School of International Arbitration, Queen Mary, University of London

# International Arbitration Case Law

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## FRAPORT AG FRANKFURT AIRPORT SERVICES WORLDWIDE V. REPUBLIC OF THE PHILIPPINES (ICSID CASE NO. ARB/03/25) DECISION ON THE APPLICATION FOR ANNULMENT

Case Report by Jie Lin**
Edited by Mark Feldman ***

An Annulment Decision rendered on 23 December 2010 pursuant to Article 52 of the ICSID Convention in the arbitration proceedings between Fraport AG Frankfurt Airport Services Worldwide and the Republic of the Philippines (ICSID Case No. ARB/03/25).

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| **Tribunal:** | Judge Peter Tomka (President), Judge Dominique Hascher, Professor Campbell McLachlan QC |
| **Applicant's counsel:** | Mr. Michael Nolan, Mr. Edward Baldwin, Ms. Elitza Popova-Talty and Mr. Frederic Sourgens, Milbank, Tweed, Hadley & McCloy LLP Washington, D.C.; Ms. Lesley Benn, Shulman, Rogers, Gandal, Pordy & Ecker PA, Potomac, Maryland; Ms. Sabine Konrad, K&L Gates LLP, Paris, France; and Mr. Eric Schwartz, King & Spalding LLP, Paris, France |
| **Respondent's Counsel:** | Ms. Agnes VST Devanadera (until January 2010), Former Solicitor General; Mr. Alberto Agra (until June 2010), Former Solicitor General; Mr. Jose Anselmo I. Cadiz, Solicitor General (from August 2010); Justice Florentino P. Feliciano (Ret.), Sycip Salazar Hernandez & Gatmaitan; and Ms. Carolyn Lamm, Ms. Abby Cohen Smutny, and Ms. Andrea Menaker, White & Case LLP, Washington, D.C. |

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INDEX OF MATTERS DISCUSSED

1.Facts of the Case ..... 2
2.Legal Issues Discussed in the Decision ..... 3
A. Manifest Excess of Power (ICSID Convention Article 52(1)(b)) (¶¶ 33-118) ..... 3
B. Serious Departure from a Fundamental Rule of Procedure (ICSID Convention Article 52(1)(d)) (¶¶ 119-247) ..... 5
C. Failure to State Reasons (ICSID Convention Article 52(1)(b)) (¶¶ 248-280) ..... 6
3. Costs (¶¶ 281-286) ..... 7
4. Decision ..... 8

*Digest*

### *1. Facts of the Case*

On 6 December 2007, Fraport AG Frankfurt Airport Services Worldwide ("Fraport") filed with ICSID an application (the "Application") requesting the annulment of an award dated 16 August 2007 (the "Award") rendered by the tribunal (the "Tribunal") in the arbitration between Fraport and the Republic of the Philippines (ICSID Case No. ARB/03/25).

The dispute arose out of an investment made by a German company, Fraport, in a Philippine company, Philippine International Air Terminals Co., Inc. ("PIATCO"). In 1997, PIATCO and the Philippine government entered into a concession agreement for the construction and operation of an international passenger terminal at Ninoy Acqino International Airport in Manila ("Terminal 3"). The concession agreement was amended and supplemented. In 1999, Fraport entered into four agreements under which it acquired direct and indirect interests in PIATCO.[1]

At the end of November 2002, the President of the Philippines declared that the Government would not honor the Terminal 3 contracts because the Solicitor General and Justice Department had determined that the contracts were null and void. In May 2003, the Supreme Court of the Philippines ruled that Philippines law had been violated and that the Terminal 3 contracts were null and void *ab initio*.[2]

On 17 September 2003, Fraport initiated arbitration proceedings against the Philippines by submitting a Request for Arbitration to ICSID pursuant to the Agreement between the Federal Republic of Germany and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments (the "BIT").[3]

