

**IN THE MATTER OF AN ARBITRATION IN GENEVA, SWITZERLAND
AND UNDER THE TREATY BETWEEN THE FEDERAL REPUBLIC OF
GERMANY AND THE KINGDOM OF THAILAND MADE ON 24 JUNE
2002 CONCERNING THE ENCOURAGEMENT AND RECIPROCAL
TREATMENT OF INVESTMENTS AND UNDER THE UNCITRAL
ARBITRATION RULES 1976**

BETWEEN

**WALTER BAU AG (IN LIQUIDATION)
CLAIMANT**

AND

**THE KINGDOM OF THAILAND
RESPONDENT**

AWARD

DATED 1 JULY 2009

Tribunal: The Hon. Sir Ian Barker, Q.C. (Chair) (New Zealand)
The Hon. Marc Lalonde, P.C., O.C., Q.C. (Canada)
Mr. Jayavadh Bunnag (Thailand)

Secretary to the Tribunal: Ms. Anja Borchardt (New Zealand)

Counsel: Mr. Robert Hunter, Dr. Mariel Dimsey, Prof. James Crawford
SC for Claimant
Mr. Michael Polkinghorne, Ms. Elizabeth Lefebvre-Gross, Mr.
Paul Brumpton for Respondent

Lawyers: Lovells LLP (Frankfurt) for Claimant
White & Case LLP (Paris) for Respondent

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1. INTRODUCTION AND PROCEDURAL HISTORY

- 1.1 On 13 December 1961, a Treaty was signed between the Respondent, the Kingdom of Thailand and the Federal Republic of Germany. That Treaty came into force on 10 April 1965. One principal aim of the Treaty was: "*The promotion and reciprocal protection of investments*". The Claimant, as a German national with an "investment" in Thailand, alleges that it is entitled to seek relief from the Respondent by virtue of provisions in a similar Treaty between the same parties, signed on 24 June 2002 and which came into force on 20 October 2004. The first Treaty will be referred to as "the **1961 Treaty**" and the second Treaty as "the **2002 Treaty**".
- 1.2 By notice dated 21 September 2005, requesting submission of a dispute to arbitration, the Claimant asserted that the 2002 Treaty, under which it brought its claim for arbitration, applied to "approved investments" made in Thailand prior to the entry into force of that Treaty and that it had an investment approved in terms of the 1961 Treaty.
- 1.3 The Claimant alleges that its "approved investment" was as a shareholder in the company which became the Concessionaire under a tollway concession granted by the Respondent in its territory and that the Respondent had breached its obligations to it as a shareholder of the concessionaire. It made its claim for relief in terms of the 2002 Treaty as an "investor", as defined in the 2002 Treaty.
- 1.4 The provision in the 2002 Treaty under which the Claimant brought its claim for arbitration is Article 10 which reads as follows:

“Settlement of Disputes between a Contracting Party and an Investor

(1) Disputes concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the dispute cannot be settled within six months from the date on which it has been raised by one of the parties to the dispute, it shall, at the request of either party to the dispute be submitted for arbitration. Unless the parties to the dispute have agreed otherwise, the provisions of Article 9(3) to (5) shall be applied mutatis mutandis on condition that the appointment of the members of the arbitral tribunal in accordance with Article 9(3) is effected by the parties to the dispute and that, insofar as the period specified in Article 9(3) are (sic) not observed, either party to the dispute may, in the absence of other arrangements, invite the President of the Court of International Arbitration of the International Chamber of Commerce in Paris to make the required appointments. The award shall be enforced in accordance with domestic law.

(3) During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.

(4) In the event of both Contracting Parties having become Contracting States of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, disputes under this Article between the parties to dispute shall be submitted for arbitration under the aforementioned Convention, unless the parties in dispute agree otherwise; each Contracting Party herewith declares its acceptance of such procedure.”

- 1.5 The provisions in Article 9(3) to (5) of the 2002 Treaty, referred to in Article 10 above, in summary require each party to appoint a member of an arbitral Tribunal. The two members so appointed should nominate a national of a third state to be Chair of the arbitral tribunal within three months from the date when the Claimant gave notice that it intended to submit the dispute to an arbitral Tribunal (i.e. 21 September 2005). In default of the co-arbitrators

agreeing on a Chairman, the nomination of a Chairman is to be made by the President of the Court of International Arbitration of the International Chamber of Commerce, Paris (the "**ICC Court**"). Article 9 of the 2002 Treaty deals with state-state arbitration in the event of a dispute concerning interpretation or application of the Treaty.

Procedural Background

- 1.6 The Claimant is Walter Bau AG (In Liquidation) ("**Claimant**" or "**Walter Bau**"), a company incorporated under the laws of the Federal Republic of Germany which is acting through its insolvency administrator, Herrn Werner Schneider.
- 1.7 The Claimant is represented by Mr. Robert Hunter of Lovells LLP, Frankfurt, Germany.
- 1.8 The Respondent is the Kingdom of Thailand ("**Respondent**"). Like all governments, the Respondent operates through a variety of agencies. Many of these will appear in the narrative, notably the Department of Highways ("**DoH**").
- 1.9 The Respondent is represented by Mr. Michael Polkinghorne of White & Case LLP, Paris, France.
- 1.10 The Claimant, through its insolvency administrator served its Request for Arbitration on 21 September 2005 pursuant to Article 10(2) of the Treaty. In this document, the Claimant appointed the Honourable Marc Lalonde, P.C., O.C., Q.C. of Montréal, Québec, Canada as a co-arbitrator.
- 1.11 The Respondent did not immediately respond to the Request for Arbitration. However, on 30 November 2005, the Respondent appointed Dr. Suvann Valaisathien of Bangkok, Thailand as a co-arbitrator.

- 1.12 The co-arbitrators were unable to agree on the appointment of a Chairman as envisaged by Articles 9(3) and 10(2) of the 2002 Treaty. By letter dated 25 January 2006, the Claimant submitted a Request for Appointment of Chair to the President of the ICC Court pursuant to Articles 9(4) and 10(2) of the 2002 Treaty.
- 1.13 In the interim, the Claimant wrote to the ICC Court on 10 February 2006 expressing concerns regarding Dr. Suvarn's impartiality.
- 1.14 The Claimant noted in that letter to the ICC Court that, although the Treaty did not provide a mechanism for the resolution of concerns of lack of impartiality against an arbitrator, the Claimant nevertheless wished to reserve its position on this point. However, the Claimant never took any formal step to challenge Dr. Suvarn's appointment.
- 1.15 On 27 February 2006, the President of the ICC Court confirmed the appointment of the Honourable Sir Ian Barker QC of Auckland, New Zealand as the Chairman of the Arbitral Tribunal ("the **Tribunal**").
- 1.16 A preliminary telephone conference was convened by the Chairman on 15 March 2006 between Counsel for the parties and the full Tribunal. The participants discussed various administrative matters, including a potential venue and date for a procedural conference to settle Terms of Reference and Terms of Appointment of the Arbitral Tribunal.
- 1.17 In accordance with arrangements reached at the telephone conference, a procedural conference was held on 8 June 2006 in Montréal, Québec, Canada. The Tribunal, counsel for the parties and representatives of the parties attended. At this conference, there emerged general agreement on the Terms of Reference for the arbitration and on the

Terms of Appointment of the Tribunal (collectively called "**Terms of Reference**"). A draft Procedural Timetable was also discussed.

- 1.18 The Respondent indicated at the procedural conference that it wished to contest the Tribunal's jurisdiction to consider the Claimant's claim for Treaty protection and that it would seek bifurcation of the proceedings in order to have jurisdictional objections disposed of at an early stage. The parties agreed that the language of the arbitration was to be English.
- 1.19 On 20 July 2006, the Chairman, on behalf of the Tribunal, settled the form of a final agreed version of the Terms of Reference and a Procedural Timetable and sent them to the parties for signature. Pursuant to paragraph 13 of the Terms of Reference, the parties were each required to deposit their share of the advance on costs. An expense account and a fees account were established. Funds were to be held and supervised by the London Court of International Arbitration ("**LCIA**") as the stakeholder approved by the parties. The LCIA was to disburse funds in accordance with directions from the Chairman given in accordance with the Terms of Reference.
- 1.20 On 24 July 2006, the Claimant confirmed to the Tribunal that it would sign the Terms of Reference and that it was arranging to make the necessary payments to the LCIA. On 28 July 2006, the Respondent advised that it was also arranging payment of its share. It still had a few minor reservations about the Terms of Reference which had yet to receive the Thai Cabinet's approval which was expected on 16 August 2006.
- 1.21 In light of the Respondent's letter, the Chairman extended the time period for obtaining the Thai Cabinet's approval to

the Terms of Reference until 16 August 2006 and emphasised that the extension should not be interpreted as permitting either party to veto the Terms of Reference. The Chairman reminded the parties that the Tribunal had the authority to issue the Terms of Reference without the parties' approval and asked that the parties proceed on the basis that the Terms of Reference were fixed.

- 1.22 The Claimant signed the Terms of Reference and sent its signed copy to the members of the Tribunal on 10 August 2006. On 11 August 2006, it forwarded a signed copy of the Procedural Timetable to the Chairman and advised that the Claimant's share of the advance on costs had been paid to the LCIA.
- 1.23 On 18 August 2006 the Respondent indicated that it had been unable to meet the 16 August 2006 deadline referred to in para 1.21 above. The Chairman granted the Respondent until 4 September 2006 as a final deadline for obtaining the Thai Cabinet's approval to the Terms of Reference.
- 1.24 On 1 September 2006, the Respondent deposited its share of the advance on costs with the LCIA. On 4 September 2006, it forwarded a signed copy of the Terms of Reference and the Procedural Timetable to the Tribunal.
- 1.25 Under the Terms of Reference, the juridical seat of the arbitration is Geneva, Switzerland. The applicable law for the arbitration is :

"public international law. Subject to this, where discrete issues of national law arise, the law to be applied or considered shall ordinarily be the law of the Kingdom of Thailand although German law issues may also arise. The Tribunal shall determine the appropriate law or laws to be applied."

- 1.26 Under the Terms of Reference, the UNCITRAL Arbitration Rules (“the **UNCITRAL Rules**”) (except as excluded, supplemented or varied by agreement of the parties), the relevant provisions (if any) of the Treaty and/or such specific orders or instructions of the Tribunal are to be the applicable procedural rules.
- 1.27 Under the Terms of Reference, the Tribunal is not to be bound by strict rules of evidence. However, as appropriate, the Tribunal may have regard to the 1999 Rules on the Taking of Evidence in International Commercial Arbitration adopted by the International Bar Association (“the **IBA Rules**”).
- 1.28 Under the Terms of Reference, the Chairman was empowered to make procedural rulings alone, subject to the provisions of Clause 14(c) which states:
- “The Tribunal and the Parties agree that the Presiding Arbitrator may make procedural rulings alone provided that:
- (i) all correspondence is copied to the co-arbitrators;
 - (ii) the Presiding Arbitrator shall be free to consult, in his discretion, with the other arbitrators or to refer significant or difficult matters to the full Tribunal for decisions; and
 - (iii) the full Tribunal shall hear and determine any procedural matter if requested by either Party.”
- 1.29 After the signing of the Terms of Reference, the Tribunal appointed Ms. Lauren Lindsay, Barrister, of Auckland, New Zealand as Administrative Secretary to the Tribunal. Ms. Lindsay resigned and was replaced in this role by Ms. Anja Borchardt, Barrister, of Auckland, New Zealand on 1 July 2008. Appointment of an Administrative Secretary was authorised by the Terms of Reference.

1.30 On 2 October 2006, the Respondent submitted a Memorial on Jurisdiction and a Request for Bifurcation. It also sought an order for security for costs against the Claimant. Both parties made various applications for discovery. A further telephone conference was held on 21 December 2006 (Auckland time) to discuss these applications and the timing of a jurisdictional hearing, should the decision be made to bifurcate the proceedings. The telephone conference was attended by all members of the Tribunal and counsel for the parties.

1.31 After consideration by members of the Tribunal of the discussion at the telephone conference, the Chairman, on behalf of the Tribunal, issued an order on 21 December 2006 which granted the Respondent's application to bifurcate the proceedings. He ordered that discrete jurisdictional questions in a form to be agreed between the parties would be considered by the Tribunal at a jurisdictional hearing which was fixed for 20-21 March 2007 in Kuala Lumpur, Malaysia, a venue acceptable to the parties.

1.32 Whilst certain discovery orders were made, the Tribunal refused to make an order for security for costs in respect of the jurisdictional hearing. It made no decision in the meantime on the Respondent's application that the Claimant give security for the Respondent's costs of the substantive arbitration. The Tribunal sought the following information from the Claimant:

"(a) the insolvency administrator's current estimate of the amount that would be available after payment of secured creditors and the costs of the insolvency;

(b) whether, out of this sum, it is possible to 'ring-fence' a discrete amount which would earn interest for the insolvency but which could be available for security for costs. Such sum

could only be disbursed on the order of the Tribunal.”

- 1.33 The Tribunal considered that, if the Respondent’s jurisdictional challenge were successful, there would be no need to consider any application for security for the costs of a substantive hearing. The parties could not agree on discovery issues and were in dispute over the scope the Tribunal’s 21 December 2006 Discovery Order.
- 1.34 The Claimant objected to the reception as evidence of a letter from Dr. Reinhard Zimmer attached to the Respondent’s rejoinder on jurisdiction. The Claimant argued that the letter, as a witness statement (expert or otherwise) was incomplete and that Dr. Zimmer should appear at the hearing in Kuala Lumpur for cross-examination if reliance were to be placed on his statement.
- 1.35 The Chairman, on behalf of the Tribunal, issued Procedural Order No. 1 on 6 March 2007 to dispose of the issues relating to Dr. Zimmer’s evidence. He ruled that, should the Respondent wish to rely on Dr. Zimmer’s evidence at the hearing, it would have to submit a witness statement from him that complied with the IBA Rules and to arrange for Dr. Zimmer to attend the hearing. The disclosure issue was to be argued at the hearing. (In the event, Dr. Zimmer did not attend either the substantial or jurisdictional hearings in Hong Kong).
- 1.36 On 16 March 2007, when M. Lalonde was already on his way from Montréal to Kuala Lumpur for the hearing and the Chairman was about to leave New Zealand for the hearing, the Respondent emailed the Tribunal challenging the continued service on the Tribunal of its own party-appointed arbitrator, Dr. Suvarn Valaisathien. This letter was seemingly in response to an earlier letter from the

Claimant to the Respondent dated 4 March 2007 where it advised that:

"It [had] come to [its] attention during the course of preparing for the March hearing that, many years ago, Dr. Suvarn Valaisathien provided some advice and temporarily held a nominal shareholding in a company connected with this project. The circumstances [were] as follows. In 1984, Dyckerhoff & Widmann AG (Dywidag") and a local Thai engineering company Delta Engineering Construction Company Limited ("Delta") established a Thai company named Dywithai Company Limited ("Dywithai"). For compliance reasons, Dr. Valaisathien held a 2% interest in Dywithai. Under its new name of Dywidag (Thailand) Company Limited ("Dywidag Thailand"), this company was part of the consortium which contracted with DMT for the design and construction of the Don Muang Tollway. Dywidag ceased to have an interest in the company in 1997. Dr. Valaisathien also provided legal advice to Dywidag and Delta on Thai corporate and tax law in connection with Dywidag's and Delta's establishment and incorporation of DMT in 1988 and 1989."

- 1.37 In their email to the Tribunal, the Respondent's lawyers noted that Dr. Suvarn's appointment had been made by the previous Thai government and before the engagement of their firm, White & Case. Following receipt of the Claimant's 4 March 2007 letter, they had obtained lists of shareholders from Thailand's Ministry of Commerce which confirmed that between 1984 and 2001, Dr. Suvarn had had an equity interest in Dywidag.
- 1.38 The Respondent therefore challenged Dr. Suvarn pursuant to Article 10 of the UNCITRAL Rules, which permits an arbitrator to be challenged by the party appointing him, if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, as long as the challenging party becomes aware of those circumstances following the appointment. In the Respondent's submission, the circumstances did give rise to justifiable

doubts as to Dr. Suvarn's impartiality and independence in that:

"Dr. Suvarn has a close relationship not only with Claimant but also with an entity closely connected with Claimant by virtue of the facts that: (i) he provided legal advice to Claimant's predecessor, Dyckerhoff & Widmann; and (ii) Dr. Suvarn held a long-term interest in a company that partnered with Claimant's predecessor to construct the very project that is at issue in this arbitration.

The matter is all the more sensitive given the nature and importance of this dispute to the Kingdom of Thailand and the need for all parties, and the Thai people, to have the utmost confidence in the decisions of this Tribunal."

- 1.39 The Respondent submitted that the challenge was timely under Article 11 of the UNCITRAL Rules since it was made within 15 days of the 4 March 2007 letter notifying it of the relevant circumstances. The Respondent invited Dr. Suvarn to withdraw as an arbitrator and, in the event that he did not willingly do so, the Respondent intimated that it would pursue its challenge with the President of the ICC Court. The Respondent requested that the hearing on jurisdiction be adjourned.
- 1.40 In an email of 16 March 2007 to the Tribunal, the Claimant categorised Dr. Suvarn's involvement with the project as tangential. It submitted that the fact that he had given certain advice a considerable time ago was not a ground for impugning his impartiality. In addition, the Respondent had, at the time it signed the Terms of Reference, knowledge of Dr. Suvarn's questioned involvement. Accordingly, the challenge was excluded under paragraph 3(e) of the Terms of Reference under which the parties waived any possible objections to the appointment of the arbitrators on the grounds of potential conflict of interest and/or lack of independence or impartiality in respect of

matters known to them at the date of signature of the Terms of Reference.

1.41 In the interests of efficiency, the Claimant suggested that:

“the hearing should go ahead ... and the evidence be taken, with a direction by the tribunal – preferably with the consent of the parties – that there shall be no rehearing if the challenge is upheld. The challenge could then follow that with a minimum impact on procedure. ... Should the challenge succeed, the new arbitrator could be appointed and the tribunal could then determine the issue upon the basis of the transcript and written submissions.”

1.42 Following this exchange of emails, Dr. Suvarn immediately resigned as a co-arbitrator without protest. The Respondent refused to agree to proceeding with the hearing without a third member of the Arbitral Tribunal on the basis suggested by the Claimant. The Chairman therefore felt obliged to adjourn the hearing. The hearing was, accordingly, adjourned, at great inconvenience to the remaining members of the Tribunal, the parties, counsel and witnesses.

1.43 The Chairman held a telephone conference with Counsel for the parties on 20 March 2007 to discuss a timetable for the appointment of a new co-arbitrator. Following the conference, the Chairman on behalf of the Tribunal issued Procedural Order No. 2 on 22 March 2007 stipulating as follows:

- “1. The Respondent is to have a new arbitrator appointed and his/her appointment advised to the Tribunal and the Claimant by 6 pm 20 April 2007 (French time).
2. The new arbitrator should make a declaration of impartiality and independence and accept the existing Terms of Reference and Terms of Appointment, subject to any necessary adjustment to the terms relating to the remuneration of the Tribunal.

3. The new arbitrator must be available to consider the jurisdictional challenge in late July/early August 2007 and conduct the substantive hearing (if any) in March/April 2008. Any consequential amendments to the TOR should be considered at the [next] telephone conference ...”

1.44 On 11 May 2007, the Respondent advised the Claimant and the Tribunal of the appointment of its replacement co-arbitrator, Mr. Jayavadh Bunnag of International Legal Counsellors Thailand Ltd, Bangkok. However, although his appointment had been made, Mr. Bunnag did not receive an official letter of confirmation for a further few days after this date.

1.45 Mr. Bunnag signed and forwarded a Statement of Independence and Impartiality to the administrative secretary of the arbitration on 18 May 2007. Mr. Bunnag signified his acceptance to the Terms of Reference on 25 May 2007. After discussions between Counsel and the Tribunal, a jurisdictional hearing was directed to take place in Hong Kong on 31 July – 1 August 2007. The Respondent wished the venue for the hearing to be in Asia. The Claimant preferred a venue in London or Paris but ultimately agreed to Hong Kong.

1.46 On 19 June 2007, the Respondent revived the issues of Dr. Zimmer and document production. The Respondent advised that because the German Government did not consent to Dr. Zimmer’s participation at the hearing, Dr. Zimmer would not be attending as a witness. The Respondent also objected to the Claimant’s assertions of privilege in relation to the disclosure of those documents that fell within paragraph 8(b) of the Tribunal’s Order for Directions No. 1. The Claimant provided its response on 13 July 2007.

- 1.47 The Tribunal issued Procedural Order No. 3 on Document Disclosure on 18 July 2007 and reiterated its views on Dr. Zimmer. It ruled that the Claimant had already complied with the Respondent's request for broader disclosure by stating that it had no documents in its possession or power falling within the scope of the request.
- 1.48 The hearing on the challenge to jurisdiction *ratione materiae* and *ratione personae* took place at the Hong Kong International Arbitration Centre on 31 July and 1 August 2007. The Claimant was represented by Mr. Robert Hunter and Dr. Mariel Dimsey of Counsel and the Respondent by Mr. Michael Polkinghorne and Ms. Sarah Cohen of Counsel. Representatives of both parties attended the hearing.
- 1.49 Prepared briefs of the evidence-in-chief of the Expert witnesses – one for each side - had been provided in advance. Each witness was cross-examined and re-examined. A verbatim transcript was taken of the whole hearing and made available to the Tribunal and the parties. The parties had already filed extensive memorials on the jurisdictional issues before the order for bifurcation had been made.
- 1.50 Written submissions were forwarded by both counsel to the Tribunal on or about 10 August 2007.
- 1.51 An Award on Jurisdiction was issued on 5 October 2007. The Tribunal determined that the claim should proceed to a hearing on the merits and on some other jurisdictional objections which the Respondent proposed to raise at the substantive hearing.
- 1.52 Until the Respondent's initial jurisdictional objections had been determined, there had been no need for the Tribunal to have considered the Respondent's application for

security for costs in respect of the substantive hearing of the arbitration.

- 1.53 On 15 January 2008, the Tribunal made a Ruling on Security for Costs, deciding that no amount for security for the costs of the arbitration be paid by the Claimant to the Respondent.
- 1.54 A Variation of Terms of Reference to Arbitration and Terms of Appointment of Arbitral Tribunal ("Amended Terms of Reference") were agreed to by the parties to accommodate the changes, *inter alia*, resulting from the increase in the size of the claim and the amended constitution of the Tribunal. Those Amended Terms of Reference were signed by the Claimant on 25 February 2008 and by the Respondent on or about 16 September 2008.
- 1.55 On 11 March 2008, a procedural conference was held via telephone between the Chairman and counsel and the Tribunal subsequently issued a timetable order.
- 1.56 A number of interlocutory steps were taken and a further procedural conference via telephone was held on 19 August 2008 between the Chairman and counsel in preparation for the substantive hearing in Hong Kong.
- 1.57 The hearing on the merits and on the Tribunal's jurisdiction *ratione temporis* took place from 6 October to 17 October 2008 over 11 sitting days. It was held at the Hong Kong International Arbitration Centre.
- 1.58 The Claimant was represented by Mr. Robert Hunter, Dr. Mariel Dimsey and Professor James Crawford S.C. of counsel. The Respondent was represented by Mr. Michael Polkinghorne, Ms. Elizabeth Lefebvre-Gross and Mr. Paul Brumpton of counsel. Various representatives of the parties and support staff from the lawyers attended the

hearing, as well as the Administrative Secretary to the Tribunal, Ms. Anja Borchardt.

- 1.59 Briefs of Evidence of the evidence-in-chief of the witnesses of fact and of the expert witnesses had been provided to the Tribunal in accordance with the procedural timetable. Statements in reply had been filed in advance. Witnesses were cross-examined by opposing counsel and questioned by members of the Tribunal. A verbatim transcript was taken of the whole hearing and was made available to the Tribunal and the parties.
- 1.60 The parties had already filed extensive memorials as follows: the Claimant's Principal Memorial on or about 30 November 2007; the Respondent's Defence Memorial on or about 1 April 2008; the Claimant's Reply Memorial on or about 27 May 2008 and the Respondent's Reply Memorial on or about 21 July 2008.
- 1.61 Written legal submissions were forwarded by both counsel to the Tribunal on or about 15 September 2008. Each party had provided a Skeleton Argument to the Tribunal on or about 29 August 2008.
- 1.62 On 6 October 2008, the Tribunal heard the opening submissions by the Claimant, followed by those of the Respondent.
- 1.63 The following factual witnesses were called by the Claimant on 7 October 2008, Mr. Albert Hacker, former head of the Finance Department of Dywidag and later Walter Bau, Mr. Franz-Josef Brinkschulte, former Claim Manager for Dywidag and Mr. Rainer Trapp, former Chief Financial Officer of Dywidag. Mr. Trapp's evidence was continued on the following day.

- 1.64 On 8 and 9 October 2008 the Respondent called its factual witnesses, i.e. Dr. Vongchai Jarernswan, former principal adviser at the Ministry of Transport and Communications of Thailand and Mr. Prasit Siripakorn, a member of the Selection Committee of the DoH which had negotiated various agreements between the parties.
- 1.65 On 9 October 2008, Mr. Philip Bates of Steer Davis Gleave, London, was called as the Claimant's expert witness on traffic issues.
- 1.66 On 10 October 2008, Mr. James Bamford formerly of Halcrow, London and Bangkok (now an independent consultant), was called as the traffic expert for the Respondent. To accommodate the witnesses' travel plans, the Tribunal sat on Saturday, 11 October 2008, and Mr. Bamford's evidence was concluded on that day. Both experts jointly considered questions from the Tribunal at the conclusion of Mr. Bamford's evidence.
- 1.67 On 13 October 2008 the Tribunal heard the evidence of Mr. Robert Boulton of LECG Limited, London, United Kingdom, as valuation expert for the Claimant. He was followed by Mr. Brent Kaczmarek of Navigant Consulting, Washington DC, United States of America, valuation expert for the Respondent.
- 1.68 On 14 October 2008, after the evidence of Mr. Kaczmarek had concluded, Mr. Boulton and Mr. Kaczmarek answered questions from the Tribunal in a "hot tub" situation.
- 1.69 On 15 October 2008, the experts on Thai law, Prof. Sompong Sucharitkul for the Claimant and Dr. Bhokin Bhalakula for the Respondent gave evidence.

- 1.70 On 16 and 17 October 2008, the Tribunal heard the closing submissions and legal argument from counsel for both parties.
- 1.71 On 17 October 2008, the Tribunal heard from counsel for the Claimant in reply to the Respondent's submissions. Afterwards the Tribunal held a dialogue with all counsel. The hearing adjourned at 11:51am on 17 October 2008.
- 1.72 Written post-hearing submissions were forwarded to the Tribunal on or about 14 November 2008. The Tribunal is grateful to all counsel for their assistance before and during the hearing and for the high quality of their submissions.
- 1.73 On 24 April 2009, the Chairman of the Tribunal received a letter from Weerawong, Chinnavat & Peangpanor Limited ("**W C & P**") a firm of lawyers in Bangkok who purported to write on behalf of the Respondent. W C & P had been a part of White & Case LLP until separation from that firm on 1 January 2009 and establishment as a separate legal firm under the W C & P name.
- 1.74 The letter advised that Mr. Sombath Phanichewa ("**Sombath**") and his son, Mr. Tarnin Phanichewa ("**Tarnin**") had commenced an ICC arbitration against the insolvency administrator of the Claimant on 15 October 2008. Their claim in this arbitration was based on alleged breaches of the agreement dated 3 December 2006 for the sale by the administrator to Sombath & Tarnin of the Claimant's shareholding in DMT.
- 1.75 A copy of this agreement was attached to the letter from W C & P who alleged that the Claimant had not disclosed the document to the Tribunal, even when requested to do so by the Respondent.

1.76 The letter stated that the Respondent believed that the Claimant had proceeded with the arbitration hearing in bad faith, had violated its obligations under the said agreement and had increased its claim after the date of the agreement, also in violation of the agreement. The claimants in the ICC arbitration were seeking an order from the ICC Tribunal to instruct the administrator to withdraw from the present arbitration. The W C & P letter concluded: *"Accordingly, the Kingdom of Thailand would like to formally notify the Tribunal of this information and the fact that the SP and TP arbitration is being considered by another tribunal. The Kingdom of Thailand strongly believes that it would be fair and equitable that the Tribunal take into consideration the above information, including the outcome of the SP and TP arbitration."*

1.77 The Chairman, by email on 25 April 2009, acknowledged receipt of W C & P's letter but pointed out that the Tribunal had received no advice from White & Case LLP and its leading counsel, Mr. M. Polkinghorne, that White & Case LLP was no longer acting for the Respondent in this arbitration. The Chairman went on to advise that the Tribunal was due to confer in London on 4 and 5 May 2009 and that the time for receiving further evidence had long since passed. The Chairman opined that W C & P's letter came nowhere close to a proper application to admit further evidence. He invited counsel on the record for both parties to file submissions.

1.78 On 25 April 2009, W C & P advised the Chairman that they would send a copy of their earlier letter to M. Lalonde and Mr. Bunnag. For some unexplained reason, they had not done so originally. They stated, *inter alia*:

"(a) After 1 January 2009 White & Case LLP continue to represent the Respondent with W C & P acting as local counsel; and

(b) W C & P has no involvement in the ICC arbitration.”

1.79 Sombath and Tarnin are represented in the ICC arbitration by a firm of Swiss lawyers. An arbitral tribunal has been appointed by the ICC. Under the relevant agreement, Swiss law applies to the arbitration and the seat of the arbitration is Singapore.

1.80 On 28 April 2009, the Claimant provided detailed comment of W C & P’s letter and advised *inter alia* :

(a) Contrary to W C & P’s letter, the relevant agreement had been before the Tribunal at the principal hearing. It bore the reference number R139 and was included the agreed volumes of documents.

(b) The Respondent had a copy of this document some five days before it applied to the Tribunal during the jurisdictional hearing on 1 August 2007 for the production of this document. This fact could be deduced from the facsimile identification notification.

(c) The Respondent produced the document R139 with its defence on 1 April 2008.

1.81 The Claimant offered argument as to the merits of the Respondent’s bad faith claim against the Claimant’s insolvency administrator. The Tribunal does not consider it necessary to explore these allegations in view of its clear conclusion that the W C & P letter should be ignored by the Tribunal.

1.82 The Claimant refuted the suggestion in W C & P’s letter that the administrator had increased the Claimant’s claim in violation of the agreement. The Claimant pointed out that it had indicated at the procedural conference in Montreal in June 2006 that once detailed reports on

damages had been received, the amount stated in the original claim could well be increased. On 31 July 2007, at the jurisdictional hearing in Hong Kong, the Claimant advised that the claim was to be in the region of €120 million. That figure was used as a basis for calculating the Tribunal's remuneration.

1.83 On 30 April 2009, the Respondent, through White & Case LLP, advised that there would be no comment on W C & P's letter. White & Case said that it had not been possible to set up a meeting of the Respondent's relevant Executive Committee.

1.84 On 1 May 2009, W C & P again communicated with the Tribunal essentially repeating the claims made in the first letter. They stated that the Respondent's Emergency Committee had met to consider the Claimant's letter of 27 April 2009. They stated that the Respondent believed that the information regarding the ICC *arbitration* "*is important and relevant to the BIT arbitration and that the Tribunal should take such information into consideration*".

1.85 The Tribunal does not propose to take any action on W C & P's letters and will ignore them when considering its Award. Its reasons can be summarised as follows:

(a) The letters have not come from the lawyers on the record as representing the Respondent. In all correspondence and appearances, the Tribunal has had no indication that the mandate of those lawyers has been terminated.

(b) Contrary to W C & P's assertion, the document which W C & P claimed should affect the Tribunal's determination was one of the many documents before the Tribunal at the substantive hearing. No reference was made to the document during the

hearing. The Tribunal was not asked to examine its terms and no submissions were made about those terms which are now said to be material. There were literally thousands of documents placed before the Tribunal. If any one document had been of significance then the Tribunal considers that counsel would have referred to it either at the hearing or in post-hearing submissions.

- (c) The ICC arbitration is *res inter alios acta*. This Tribunal is not in any position to comment on the issues that will fall to be considered by the ICC arbitrators.
- (d) Mr. Sombath, as the leading shareholder in DMT, must have known of this present arbitration. Indeed, the Respondent requested at the jurisdictional hearing, that Mr. Sombath give evidence about the share purchase transaction. Clearly, if his evidence had been considered material for the substantive hearing, the Respondent should have tried to call him.
- (e) The hearing of evidence in the arbitration closed on 17 October 2008, save for the Tribunal receiving written submissions and some agreed further information from the traffic experts. Very strong grounds would be needed for the Tribunal even to consider, let alone grant, an application to call further evidence at a stage when the issue of an award is imminent. This is especially so when the evidence sought to be addressed was before the Tribunal at the time of the substantive hearing. Moreover, when the allegedly crucial document, which was before the Tribunal, had not been made the subject of any comment or submission.

- 1.86 Accordingly, the Tribunal proceeds to consider the claim on the merits untrammelled by the letter from W C & P.
- 1.87 The members of the Tribunal met to confer over preparation of this Award in London, United Kingdom on 4 May 2009. As a result of these deliberations, they issued a request for further information and calculations to be supplied by the accounting experts for each party. The experts supplied an agreed report to the Tribunal on 13 May 2009.
- 1.88 The Tribunal will now give a summary of relevant facts. Of necessity, this summary does not set out many matters in huge detail but endeavours to note everything of significance to the issues which the Tribunal has to address. The volume of evidence, submissions and exhibits was such that would make detailed canvassing of every nuance of factual material impracticable in any award of tolerable length.

2. EVENTS 1984 TO CONCESSION AGREEMENT

- 2.1 In 1984, Dyckerhoff & Widmann AG ("**Dywidag**"), a German construction company with international experience, incorporated under the laws of Germany, commenced construction activities in Thailand.
- 2.2 In 2000, Dywidag's International Operations Division was transferred to a separate legal entity, Dywidag International GmbH ("**Dywidag International**") which was fully owned by Dywidag.
- 2.3 On 16 August 2001, Dywidag was merged with Walter Bau AG ("**Walter Bau**"), a public limited company incorporated under the laws of Germany.

- 2.4 On 1 April 2005, Walter Bau became insolvent. Its remaining business has continued to be operated by Dywidag International in co-ordination with Walter Bau's insolvency administrator, Herrn Werner Schneider. As noted earlier, this present claim is being brought by the insolvency administrator.
- 2.5 It will be convenient in this Award to refer to the Claimant in all its various guises as "the **Claimant**".
- 2.6 During the late 1980s, the Kingdom of Thailand was experiencing rapid population growth which involved a consequential need to develop public infrastructure. In particular, there had been a rapid growth of traffic flowing between Bangkok to the north of the country which had led to a level of congestion on the existing road to the north which was also the route to Don Muang International Airport, some 20 kms from the centre of Bangkok. This road to the north was known as the Vibhavadi-Rangsit Highway (the "**VRR**").
- 2.7 In a study made in 1986 by DoH (the "**1986 Report**") it was noted that:
- (a) upgrading the VRR would require a large investment and there would be difficulty in obtaining the necessary funds from government sources;
 - (b) the private sector should be allowed to participate in investment on this highway or any other highway in the form of tolls.
- 2.8 The 1986 Report pointed out that, in order to attract private investment, it would be necessary to create benefits and incentives for private investors. It further stated:
- "Based on the principle that it should bring benefits to all the parties concerned, the private party would be granted concession right to construct and operate

a toll road along the existing route..". "This alternative would ease the burden on the budget fund, eliminate the difficulties of the users, as well as create additional jobs in the construction industry."

- 2.9 The DoH followed up this Report with a further document in 1987 called "Guidelines for Proposals for a Concession Highway" ("the **1987 Guidelines**"). This document recorded that "*Concessionaire has the right to collect toll fees for elevated road users at justifiable rates to recover investment*".
- 2.10 Having heard at an early stage about the 1986 Report, the Claimant saw a profitable investment in the Tollway project suggested in the Report. It combined forces with a joint venture partner, a Thai company, Delta Engineering Construction Co. Limited ("**Delta**").
- 2.11 The Joint Venture submitted a bid to DoH on 20 January 1988 seeking to be considered as the constructor and operator of the proposed Tollway. This original bid proposed a general toll of THB 10 for the first 10 years of operation. The bid was the result of an invitation from DoH to the Joint Venture to apply to tender for the Tollway Concession. The concession required the Concessionaire to construct the Tollway and to operate it once it had been built for the period of the concession. At the end of the concession period, the Tollway would be handed over to the Respondent without compensation. The Concessionaire was to recover the costs of construction and operation, plus a return on its investment from the tolls payable by motorists using the Tollway over the life of the concession.
- 2.12 On 9 March 1988, the Claimant and Delta were informed by the DoH that the Joint Venture's proposal had been selected for negotiation.

- 2.13 The Tollway was to be what was described at the hearing by the Claimant's traffic expert as a "congestion-buster" tollway, as distinct from a tollway which either provided a road where none had existed before or which provided an alternative to an otherwise lengthy or inconvenient journey.
- 2.14 The Joint Venture's bid was based on the 1986 Report and the 1987 Guidelines plus a one-page sketch of the average daily traffic volumes on the VRR recorded in January 1988. The basic assumption was that through-traffic and higher-speed traffic would travel on the elevated triple-carriageway express lanes of the Tollway whilst the ten lanes of the VRR would cater for local and lower-speed traffic.
- 2.15 As part of the bid, the Claimant considered that four existing longitudinal flyovers on the VRR would have to be demolished. The benefit in doing this was that the bulk of north-south traffic would be induced to use the Tollway and that east-west through-traffic would use newly-constructed east-west flyovers.
- 2.16 On 9 May 1988, the Thai Council of Economic Ministers rejected the Joint Venture's technical proposals. The Council decided to maintain the status quo of the VRR rather than accept the turning of four flyovers. Despite this rejection, the Respondent maintained the status of the Joint Venture as preferred bidder for the Tollway.
- 2.17 In mid June 1988, the Claimant was informed by Delta that the Respondent might accept the technical concept with two flyovers being turned and two flyovers staying as they were. Consequently, a supplementary proposal from the Joint Venture (which by now had become an incorporated company, Don Muang Tollway Co. Limited ("**DMT**")) was submitted on 5 August 1988 to DoH and to the Chairman of

the “*Committee of Highways Construction Project by Concession Highway No. 31*”. The shareholding in DMT at this stage was 51% for Delta and 49% for the Claimant.

2.18 DMT’s supplementary proposal offered two alternatives. The first was that all the existing flyovers stay as they were, with an increase in tolls of THB 5 and an extension of the Tollway concession period from 24 to 30 years.

2.19 The second alternative involved:

- (a) the turning of two of the four flyovers;
- (b) maintaining the original proposed toll for 4-wheeled vehicles (20 THB for the whole journey) but with 5 THB toll increases in the 9th and 14th year respectively;
- (c) an extension of the concession period from 24 to 30 years;
- (d) equal treatment with already-agreed Concession Agreements concerning other private toll roads; and
- (e) the award of Board of Investment (“**BoI**”) privileges to DMT.

2.20 According to the evidence of Mr. Trapp (who was Dywidag’s Commercial Project Manager at the time and effectively driving the bid), the Claimant’s investment strategy at the time of submission of DMT’s supplementary offer was for the Claimant to invest a minimum of DM 17 million which corresponded to a 20% shareholding in DMT’s total equity of DM 85 million, which in turn corresponded to 20% of the total necessary capital investment for the Tollway of DM 425 million (a debt-equity ratio of 1:4).

- 2.21 The Claimant viewed this as a long-term investment. It saw the possibility of its investment being realised following completion of the Tollway by means of listing, selling or maintaining its shares in DMT as a portfolio investment so that the main proposal showed an IRRE of 16.9% after 24 years in the Claimant's assessment. Alternative 2 showed an IRRE of 15.9% after 25 years, in the Claimant's assessment.
- 2.22 On 20 September 1988, the Thai Cabinet approved Alternative 2 of the Claimant's Supplementary Proposal, but with a 25 rather than a 30 year concession term. Nothing was said about BoI privileges or equal treatment with other concessions.
- 2.23 The Claimant then proceeded to obtain external evaluations of feasibility and funding and to seek a third construction partner. It prepared a report internally on 10 October 1988 which stated that, on a worst case analysis, the average return of the invested equity should reach about 18% p.a. by the end of the concession period.
- 2.24 On 19 October 1988, DMT appointed Wardley Capital Limited ("**Wardley**") as its financial adviser, engaged Dorsch Consultant Ingenieurgesellschaft mbH ("**Dorsch**") as an independent technical and traffic expert and Slaughter & May as its legal adviser. Dorsch provided a report on the viability of the Tollway from a traffic engineering standpoint.
- 2.25 In March 1989, Wardley prepared an information memorandum on the financing of the project which was supplemented by a progress report in July 1989 to account for amendments to the project costs and other changes since its first memorandum. Wardley, which is associated with the Hongkong & Shanghai Banking Corporation relied

on the traffic predictions prepared by Dorsch when making its financial projections.

- 2.26 The Dorsch report was criticised in the evidence of Mr. Bamford and endorsed in the evidence of Mr. Bates. The Dorsch Report does not fall to be discussed in this section of the Award.
- 2.27 As a result of Wardley's information, further investors were attracted to DMT, including a number of local Thai investors. A French company, GTMI, became a joint venture construction partner and a fellow investor in the equity capital of DMT. The relationships amongst the shareholders of DMT were set out in a Shareholders' Agreement dated 17 August 1989.
- 2.28 GTMI was a French construction company which was involved the construction and operation of toll motorways in France. It offered useful international experience and technical knowhow. This company was later to be known as VINCI.
- 2.29 In broad terms, Wardley's financial projections anticipated that the key milestones in DMT's financial performance would be as follows:
- (a) DMT's equity investors (including the Claimant as investor) would inject certain sums of capital each year from 1989 to 1993 on specific dates. In parallel, DMT would draw down on its loans. The joint proceeds of the debt and equity sources of finance would be used to construct the toll road.
 - (b) The toll road would commence partial operation in late 1992 (in the 1989 projections) or early 1993 (in the 1990 projections), generating revenues from then onwards. Following the full opening of the toll

road in 1993, revenues were projected to climb steeply, realising an operating profit for DMT from the date of the full opening of the toll road;

- (c) DMT would begin repaying its debt in 1995 and would continue to do so for the next eight or ten years;
- (d) Once net profits had been earned for two years or so and its legal reserve built up, DMT would have positive retained earnings and would begin to pay dividends to shareholders, from about 1996 or 1997;
- (e) Following the repayment of its loans to the banks, DMT would pay significantly higher dividends to shareholders, from around 2004 to 2010;
- (f) From 2010 to 2014, dividends to shareholders would be reduced by the introduction of some revenue sharing with the Respondent.

2.30 The minimum expected return on equity for shareholders/investors in DMT according to Wardley was 14.67%, but all of the projections termed "base case" suggested considerably higher rates of a return up to 20.61%. These returns constituted an equity risk premium of 4% to 8% over interbank rates. The risk-free rate, the Bank of Thailand's lending rate, was 8% in February 1989 when the first Wardley projection was made, and 9.5% in mid-1990 at the time of the Wardley 1990 projections. The IRRE of the 1990 Wardley BoI Base Case was 15.86%, towards the lower end of that range.

2.31 Some local banks which were contemplating financing the Tollway project engaged the Transport Research Unit of the Chulalongkorn University Faculty of Engineering to conduct an independent "review" of the Dorsch report. This review

endorsed the Dorsch report, but it, too, was criticised in the Respondent's evidence as lacking in depth and critical analysis.

- 2.32 DMT was able to attract new equity investors before it had secured the overall financing of the project. The Claimant's eventual equity participation in DMT was 18% at the time of the Concession. It increased its equity investment to DM 23.58 million, which is more than the DM 17 million originally envisaged.
- 2.33 A construction contract was signed on 17 August 1989 between DMT as "the **employer**" and Don Muang Tollway Constructions ("**DMC**") described in the Agreement as a joint venture between Dywidag, Delta and Dywidag (Thailand) Company Limited ("the **contractor**"). The latter company was to provide design services.
- 2.34 The construction contract was a "lump sum" contract subject to limited adjustments as appeared in the detailed conditions. It stated in its preamble that the employer proposed to enter into a Concession Agreement with DoH.

The Concession Agreement

- 2.35 The Concession Agreement was signed on 21 August 1989. The parties were DoH (acting with the approval of the Council of Ministers) and DMT represented by Mr. Uthai and Mr. P.M. Kramer, the General Manager of DMT, who was also Regional South East Asian Director of Dywidag's International Division.
- 2.36 Under this agreement, DMT was responsible for the financing, design, construction, operation and maintenance of the Tollway for the entire concession period of 25 years. At the end of the concession period, the Tollway was to be handed back to the Respondent in good condition and at no

cost. Consequently, DMT's sole source of income was only ever to be the tolls from the Tollway over the life of the concession period. For the Claimant in its role as an investor in DMT, as distinct from its role as constructor, it could only expect a return on its shareholding from any excess of toll income over DMT's investment and operating costs.

2.37 Clause 20 of the Concession Agreement set out agreed toll rates which were to be increased on stated occasions over the duration of the concession. Toll increases had to be approved and implemented by the Respondent. DMT had to invoke clause 25 (to be discussed later) whenever it were to seek a toll increase.

2.38 Under Clause 29, the Respondent could assume ownership of the Tollway earlier than at the end of the Concession. In that event, it had to pay compensation which was "*considering*" invested equity capital plus a return thereon – a return comparable to one which could be expected from this type of project taking into account the sums involved, plus a sum equal to all outstanding loans and early repayment fees, plus other outstanding obligations of DMT, plus loss of profit for the remainder of the concession period.

2.39 Other provisions in the Concession Agreement (apart from clause 25 which will be discussed separately) which should be noted are:

(a) Clause 31 which required disputes to be settled amicably within 60 days or within any agreed extension of that time. Failing that, there was provision for arbitration in Bangkok under the Thai Arbitration Act with two party-appointed arbitrators

and a third appointed by the Thai Chamber of Commerce;

- (b) Clause 34 which was a "*complete agreement*" clause;
- (c) Clause 35.3 which permitted amendment to the Concession Agreement only by further written agreement;
- (d) Clause 35.5 which provided for Thai law as the law governing the interpretation and execution of the contract;
- (e) Dywidag and Delta agreed to hold together not less than 30% of the shares in DMT for the term of the construction period;
- (f) there was some profit-sharing with the Respondent should profits exceed a stated level.

2.40 DoH was to be responsible for inspection, supervision and control of the Concession. DoH was to exercise its powers under statute, and to support and co-ordinate the Concessionaire's activities with "*the Authorities, public utility organisation owners of adjacent land, users of the VRR and crossing roads...*" It also was to support and co-ordinate DoH's requirements for permits, approvals and licences "*...all within time schedule for engineering and construction of the Tollway*".

3. EVENTS POST-CONCESSION AGREEMENT

3.1 It took a year from August 1989 to November 1990 for DMT's financing agreements to be completed. Originally, heavy borrowing in Thai Baht ("**THB**") had been envisaged. If revenues and expenditures were expressed solely in THB, there could be no exchange fluctuations as there would be if a mix of currencies were used. According to the Claimant

(there being no relevant documents to counter the assertion produced by the Respondent), a “decree” or instruction was issued by the Respondent’s Ministry of Finance at the end of 1989/beginning of 1990 requiring that, for large scale projects involving foreign investors (such as the Tollway), a considerable part of the project must be financed by loans in foreign currency.

- 3.2 Eventually, loan arrangements were concluded between DMT and a consortium of banks led by Commerzbank, a German bank which acted as facility agent for an offshore banking syndicate.
- 3.3 A loan period of 10 years, including construction time, was set. Obligations were imposed on promoter/shareholders such as the Claimant in that the shares of the promoter/shareholders in DMT had to be pledged to the banks. They had also to provide a junior-ranking loan of approximately THB 500 million.
- 3.4 DMT managed to gain BoI approval, in principle, on 29 October 1990. In order to receive these privileges, it had to agree to an extended profit-sharing arrangement with the Respondent over and above the benefits agreed to in the Concession Agreement.
- 3.5 Loan documentation was signed on 16 November 1990. Wardley’s final banker’s computer runs in November 1990 showed expected IRREs between 14.67% and 20.61%. A supplemental Shareholders’ Agreement was signed on 21 November 1990.
- 3.6 Shortly after the financial closure, DMT instructed DMC to commence full construction of the Tollway. The first loan was drawn down in early 1991 and construction commenced on 29 June 1991. Design activities had already been implemented since September 1989. An initial

Promotional Certificate was issued by BoI to DMT on 16 May 1991.

3.7 The construction phase did not proceed smoothly for a number of reasons which are not necessary to be explored in detail because, in the Tribunal's view, any problems occurring under this heading were resolved by the conclusion of MoA2.

3.8 The various problems encountered by the Claimant over the years until 1996 can be summarised under a number of headings as follows.

Initial Delay

3.9 The Claimant led evidence from one of its construction team, Mr. Brinkschulte, to the effect that DoH and/or DMT delayed design approvals and that these delays caused costly overruns. The contractual arrangements for the construction of the Tollway were inherently inefficient because, in addition to the normal constructor/principal relationship, approval and input from a third party, the DoH, were required in respect of the construction and design of the Tollway. However, the Tribunal does not need to scrutinise the detail of the Claimant's complaints in this area against both DoH and DMT or the Respondent's allegations of inefficiency against the Claimant because of the Tribunal's view of the effect of MoA2.

3.10 Suffice to say, there seems to have been miscommunications amongst all three of the parties concerned, DoH, DMT and DMC (in which the Claimant was the major player).

The Hopewell Project

- 3.11 In November 1990, just after the signing of the DMT loan agreements, the Claimant and DMT were surprised to learn that the Respondent's Minister of Transport (DoH being a constituent part of the Ministry of Transport) had signed a Concession Agreement with a Hong Kong company known as "Hopewell". The concession envisaged the construction of a 60km long, elevated toll-road which was to run in parallel to the Don Muang Tollway for a length of 12km, some 50 metres to its west.
- 3.12 It was said that the Hopewell concession caused political scandal and led to the enactment of a statute in 1992 concerning private persons participating in or undertaking activities of the State. The Hopewell project sought to utilise land owned by the Thai State Railways which, like DoH, were also under the aegis of the Minister of Transport. The Claimant maintained that its interests and those of DMT were severely affected by the Hopewell Project. Again, because of the Tribunal's view of MoA2, it is not necessary to investigate or record the detail of the Claimant's grievances.
- 3.13 The Hopewell Project failed in 1998, leaving a number of upright girders *in situ*, in silent witness to the ill-conceived project. It is significant that one of the witnesses for the Respondent, Mr. Prasit Siripakorn, in response to a question from the Tribunal, virtually acknowledged that an investor in the situation of DMT would have been unlikely to have signed the Concession Agreement for the Tollway had it been known at the time that the Hopewell Concession was to be granted nearby.

Turning the Flyovers

- 3.14 The requirement for turning the flyovers on the VRR had been agreed between DMT and DoH when the Respondent had accepted DMT's alternative proposal which involved turning two out of four flyovers. However, political considerations had intervened to prevent the turning happening. Public opinion was strongly against the turning of the flyovers. Demonstrations occurred. Cabinet Resolutions on 3 and 10 March 1992 required the Minister of Transport to enter into negotiations with DMT to amend the Concession Agreement by not requiring the turning the flyovers in exchange for DMT receiving benefits from the Northern Extension of the Tollway. The proposal for the Northern Extension was not eventually made until 1995.
- 3.15 It is unnecessary to relate all the numerous iterations between the parties and the political happenings concerning the turning of the flyovers. The obligation for them to have been turned was clearly part of the Concession Agreement. It is clear that the Respondent did obstruct (for whatever reason) the turning of the flyovers until such time as MoA2 had been finally concluded. However, the Tribunal does not need to assess either liability or damages caused by this failure for the reason that MoA2 settled any such claims.

Failing to Make Land Available

- 3.16 DMT had been unable to obtain land required for the Tollway which land was owned by Kasetsart University. Nor could it obtain a right-of-way over the Hopewell land. The Respondent had assumed obligations to provide the land necessary for the Tollway. Even if the turning of the flyovers had been approved, there was nowhere for them to go. Again, for the same reason as above, the Tribunal finds it unnecessary to explore this complaint of the Claimant.

VAT Imposition

- 3.17 The Respondent imposed a general VAT tax after the signing of the Concession Agreement. It applied to the tolls charged. The Respondent would not allow any toll increase to compensate DMT. Again, this contention is not explored for the same reason.
- 3.18 Throughout the period under review, DMT pressed for toll increases to be authorised by the Respondent – but to no avail.
- 3.19 As is described in the next section of the Award, the various delays and other problems undermined the confidence of the offshore bankers and caused pressure to be put on DMT.

MoA1

- 3.20 The Concession Agreement was varied in writing by DoH and DMT on 27 April 1995 by what has been called MoA1. DMT agreed not to request a toll adjustment under clause 25 of the Concession Agreement except on the occurrence of changes in the Basic Economic Factors which are greater than those taken into account at the time the BoI approved the granting of investment promotion to the Tollway project. DMT agreed to further profit-sharing arrangements with DoH as set out in MoA1.

4. EVENTS PRECEDING MOA2

- 4.1 The Tollway was partially opened, without the turned flyovers, on 14 December 1994. The turned flyovers were opened to traffic only on 7 July 1996. According to the Claimant, this consequential delay was due entirely to the Respondent's attitude in agreeing initially to the turning of the flyovers and then refusing, for political reasons, to allow

the exercise to take place. During the period the flyovers were being turned (from 21 April to 7 July 1996), the Respondent suspended the collection of tolls, during which time DMT is said to have lost THB 2.34 million per day. The Respondent acknowledged that it had been at fault over the failure to turn the flyovers but claimed that it had "*done its best*" in a difficult political situation.

- 4.2 Furthermore, as noted earlier, there had been delays by the Respondent in obtaining the necessary land for the two intersections as it was asserted by the Claimant that the delays were in part the result of the conflict caused by the proximity of the Tollway to the ill-fated Hopewell project described earlier.
- 4.3 The consortium of overseas banks financing the Tollway project was becoming more-and-more concerned at these delays: so much so, that, in mid-1993, it froze credit lines, placing DMT (and consequentially DCT as constructor) under grave financial stress. Mr. Trapp stated in evidence that these banks had been unwilling to "*take a haircut*" – meaning they had not been willing to take any loss.
- 4.4 The Claimant's own liability increased when it signed an agreement with DMT, granting DMT interim financing whilst the refinancing by DMT's lenders was pending.
- 4.5 A supplemental agreement was signed at the end of 1993 between the Claimant, DMT and the investing banks. This had the effect of making the Claimant directly responsible for further delays and cost overruns. The final restructuring of financing was agreed on 27 May 1994. On 29 December 1994, Commerzbank (the lead financier) forced DMT into a situation of potential default.
- 4.6 The investor banks put pressure on DMT to assert against the DoH breaches of the Concession Agreement in an

attempt to force the Respondent to remedy the problems with the flyovers and the consequential loss of revenue.

- 4.7 The Claimant's witnesses claimed in evidence that the Hopewell project by the Respondent had been the "final straw" so far as the offshore financiers were concerned. Pressure from them increased significantly during the second half of 1995, especially when Commerzbank requested the Claimant to consider becoming a party to a "standstill agreement" whereby it waived the right to any outstanding payments owed to it by DMT until an agreement had been reached with DMT and the banks.
- 4.8 The Respondent decided that a Northern Extension to the Tollway should be constructed and that it would neither be sensible nor viable financially to use any other concessionaire than DMT and any other constructor than the Claimant and its associates.
- 4.9 Mr. Kramer, who appears to have had day-to-day control of DMT, wrote a memorandum to the DMT executive board on 16 January 1995, noting that "*The northern extension is an absolute must for the company*" and "*The company is facing a number of significant difficulties which are all intended to be remedied in one go, together with the northern extension*".
- 4.10 DMT submitted a proposal for construction of the Northern Extension on 17 May 1995. It had initially refused to construct the Northern Extension unless it was made part of "*a more comprehensive approach thereby solving all pending matters in one go.*" DMT suggested the building of an extension to the Rangsit interchange. On 15 September 1995, DMT gave notice of its intention to terminate the Concession Agreement and on 18 December 1995, it sent

another letter stating its intention to request arbitration under clause 31 of that Agreement.

4.11 DMT submitted a seven-point proposal on 26 December 1995 to DoH requiring that, amongst other things, the Respondent grant DMT a “*soft loan*” of THB 500 million at an interest rate of 3% with a two-year grace period, an extension of the term of the Concession Agreement, the right to construct and operate the Northern Extension and an increase in tolls. It was made clear in this proposal that DMT would be prepared to “*waive all of its claims because of the breaches of contract by the government*” in return for the Respondent’s “*assistance*”.

4.12 The 17 May 1995 letter from DMT included the following paragraph:

“Such more comprehensive approach would certainly also create the opportunity to at the same time deal with the issue of compensations due to DMT having suffered damages caused by the actions or omission of the government or the pending appearance of competing roadways causing vehicle loss to DMT, i.e. by agreeing on appropriate conditions for a concession covering the existing tollway, plus the extensions thereto and thereby solving all pending matters in one go.”

4.13 After a personal approach by DMT on the same day, DMT’s proposal of 26 December 1995 was presented by the Ministry of Transport to the Thai Cabinet for approval on 11 January 1996. On 13 March 1996, DMT advised the Deputy Prime Minister that “*the requisite soft loan is not a loan in ordinary case, but rather it is a part of the compensation for the damages incurred to DMT as a result of a breach of contract on the part of the government.*” A compilation of DMT’s damages allegedly caused by the Respondent’s actions, was communicated to the Ministry of Finance by DMT on 29 March 1996. The amount claimed was THB 9773.6 million. The calculation was on the basis that

DMT would be compensated for loss of tolls caused by the “Retention of Competing Freeflow Traffic Conditions” on the VRR for the lifetime of the Concession.

- 4.14 On 13 May 1996, DMT submitted, at the request of the Respondent, a revised proposal to that of 26 December 1995. This revised offer was made on the basis that the Respondent had informed DMT it would not be able to offer a soft loan on the conditions originally requested and would not approve an exemption from having to pay VAT on toll revenues collected by DMT.
- 4.15 On 22 May 1996, the Minister of Finance wrote to the Chairman of a Committee established by the Respondent for “finding solutions of the problems with the implementation of the connection or extension project of the Tollway” (“the **Solutions Committee**”).
- 4.16 The letter noted “*The problems have been lingered [sic] on for more than 6 years due to DoH’s inability to fulfil its contractual obligations*”. It was a condition that an acceptance of one of the alternatives suggested involved DMT bringing no other claims for compensation.
- 4.17 The Minister of Finance also wrote as follows: “*The private sector concessionaire can also continue to proceed with his business and achieve a reasonable rate of return on his investment of 14%*”. Two alternatives of those suggested by DMT were approved in principle by the Cabinet on 11 June 1996.
- 4.18 A letter dated 17 June 1996, confirming the Cabinet resolution, stated that the Ministry of Finance was to consider the terms and conditions and sources of loans.
- 4.19 DMT received a formal request on 26 July 1996 from DoH to make a proposal in respect of the Northern Extension.

- 4.20 A further letter from DMT dated 23 August 1996 indicated that DMT was only prepared to grant a waiver of its right to claim for the Respondent's breaches if the Respondent granted it the benefit approved in resolution of 11 June 1996. It said: "*Under the condition that DMT will be granted additional benefits as stipulated in the Council of Ministers' resolution of 11 June 1996, DMT is prepared to waive its claims for damages suffered as a result of the government actions as forwarded to DoH with letter DMT/PNK 96297 on 29 March 1996 or events directly related to the matters listed.*" Mr. Trapp in evidence described his strategy of not abandoning rights of arbitration until "*the very last moment*".
- 4.21 Negotiations took place between the date of the Cabinet approval on 11 June 1996 and the date of the signing of MoA2 on 29 November 1996. A more detailed iteration of the negotiations is not required in view of the Tribunal's findings about the effect of MoA2. DMT was successful in some negotiations, e.g. an extension of the period during which the soft loan would be charged at the lowest rate of 10% from 5 years to 7 years.
- 4.22 The Claimant (in those days still Dywidag) seemed fully aware of the state of DMT's negotiations. This must be so because of the heavy involvement of Mr. Kramer, who wore 'two hats' – one for DMT and one for the Claimant. The Claimant prepared a memorandum dated 7 October 1996 to DMT saying that DMT must "*refrain to ask [sic] for any additional concessions which require a new Cabinet approval and must hurry to get all agreements officially signed before 17 November 1996.*"
- 4.23 The Claimant agreed to finance a further investment in 1996 but, during the latter part of 1996, the offshore banks continued to agitate and demanded that their loans be

repaid in full. They were also placing pressure on the Claimant to bear part of the burden of restructuring in a letter of 14 October 1996. There would have been concern by the Claimant if MoA2 were not to be concluded, since it was owed construction payments by DMT.

4.24 The final drafts of MoA2 were submitted to the Claimant before being formally submitted to the Cabinet "tomorrow, 5 November 1996". This draft contained a number of amendments to what had earlier been the subject of Cabinet approval. DMT objected to these amendments, including a reduction of the toll fee, a penalty clause for construction overruns and the provision that diversion of traffic in any manner on the VRR was excluded from the scope of compensation. The toll fees were set to increase on 1 October 1997 without the completion of four "u-turns".

4.25 The Cabinet approved the draft on 12 November 1996 but the office of the Attorney-General included a number of last-minute amendments which had the effect of raising the toll fees dependent on an event fully out of DMT's control, namely, the approval of Ramp 4, the positioning of which was to be decided by the Airport Authority of Thailand ("AAT") and which required Cabinet approval. