdiction *rationae materiae* — the only issue upon which it decided. As the Committee determined that Fraport had been denied the right to be heard on the one and only dispositive issue in the Award, it had no other choice but to annul the Award in its entirety. Claimant further submits that the reasoning underlying the annulled Award which Respondent seeks to "resuscitate" cannot be considered *res judicata* because that reasoning did not actually decide a right at issue in the case independent of the holding it supported.[19] Claimant also notes that while not annulling the Award on the ground of manifest excess of power, the Committee criticized the treaty interpretation followed by the majority of the First Tribunal, including the use it made of the Philippines Instrument of Ratification.[20]

28 . Additionally, Fraport affirms that the Tribunal is bound to determine its jurisdiction independently in furtherance of the so-called "kompetenz — kompetenz" principle included in the ICSID Convention in Article 41(1) and broadly affirmed in jurisprudence.[21] To simply adopt the First Tribunal's findings and records would abdicate the Tribunal's duty.[22]

B . The Records of the First Proceeding and the ICC Arbitration and the Question of Witnesses and Experts

1 . Respondent's Position

29 . Respondent argues that, pursuant to Article 53 of the ICSID Convention, all evidentiary records from the First Proceeding and the ICC Arbitration should be admitted in the present proceeding. It submits that the Tribunal has the power to do so under ICSID Arbitration Rule 34(1), considering that the Tribunal is faced with a "resubmitted" case which allegedly raises identical claims based on the same facts as those in the First Proceeding, and that the same essential facts were also the ones at issue in the ICC Arbitration.[23]

30 . Respondent further asserts that the First Tribunal and the ICC tribunal had, respectively, each ordered the production of documents from the other proceeding, for purposes of consistency, which is an objective that should be pursued in the present proceeding as well.[24]

31 . Respondent also claims that, in due consideration of the principle of finality, witnesses and experts whose testimony has already been admitted into the record of the First Proceeding should not be cross-examined again, unless such testimony relates to new facts or issues open for re-litigation (*i.e.*, post-January 5, 2007 procedures), in accordance with ICSID Arbitration Rules 32 through 36.[25]

32 . The Philippines point out, in fact, that Fraport already had a reasonable opportunity to present its case, and the right to be heard does not need to be exercised orally; written evidence suffices.[26]

33 . Respondent finally submits that, should the Tribunal allow cross-examination of previous witnesses and experts, the procedure would prove (i) costly and burdensome because the majority of those witnesses reside in the Philippines; (ii) inefficient because such examination would relate to facts for which witnesses' recollection would have been more reliable at the time of the First Proceeding than at present; and (iii) unreliable because the testimony may be altered by exposure to the existing record.[27]

2 . Claimant's Position

34 . With respect to the Philippines' argument that admitting the full evidentiary record from the First Proceeding and the ICC Arbitration while restricting re-examination of witnesses would promote judicial economy and efficiency, Claimant advances that the Parties' and their counsel's knowledge of the record will allow for expedient and efficient proceedings. According to Claimant, witnesses' credibility and relevance must be assessed by the Tribunal. There is no need to prejudge these issues in the abstract.[28]

35 . As a result, Claimant proposes that each Party may submit from the First Proceeding complete versions or portions of written statements of witnesses, experts' reports, and transcripts of cross-examinations of witnesses or experts, as well as any documentary evidence; that a Party may submit new statements from its witnesses in the First Proceeding; that a Party needs the approval of the Tribunal to call a witness or expert of the other Party who has not submitted a new statement or report for cross-examination in the current proceeding; and that statements of witnesses, experts' reports and documentary evidence from the First Proceeding may also be admitted by the Tribunal *sua sponte*, upon notice to the Parties.[29]

36 . Claimant finally argues that, although the Parties can refer to witness statements from the ICC Arbitration, they should not be considered as testimony in the present proceedings.[30]

C . The Question of the Binding Effect of the ICC Awards

1 . Respondent's Position

37 . Respondent expresses the view that, considering the existence of privity and identity of interests between Fraport and PIATCO, the claimant in the ICC Arbitration, the findings made in the ICC Awards are binding upon the Parties who are thus estopped from re-arguing the same issues already addressed therein.[31]

38 . Respondent explains that, given the different timeframe of the ICC Arbitration, PIATCO had the opportunity to address the Prosecutor's Resolution and in fact filed submissions pertaining thereto. Yet, the ICC Partial Award declared PIATCO's claims inadmissible due to its breach of the ADL. The High Court in Singapore dismissed PIATCO's application to set aside the ICC Partial Award. The ICC Awards are thus now final and binding.[32]

39 . Respondent submits that the findings of the ICC Awards are binding upon the Parties to this proceeding on the basis of the doctrine of collateral estoppel. This doctrine applies when a question was put in issue in a prior proceeding; the court or the tribunal actually decided it; and the resolution of the question was necessary to resolving the claims before that court or tribunal.[33]

40 . According to Respondent, the issue related to the ADL was raised in the ICC Arbitration, actually decided on the merits, and necessary to resolving the subject matter of the dispute. The Philippines allege that beyond this three-prong test, the proceedings in the First Proceeding and the ICC Arbitration were closely related and overlapping.[34]

41 . Respondent contends that the fact that Fraport was not a named party to the ICC Arbitration does not affect its conclusion, as the principle of privity applies to the close connections between PIATCO and Fraport.[35] According to the Philippines, Fraport was found to be PIATCO's finance arranger[36] and had entered into shareholder

agreements with PIATCO's shareholders to gain control over the Terminal 3 project; Fraport is a substantial direct and indirect shareholder in PIATCO, it has access to the latter's documents and it paid PIATCO's legal fees in the ICC Arbitration.[37]

2 . Claimant's Position

42 . Claimant submits that it is not permissible to treat the findings in the ICC Arbitration as *res judicata*, which requires that both disputes involve the same parties, subject matter and cause of action. Claimant contends that the parties involved in the different arbitrations are not the same and the principle of privity does not apply here as Fraport is only a minority shareholder of PIATCO; it never enjoyed an unfettered access to PIATCO's documents (as Respondent suggests); and even though it paid some of PIATCO legal fees, it did so as a minority shareholder which, as such, had an economic interest in PIATCO's arbitration. Furthermore, the ICC tribunal had denied Respondent's request to adopt the findings of the Award in the First Proceeding, as it determined that the ICSID arbitration concerned different parties and issues. Claimant also argues that the causes of action are different since the ICC Arbitration was brought under a contractual arbitration clause and not under the BIT. Finally, Claimant contends that the ICC Arbitration was based on an incomplete factual record due to Respondent's misleading statements to the ICC tribunal.the BIT. Finally, Claimant contends that the ICC Arbitration was based on an incomplete factual record due to Respondent's misleading statements to the ICC tribunal.the BIT. Finally, Claimant contends that the ICC Arbitration was based on an incomplete factual record due to Respondent's misleading statements to the ICC tribunal.[38]

IV . Relief Sought by the Parties

43 . Respondent requests that the Tribunal decide:

(1) That paragraphs 1–76, 78–356, 383–385 (excluding the last sentence of paragraph 353), 392–400, 402–405 of the First Award are binding on the Parties and not the subject of readjudication in this proceeding;

(2) That the determinations of the ICC Tribunal are binding on the Parties and not the subject of readjudication in this proceeding; and

(3) That the records of *Fraport I* and the *PIATCO* arbitration are admitted into the record of this proceeding; and

(4) That Respondent's proposed guidelines for the treatment of witnesses are adopted.[39]

44 . Claimant requests that the Tribunal decide to:

(1) Reject Respondent's requests as set forth in its Letter dated March 29, 2012 and its Preliminary Phase Submission;

(2) Enforce the *dispositif* of the annulment decision in ARB/03/25 to annul the award in ARB/03/25 as mandated by ICSID Convention Article 53;

(3) Reject that any of the annulled award in ABR/03/25 is *res judicata* in these proceedings;

(4) Reject that any of the determinations of the ICC Tribunal in the proceedings between PIATCO and the Republic of the Philippines are binding in these proceedings;

(5) Decline to make further modifications to section 15 of the first session minutes, as no further modifications are required; and

(6) Adopt the Claimant's proposed guidelines for the treatment of witnesses as set forth herein.[40]

V . The Tribunal's Analysis

A . The Annulment of the ICSID Award

45 . The first question that the Parties were asked to address is the following:

> whether, and to what extent, the findings of fact and conclusion of law set forth in the original ICSID Award shall remain binding on this proceeding.

46 . Both in its letter of March 29, 2012 to the Tribunal and in its Submission, Respondent relies on the annulment decision in *Amco I* to claim that, since the Tribunal has the competence to determine its own jurisdiction, it must assess on the basis of the Annulment Decision, which issues may be resubmitted to arbitration by Fraport and which are *res judicata* so that they may not be re-litigated.

47 . In its letter of March 29, 2012, Respondent states:

> In the first annulment phase in the *Amco Asia v. Indonesia* case, for example, the *ad hoc* committee decided to annul "the Award as a whole for the reasons and with the qualifications set out above." The *Amco II* tribunal had therefore to decide, as a preliminary matter, what determinations set forth in the first *Amco* award had been annulled and what determinations set forth in the award were *res judicata*, deciding in effect the extent to which the annulment "as a whole" was qualified by language in other parts of the annulment decision. Similarly, this Tribunal is faced with an Award annulled "in its entirety," but with the qualification that annulment was undertaken "for all the reasons set out in Part IV B" of the Annulment Decision, including notably paragraphs 209, 218, 245, and 246.[41]

48 . In its Submission, Respondent states the following:

> As part of its competence to determine its own jurisdiction, this Tribunal has the authority to interpret the Annulment Decision and to decide whether there are determinations set forth in the First Award that remain binding between the parties. Much like the *Amco II* proceedings which followed the annulment of an award "as a whole for the reasons and with the qualifications set out above," the Annulment Decision in this case expressly circumscribed the basis for annulment to only one ground relating to an alleged serious departure from a fundamental rule of procedure after the closure of the arbitral proceedings. As such, significant portions of the First Award remain intact.[42]

49 . There is a major difference between the decision of the *ad hoc* Committee in *Amco I* and the decision of the *ad hoc* Committee in the present case.

50 . In the *Amco I*, Annulment Decision, the *ad hoc* Committee, in the *dispositif*, annulled the first Award "as a whole for the reasons and with the qualifications set out above." In addition, the Committee further stated in the *dispositif* that the annulment did not extend to the tribunal's finding that the action of the army and police personnel was illegal but *did* include the findings on the duration of such illegality and on the amount of the indemnity due on this account. It was therefore a "qualified" annulment in the body of the *dispositif* itself. By contrast, in the *dispositif* of the Annulment Decision, the *ad hoc* Committee annulled the Award without any qualifications, while stating in another part of the Decision: "Accordingly, for all the reasons set out in Part IV B of this Decision, the award must be annulled in its entirety."[43]

51 . The *Amco II*, Decision on Jurisdiction, after reproducing the *dispositif* of the *Amco I*, Annulment Decision,[44] states that, "[a]s can be seen, the dispositif refers both to annulment 'as a whole' and 'with…qualifications.' To understand the scope of the annulment it is therefore necessary to refer to the 'qualifications set out above' in the Decision."[45]

52 . The qualified *dispositif* in the *Amco I*, Annulment Decision, presented the *Amco II* tribunal with the problem of interpreting its formulation by identifying which parts of the first decision had not been annulled and were therefore binding on the parties as *res judicata*, and which parts could be re-litigated after being nullified by the *ad hoc* Committee.[46] Respondent refers to the interpretation of the *Amco I*, Annulment Decision, by the *Amco II* tribunal in its Submission.[47] Having ascertained which were the "pertinent findings" of the *Amco I*, Annulment Decision,[48] the *Amco II* tribunal explained that "[a]ll of these findings are in the view of the present Tribunal, pertinent to an understanding of the 'qualifications set out above' referred to in the dispositif of the Decision of the Ad Hoc Tribunal — qualifications to the 'annulment as a whole'."[49] The *Amco II* tribunal stressed the relevance of the reference to "qualification" in the *dispositif* as the reason for proceeding to reconstruct such qualifications assuming that the *res judicata* effect of the *dispositif* extends to the qualifications.

53 . The *Amco II*, Decision on Jurisdiction, which both Parties have referenced extensively,[50] analysed the extent to which a judgment should be given effect as *res judicata* by reviewing the writings of authorities in the field, the *Orinoco Steamship Company Case* (also referenced by Claimant)[51] and the history of the ICSID Convention.[52]

54 . The *Amco II* tribunal concluded that "[i]f the present Tribunal were bound by 'integral reasoning' of the Ad Hoc Committee, then the present Tribunal would have bestowed upon the Ad Hoc Committee the role for an appeal court. The underlying reasoning of an Ad Hoc Committee could be so extensive that the tasks of a subsequent Tribunal could be rendered mechanical, and not consistent with its authority — as indicated in Article 52(6), which speaks of 'the dispute' being submitted to a new Tribunal."[53]

55 . The *Amco II* tribunal acknowledged the difficulty in identifying which parts of the award in *Amco I* had not been annulled and spent over 130 paragraphs of its Decision on Jurisdiction attempting to do so. This was not the end of the story, as the *Amco II,* Award,[54] was challenged by both parties on the grounds that the tribunal had manifestly exceeded its powers by having reconsidered different issues from the *Amco I,* Award, which the parties, respectively, considered *res judicata*.[55]

56 . In the present case, if this Tribunal, in the absence of any "qualifications" in the *dispositif* of the Award, attempts to determine which issues are *res judicata* and which issues may be re-litigated, it would likely expose its own decision to a request for annulment, as occurred in *Amco II*, thus defeating the objective of saving costs and time.

57 . The *dispositif* of the Annulment Decision reads:

For the foregoing reasons, the Committee unanimously decides:

(1) To annul the Award of 16 August 2007 in *Fraport AG Frankfurt Airport Services Worldwide* v. *The Republic of the Philippines*….[56]

58 . The reference to "the foregoing reasons" in the *dispositif* does not advance Respondent's case for a number of reasons.

i . It is a customary reference so that, even if absent, it would be implicit.

ii . This reference may not be equated to "qualifications" of the *dispositif*, as in *Amco I*, Decision on Annulment, given that the reasons for a decision have no independent *res judicata* effect.[57]

iii . It is a reference of a general nature ("foregoing reasons") to the whole body of the Annulment Decision, and not limited to any one part (such as Part IV B, to which paragraph 247 of the Annulment Decision refers).[58]

59 . As stated in the *Amco II*, Decision on Jurisdiction, "[i]t is by no means clear that the basic trend of international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*."[59] *Amco II*, Decision on Jurisdiction, also rejected the notion that the reference made by the tribunal in the *Pious Funds Case*[60] to the fact that "all the parts of the judgment…serve to render precise the meaning and bearing of the *dispositif*"[61] could be read as accepting that a decision's reasoning constituted *res judicata*. The Tribunal also notes that the *Polish Postal Service in Danzig* Advisory Opinion states that "it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned," meaning that reasoning stands and falls with the *dispositf*.[62]

60 . This conclusion is not contradicted by the holding of the Court of Arbitration in the *Channel Arbitration*,[63] which has recognised "the close links that exist between the reasoning of a decision and the provisions of its *dispositif*," the reasoning helping "to elucidate the meaning and scope of the *dispositif*." However, in contrast to the *Channel Arbitration* case where the Court found that there was a "discrepancy" between the *dispositif* and a key paragraph in the decision, no such discrepancy exists in the Annulment Decision.

61 . Respondent relies on paragraph 247 of the Annulment Decision as evidence of a limited annulment of the Award.[64] The meaning of this paragraph is only that the reasons for annulling the Award identified in Part IV B of the Annulment Decision are so relevant to the tribunal's ultimate decision as to its lack of jurisdiction that "the Award must be annulled in its entirety." There is therefore no contradiction with the *dispositif* which merely omits certain words — "in its entirety" — that are nevertheless implied by the unqualified annulment. Nothing would have prevented the *ad hoc* Committee from deciding to annul the Award in part, as permitted by the ICSID Convention, if it had so intended. As confirmed by the reference in the Annulment Decision to Article 52(3) of the ICSID Convention, the *ad hoc* Committee was obviously aware that it had "the authority to annul the award or any part thereof."[65] The

reasons why the *ad hoc* Committee did not annul in part only the Award result clearly from the body of the Annulment Decision, not limited to Part IV B, when read in the light of the annulled Award as a whole.

62 . The *ad hoc* Committee found that grounds for annulment existed due to "a serious departure from a fundamental rule of procedure," because the First Tribunal had failed to accord the Parties the right to be heard regarding the factual record before the Philippine Prosecutor and the implications of the Prosecutor's Resolution for the issue of the Philippine law (the construction of Section 2-A of the ADL) before the tribunal, both of which had been submitted to the First Tribunal after the close of the proceeding under Arbitration Rule 38.[66]

63 . As explained by the *ad hoc* Committee, the proper construction of the ADL was of "central importance…in the Tribunal's analysis"[67] of "an issue which proved determinative in the outcome of the case."[68] The First Tribunal relied on its interpretation of Philippine law, specifically the ADL, in determining whether it had jurisdiction *ratione materiae*.[69] The Award found that Fraport had violated the ADL and, accordingly, upheld Respondent's jurisdictional objection that Fraport's investment had not been made in accordance with the host State law,[70] and was therefore not "an 'investment' which is covered by the BIT."[71] This determination led the First Tribunal to conclude that, "[a]s the BIT is the basis of jurisdiction of this Tribunal, Fraport's claim must be rejected for lack of jurisdiction *ratione materiae*."[72]

64 . In the light of the foregoing analysis regarding the scope of the Annulment Decision, the *ad hoc* Committee's statement that "there can be no concern as to the Tribunal's process up to and including receipt of the Prosecutor's Resolution on 5 January 2007"[73] may not be interpreted, as suggested by Respondent,[74] to mean that only procedural matters post-January 5, 2007 constituted the basis for annulment. For the *ad hoc* Committee, the violation of the right to be heard was so relevant to an essential aspect of the First Tribunal's conclusion regarding its lack of jurisdiction *ratione materiae* as to vitiate the entire Award. Accordingly, the Tribunal does not accept Respondent's arguments in Part II.D of its Submission.

65 . The relevance of the Prosecutor's Resolution for the interpretation of the ADL, regarding which the First Tribunal had failed to accord the Parties the right to be heard, was so determinative for the First Tribunal's decision that the breach of that right led the *ad hoc* Committee to annul the Award in its entirety. As the Committee stated:

> Failure to reopen the proceedings following receipt of the Prosecutor's Resolution and documents from his file also had consequences with regard to the conclusions in the Award on the Respondent's objection to the jurisdiction *ratione materiae* of the Tribunal based on an alleged violation of the ADL. This was the issue which came to form the *ratio* of the Tribunal's Award. In the Committee's view, the Tribunal's failure to permit the parties to make fresh submissions to it in the light of important new material casting doubt on the whole basis on which the Tribunal was proceeding underscores the serious nature of the departure from the right to be heard.[75]

66 . This consideration of the Committee supports the conclusion that the Committee did not leave parts of the Award standing and that it is not possible for the Tribunal to dissect the Annulment Decision into those parts that may be re-litigated and those that are deemed *res judicata*, all such parts not being severable one from the other. As noted by Professor Lowenfeld, "[t]he Committee grew to have doubt *on the whole basis* on which the Tribunal was proceeding, and the solution, as set out in paragraph 247, became inevitable."[76] Accordingly, the Tribunal considers Respondent's arguments in Parts II.B and II.F of its Submission as immaterial.

67 . Far from being based on a "narrow" ground relating to a "narrow" issue, as Respondent argues,[77] the departure from a fundamental rule of procedure was held by the *ad hoc* Committee to be sufficiently serious with respect to "an essential step in the Tribunal's reasoning" relating to its jurisdiction *ratione materiae*.[78]

68 . The circumstance that "a significant number of findings in the First Award either were not challenged by Fraport, or they were challenged and the *ad hoc* Committee found no basis to annul on those grounds"[79] is not relevant due to the need of unitary consideration of the Annulment Decision. Respondent's arguments in Part II.C of its Submission are immaterial. Additionally, the deference due to the Annulment Decision may not be outweighed by the principles of finality and judicial economy advanced by Respondent in Part II.E of its Submission.

69 . For all the reasons set forth above, the Tribunal concludes that the *ad hoc* Committee annulled the entirety of the Award and, therefore, the findings of fact and conclusions of law set forth in the original ICSID Award, having been annulled, can have no binding effect in the current proceeding.

70 . The Tribunal will add that even though it believes that the Parties developed an extensive evidentiary record in the First Proceeding at considerable burden and expense as explained by Respondent in Part II.A of its Submission, these considerations are immaterial as they do not affect the Tribunal's findings that the Award was annulled in its entirety. The Tribunal urges counsel for the Parties to use their knowledge of the subject matter to focus quickly and efficiently on key factual and legal issues.[80]

B . Use of the Records of the First Proceeding and the ICC Arbitration, including Witness and Expert Evidence

71 . The second question that the Parties were asked to address was the following:

> whether, and to what extent, the evidentiary record from the *Fraport AG Frankfurt Airport Services Worldwide* v. *Republic of the Philippines* (ICSID Case No. ARB/03/25) and *PIATCO* v. *Republic of the Philippines* (ICC Case No. 12610/TE/MW/AVH/JEM/MLK) arbitral proceedings — including all related documents, witness statements, expert reports, transcripts, or other evidence — shall be incorporated in the present proceeding. In this respect, the parties should also address the question of how to deal with witnesses and experts who have submitted a statement or a report in the first ICSID proceeding (ICSID Case No. ARB/03/25), and in particular the process that should be followed to produce them at the hearing.

72 . Respondent addresses the first part of this question in Section IV of its Submission,[81] arguing that both the record in the First Proceeding and the record in the ICC Arbitration should be admitted into these proceedings.[82]

73 . Claimant appears to prefer that each side make reference to the record of the First Proceeding if and when needed.[83] With respect to the record of the ICC Arbitration, Claimant requests that, if the Parties refer to the witness statements and expert reports from the ICC Arbitration, they should not be considered as testimony in the present proceeding.[84] Claimant reserved its right to object to Respondent's submission of the record of the ICC Arbitration to the Tribunal after the First Session.[85]

74 . Having duly considered the Parties' submissions, the Tribunal, pursuant to Article 43 of the ICSID Convention, admits into the record of this proceeding the records of the First Proceeding and the ICC Arbitration, including the record related to the set-aside proceeding before the Singapore High Court, with the provisos that (i) the entire record of both arbitrations is submitted at once in the present arbitration in an orderly fashion agreed by the Parties with an appropriate and complete list of all documents included each bearing a distinct identification code; (ii) both records are an evidentiary matter only which is not binding on the Parties in this proceeding; and (iii) the Tribunal shall be the judge of their probative value, in accordance with Arbitration Rule 34(1).

75 . Regarding the second part of the question (treatment of witnesses and experts who have submitted a statement or report in the first arbitration), the Parties each propose different approaches.[86]

76 . Because the Tribunal found that the Award was annulled in its entirety, the Tribunal does not see a reason that the Parties should be limited in their ability to call and examine the same witnesses or experts who testified in the First Proceeding. The Tribunal is aware of the costs and difficulties that this may entail but notes its authority to ensure that neither Party abuses the evidentiary process.

77 . Accordingly, the Tribunal adopts the following guidelines for witnesses and experts of the First Proceeding:

i . A Party can submit the witness and expert testimony in full or in part (including written statements, written reports, and oral testimony recording in transcripts and on audio tapes) of its own witnesses and experts from the First Proceeding;

ii . A Party can submit a new statement from those witnesses and experts;

iii . The other Party can submit any remainder of those witnesses' and experts' testimony and can decide to call them for cross-examination;

iv . A Party can submit the witness and expert testimony in full or in part (including written statements, written reports, and oral testimony recording in transcripts and on audio tapes) of the opposing Party's witnesses and experts from the First Proceeding ("adverse witnesses or experts"). However, that Party can only call these adverse witnesses and experts for cross-examination with the Tribunal's approval, provided that these adverse witnesses and experts have not been submitted by the other Party as its own witnesses or experts under (i) or (ii);

v . The other Party can submit any remainder of those witnesses and experts' testimony; and

vi . As indicated in paragraph 15.6 of the Minutes of the First Session, the Tribunal is entitled to call upon a Party to produce at the hearing for cross-examination any witness or expert whose written testimony has been submitted in the First Proceeding.

78 . With respect to the witness and expert testimony of the ICC Arbitration, a Party can refer to these testimonies but they will not be considered testimony in the present proceeding and those witnesses and experts cannot be called for examination, unless a new statement or report is introduced in the present proceeding.

C . Whether ICC Awards are Binding on the Parties

79 . In Section III of its Submission, Respondent requests that the Tribunal consider the awards in the ICC Arbitration between PIATCO and the Republic of Philippines to be binding on the Parties in this proceeding based on the doctrine of collateral estoppel.

80 . Claimant has objected to Respondent's request for the reasons that have been mentioned above.[87]

81 . According to the Tribunal, the ICC Awards are not binding on the Parties to this proceeding as there is no identity of (i) parties, (ii) *petitum* and (iii) *causa petendi*.

82 . As to (i), the ICC Arbitration involved an entity, PIATCO, which is not party to this proceeding. Moreover, Respondent has not convincingly shown that Claimant and PIATCO are in privity with each other, such that they can be considered the same party.

83 . As to (ii) and (iii), the ICC Arbitration was brought under the Concession Agreements between PIATCO and the Philippines' Authorities and sought a declaration that those Concession Agreements were valid. The ICSID arbitration is brought under the Germany-Philippines BIT and seeks a determination that the State has breached the BIT.

84 . For the foregoing reasons, the circumstances adduced by Respondent do not justify the application in this case of a general principle of collateral estoppel. Respondent's request that the ICC Awards are binding on the Parties is accordingly denied.

VI . The Tribunal's Order

85 . For the above reasons, the Tribunal:

1) Finds that the Award was annulled in its entirety;

2) Denies Respondent's request to consider paragraphs 1–76, 78–356, 383–385, 392–400, 402–405 of the Award binding on the Parties and not subject to adjudication in this proceeding;

3) Denies Respondent's request to consider that the determinations of the ICC tribunal in the ICC Arbitration are binding on the Parties and not subject to readjudication in this proceeding;

4) Admits the records of the First Proceeding and the ICC Arbitration into the record of this proceeding with the provisos that (i) the entire record of both arbitrations submitted at once in this proceeding in an orderly fashion agreed by the Parties with an appropriate and complete list of all documents included each bearing a distinct identification code; (ii) both records are an evidentiary matter only which is not binding on the Parties in this proceeding; and (iii) the Tribunal shall be the judge of their probative value, in accordance with Arbitration Rule 34(1);

5) Adopts the guidelines for the treatment of witnesses and experts contained in paragraphs 77 and 78 of this Order;

6) Fixes the following schedule:

Filing	Number of Days	Deadline
Claimant's Memorial on Liability (no quantum)	92 days (from Tribunal's Order on Preliminary Phase)	August 17, 2012
Respondent's Counter-Memorial on Liability and Memorial on Jurisdiction / Counterclaim	94 days thereafter	November 19, 2012 (November 17 being a Saturday)
Exchange of Document Requests	21 days thereafter	December 10, 2012
Exchange of Objections to Requests	14 days thereafter	December 24, 2012
Exchange of Responses to Objections	14 days thereafter	January 7, 2013
Tribunal Order if necessary	15 days thereafter	January 22, 2013 (January 21 being a holiday observed by the Centre)
Production of Documents	7 days thereafter	January 29, 2013
Claimant's Reply on Liability and Counter-Memorial on Jurisdiction / Counterclaim	66 days thereafter	April 5, 2013
Respondent's Rejoinder on Liability and Reply on Jurisdiction / Counterclaim	66 days thereafter	June 10, 2013
Claimant's Rejoinder on Jurisdiction / Counterclaim	32 days thereafter	July 12, 2013
Hearing	66 days thereafter	Sept. 16–27, 2013

Piero Bernardini

President

On behalf of the Tribunal

Footnotes

[1] Annulment Decision, ¶ 15.

[2] ICC Partial Award, ¶¶ 16, 773. Exhibit RE-3 to Respondent's Preliminary Phase Submission ("Resp. Submission").

[3] ICC Final Award, ¶ 222. Exhibit RE-4 to Resp. Submission.

[4] *Amco Asia Corporation and others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1), Annulment Decision of May 16, 1986 ("*Amco I,* Annulment Decision").

[5] Resp. Submission, ¶¶ 6–7.

[6] Resolution, *NBI v. Cheng Yong*, et al., I.S. No. 2006-817 (Dec. 27, 2006).

[7] Resp. Submission, ¶¶ 32, 45.

[8] *Ibid.*, ¶ 32.

[9] *Ibid.*, ¶ 33 quoting the Annulment Decision at ¶ 209.

[10] *Ibid.*, ¶ 34 quoting the Annulment Decision at ¶ 218.

[11] *Ibid.*, ¶ 36.

[12] *Amco Asia Corporation and others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of May 10, 1988 ("*Amco II*, Decision on Jurisdiction").

[13] Resp. Submission, ¶¶ 38–42.

[14] *Ibid.*, ¶¶ 45–46, 58–78.

[15] Claimant's Observations Regarding the Two Preliminary Phase Questions Outlined by the Tribunal ("Cl. Obs."), ¶¶ 12–16.

[16] *Amco Asia Corporation and others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1), Award of November 20, 1984 ("*Amco I*, Award").

[17] Cl. Obs., ¶¶ 17–24.

[18] *Ibid.*, ¶¶ 25–34.

[19] *Ibid.*, ¶¶ 35–37.

[20] *Ibid.*, ¶¶ 42–46.

[21] *Ibid.*, ¶¶ 47–52.

[22] *Ibid.*, ¶¶ 53–61.

[23] Resp. Submission, ¶¶ 110–112.

[24] *Ibid.*, ¶¶ 113–114.

[25] *Ibid.*, ¶¶ 115–127.

[26] *Ibid.*, ¶ 121.

[27] *Ibid.*, ¶¶ 129–132.

[28] Cl. Obs., ¶¶ 75–81.

[29] *Ibid.*, ¶¶ 84–93.

[30] *Ibid.*, ¶¶ 94–95.

[31] Resp. Submission, ¶¶ 79–108.

[32] *Ibid.*, ¶¶ 87–89.

[33] *Ibid.*, ¶¶ 90–94.

[34] *Ibid.*, ¶¶ 92–96.

[35] *Ibid.*, ¶¶ 103–107.

[36] *Ibid.*, ¶¶ 82–83.

[37] *Ibid.*, ¶¶ 97–100.

[38] Cl. Obs., ¶¶ 62–74.

[39] Resp. Submission, ¶ 134.

[40] Cl. Obs., ¶ 96.

[41] Respondent's March 29, 2012 letter, p. 7 (citations omitted).

[42] Resp. Submission, ¶ 6 (citations omitted).

[43] Annulment Decision, ¶ 247.

[44] *Amco II*, Decision on Jurisdiction, ¶ 10.

[45] *Ibid.*, ¶ 11.

[46] *Ibid.*, ¶ 21.

[47] *See* Resp. Submission, ¶¶ 38–42, 58–60.

[48] *Amco II*, Decision on Jurisdiction, ¶ 11.

[49] *Ibid.*, ¶ 12.

[50] *See* Resp. Submission, ¶¶ 6, 39, 40–41, 59, 60, 64; Cl. Obs., ¶¶ 18–25, 27–28, 36.

[51] *See* Cl. Obs., ¶ 37, note 77.

[52] *Amco II*, Decision on Jurisdiction, ¶¶ 32–42.

[53] *Ibid.*, ¶ 44.

[54] *Amco Asia Corporation and others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1), Award of June 5, 1990 ("*Amco II*, Award").

[55] *See Amco Asia Corporation and others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1), Annulment Decision of December 17, 1992.

[56] Annulment Decision, Part VI.

[57] *Amco II*, Decision on Jurisdiction, ¶ 32; *infra* ¶ 59.

[58] *Supra*, ¶ 50.

[59] *Amco II*, Decision on Jurisdiction, ¶ 32.

[60] *See* Resp. Submission, ¶ 41; Cl. Obs., note 78.

[61] *Amco II*, Decision on Jurisdiction, ¶ 32.

[62] *Polish Postal Service in Danzig*, Advisory Opinion, PCIJ, Series B 11, at 29–30; Cl. Obs. ¶ 36.

[63] *See* Resp. Submission, ¶¶ 43–44.

[64] *Ibid.*, ¶¶ 32, 58.

[65] Annulment Decision, ¶ 32.

[66] *Ibid.*, ¶ 218.

[67] *Ibid.*, ¶ 230.

[68] *Ibid.*, ¶ 231.

[69] *Ibid.*, ¶ 236 referring to ¶¶ 335–343 of the Award.

[70] Award, ¶ 401.

[71] *Ibid.*, ¶ 404.

[72] *Ibid.*

[73] Annulment Decision, ¶ 109.

[74] Resp. Submission, ¶ 34.

[75] Annulment Decision, ¶ 235.

[76] Lowenfeld Opinion, ¶ 14.

[77] Resp. Submission, ¶¶ 32–33.

[78] Annulment Decision, ¶ 246.

[79] Resp. Submission, ¶ 30.

[80] Cl. Obs., ¶ 75.

[81] Resp. Submission, ¶¶ 109–114.

[82] *Ibid.*, ¶ 114.

[83] Cl. Obs., ¶ 76.

[84] *Ibid.*, ¶¶ 94–95.

[85] *Ibid.*, note 145.

[86] *See* Resp. Submission, ¶¶ 115–133; Cl. Obs., ¶¶ 78–92.

[87] *Supra*, ¶ 42.