In the arbitration, the Philippines argued that Fraport's investment had been made in violation of the Philippines Anti-Dummy Law ("ADL") and thus fell outside the scope of the BIT, which required, under Article 1(1), that an investment be "accepted in accordance with the respective laws and regulations of either Contracting State." Fraport maintained that it had an investment within the meaning of Article 1(1) of the BIT, and emphasized that the Philippines had known the details of PIATCO's shareholding structure and that it never charged Fraport with any violation of the ADL or any other law.[4]

[1] Award ¶¶ 14-17.
[2] *Id*. ¶¶ 23-25.
[3] *Id*. ¶¶ 14-19, 24.
[4] *Id*. ¶¶ 27-28

In its Award, the Tribunal dismissed Fraport's claim, finding that Fraport's investment had not been made in accordance with Philippine law and thus fell outside the scope of the BIT. Dr. Bernardo Cremades signed a dissenting opinion, maintaining that no violation of Philippine law by Fraport had been established, and that in any event Fraport's shareholdings in PIATCO constituted an asset that had been accepted in accordance with Philippine law.[5] Fraport subsequently filed its Application, seeking annulment of the Award under Article 52(1) of the ICSID Convention.

### 2. *Legal Issues Discussed in the Decision*

In its Application, Fraport sought annulment on three separate grounds under Article 52(1): (i) the Tribunal had manifestly exceeded its powers; (ii) there had been a serious departure from a fundamental rule of procedure; and (iii) the Award failed to state the reasons on which it was based.[6]

*A. Manifest Excess of Power (ICSID Convention Article 52(1)(b)) (¶¶ 33-118)*

The Committee found that a tribunal exceeds its powers under Article 52(1)(b) not only when the tribunal exercises jurisdiction that it does not in fact possess, but also "when a Tribunal fails to exercise the jurisdiction which it has been granted."[7]

The Committee observed that Article 52(1)(b) requires an excess of powers and that such excess be "manifest."[8] The Committee found that the "manifest" requirement "goes to the nature of the review exercise": when a tribunal's jurisdiction "is reasonably open to more than one interpretation, the *ad hoc* Committee will give special weight to the Arbitral Tribunal's interpretation of the jurisdictional instrument."[9] When a tribunal's decision on jurisdiction was not unreasonable, the "Committee will not intervene."[10] The Committee found that there is a "heavy burden" on the applicant to establish a manifest excess of powers, which should be "demonstrable and substantial."[11]

Fraport argued that the Tribunal manifestly exceeded its powers on three separate grounds. First, the Tribunal interpreted Article 1(1) of the BIT as a "legality

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[5] Dissenting Opinion of Bernardo M. Cremades §§1, 13.
[6] Decision on the Application for Annulment ("Decision") ¶ 2.
[7] Decision ¶ 37.
[8] *Id*. ¶ 40.
[9] *Id*. ¶ 44.
[10] *Id*. ¶ 44.
[11] *Id*. ¶ 44.

requirement" (requiring investments to be made in accordance with law) rather than as an "admission provision" (requiring investments to be "accepted" in accordance with law). Second, when dismissing Fraport's claim, the Tribunal considered only part of Fraport's investments, and failed to consider certain shareholdings, loans, and guarantees held by Fraport. Third, the Tribunal failed to identify any violation of the ADL by a principal, and thus Fraport could not have violated the ADL as an accessory.[12]

Regarding Fraport's first argument, the Committee clarified that it was not "empowered to act as an appeal body and substitute its own interpretation of the BIT" for the one adopted by the Tribunal.[13] In particular, the Committee found that so long as the Tribunal's interpretation was "tenable," it would not be "open to the Committee to conclude that the Tribunal manifestly exceeded its powers."[14] Finding that the Tribunal's interpretation of Article 1(1) of the BIT was "not untenable," the Committee concluded that the Tribunal did not manifestly exceed its powers.[15]

In response to Fraport's second argument – that the Tribunal had failed to consider some of Fraport's investments when dismissing the claim – the Committee ruled that the Tribunal had not manifestly exceeded its powers, finding that "the Tribunal was entitled to treat Fraport's investment participation in the Terminal 3 Project as a unity pursuing the same objective" and thus could apply its analysis "to the investments of Fraport as a whole."[16]

Regarding Fraport's third argument, the Committee did not "consider it appropriate to review, in the context of an annulment procedure, the findings of the Tribunal that Fraport had violated the ADL."[17]

With respect to Fraport's arguments under Article 52(1)(b), the Committee ultimately concluded that "it would trespass the limits of its annulment powers, transforming itself into an *organe d'appel*, if it were to uphold Fraport's claim that the Tribunal manifestly exceeded its powers."[18]

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[12] *Id*. ¶¶ 48-58.
[13] *Id*. ¶ 112.
[14] *Id*. ¶ 112.
[15] *Id*. ¶ 112.
[16] *Id*. ¶ 113.
[17] *Id*. ¶ 116.
[18] *Id*. ¶ 118.

*B. Serious Departure from a Fundamental Rule of Procedure (ICSID Convention Article 52(1)(d)) (¶¶ 119-247)*

The Committee observed that the availability of annulment Article 52(1)(d) for "a serious departure from a fundamental rule of procedure" was intended to "control the integrity of the arbitral procedure" and contained "the twin requirements that the rule of procedure must be fundamental and that the departure from it must be serious."[19]

Fraport argued, on two grounds under Article 52(1)(d), that the Tribunal committed a serious departure from a fundamental rule of procedure: (a) by disregarding the principles that must be respected when determining whether a criminal law had been violated, specifically the principles of *nullum crimen sine lege* and *in dubio pro reo*; (b) by relying on evidence admitted after the close of proceedings in denial of Fraport's right to be heard.[20]

Fraport characterized the principles of *nullum crimen sine lege* and *in dubio pro reo* as "expressions of the right to a fair trial in any case where a court or a tribunal is applying criminal law."[21] Fraport asserted that those principles must be respected whenever a criminal statute (such as the ADL) is applied, even when the statute is applied "only incidentally in the context of international arbitral proceedings."[22] A failure to do so, Fraport maintained, constitutes a breach of a fundamental rule of procedure.

The Philippines responded that the *nullum crimen sine lege* and *in dubio pro reo* principles were not applicable to the case because they were not rules of procedure; rather, "*nullum crimen* is a substantive rule, and *in dubio* establishes a standard of evidential proof applicable only to criminal cases."[23]

The Committee agreed that the *nullum crimen* principle was not a rule of procedure,[24] and found that the *in dubio* principle applied "as a right of the defence in criminal proceedings" but could not be "transposed into the context of international arbitral proceedings because to do so would be inconsistent with the principle of equality of the parties."[25]

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[19] *Id*. ¶ 180.
[20] *Id*. ¶ 120.
[21] *Id*. ¶ 124.
[22] *Id*. ¶ 121.
[23] *Id*. ¶ 134.
[24] *Id*. ¶ 191.
[25] *Id*. ¶ 193.

The Committee then addressed the right to be heard, which, it found, "is undoubtedly accepted as a fundamental rule of procedure, a serious failure of which could merit annulment."[26] The issue of the parties' right to be heard concerned the Tribunal's decision to admit evidence relating to the determination by the Philippine Special Prosecutor not to prosecute officers and directors of Fraport for any alleged violation of the ADL (the "Prosecutor's Resolution").[27]

The Committee concluded that "the Tribunal's treatment of the parties following receipt of the Prosecutor's Resolution did constitute a serious departure from the fundamental rule of procedure entitling the parties to be heard."[28] Specifically, the Tribunal failed to reopen proceedings following its receipt of the Prosecutor's Resolution and documents from the Prosecutor's file,[29] which denied the parties an opportunity to make submissions on the legal effect of the Prosecutor's Resolution.[30] Denying the parties that opportunity, the Committee found, "materially prejudiced Fraport, in view of the Tribunal's adverse findings both as to the question of fact relating to the record before the Prosecutor and as to the relevance of the Prosecutor's Resolution for the question of law concerning the construction of the ADL."[31] Given the serious departure from the fundamental rule of procedure, the Committee concluded that "the Award must be annulled in its entirety."[32]

*C. Failure to State Reasons (ICSID Convention Article 52(1)(e)) (¶¶ 248-280)*

In its third ground for annulment of the Award, under Article 52(1)(e) of the ICSID Convention, Fraport asserted the Award "failed to state the reasons on which it is based." The Committee observed that "the obligation to give a reasoned award is a guarantee that the Tribunal has not decided in an arbitrary manner," but that a challenge under Article 52(1)(e) is limited to review of the legality of the award "without retrial of the factual and legal issues dealt with by the tribunal."[33]

Fraport maintained that the Tribunal failed to state reasons in the Award in four respects: first, "there are no reasons with respect to [Fraport's] alleged breach as principal or accessory"; second, "the failure to give reasons as to whether an attempt constitutes an offense under the ADL"; third, the Award failed to apply the *nullum*

[26] *Id*. ¶ 197.
[27] *Id*. ¶¶ 120, 166.
[28] *Id*. ¶ 218.
[29] *Id*. ¶ 235.
[30] *Id*. ¶ 244.
[31] *Id*. ¶ 246.
[32] *Id*. ¶ 247.
[33] *Id*. ¶ 250.

*crimen* principle; and fourth, "the Award fails to give reasons for its failure to apply the BIT separately to each of Fraport's discrete investments."[34]

The Committee observed, with respect to Article 52(1)(e), that "an *ad hoc* committee controls the award for what has been actually decided by the Tribunal and not for what the applicant would have wished the award to be."[35] That distinction, the Committee found, had "particular implication" for Fraport's first, third, and fourth objections under Article 52(1)(e).[36]

Regarding Fraport's first objection, given that the "Tribunal considered the ADL in the course of its examination of whether Fraport's investment was protected by the BIT, not in the context of criminal charges against Fraport," the Tribunal was not required to clarify whether Fraport had acted as a principal or accessory.[37] With respect to Fraport's third and fourth objections, the Committee found that Fraport had not raised those arguments before the Tribunal, and thus "Fraport's criticism of the Award for giving no reasons to arguments which [Fraport] raises for the first time in the annulment proceeding is groundless."[38]

As to Fraport's second objection, the Committee emphasized that "the annulment proceeding cannot cause an entire reopening of the case."[39] Finding that "[i]t is not the task of the ad hoc Committee under Article 52(1)(e) of the ICSID Convention to consider whether the reasons given by the Tribunal are convincing,"[40] the Committee concluded that "there was no lack of reasoning or contradictions in the reasoning of the Tribunal" and thus the conditions for annulment under Article 52(1)(e) "are not present in the case at hand."[41]

***3. Costs (¶¶ 281-286)***

The Committee found that it was appropriate and fair for each party to bear the costs of its legal representation and for ICSID costs, including the fees and expenses of the Committee members, to be borne equally by the parties.

[34] *Id*. ¶¶ 251-254, 272.
[35] *Id*. ¶ 259.
[36] *Id*. ¶ 259.
[37] *Id*. ¶¶ 268, 269.
[38] *Id*. ¶ 270.
[39] *Id*. ¶ 272.
[40] *Id*. ¶ 277.
[41] *Id*. ¶ 280.

***4. Decision***

The Committee decided as follows:

"(1) To annul the Award of 16 August 2007 in *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (ICSID Case No. ARB/03/25);

(2) Each Party shall bear one half of the ICSID costs incurred in connection with this annulment proceeding; and

(3) Each Party shall bear its own party costs and expenses incurred with respect to this annulment proceeding."[42]

[42] Decision Section VI.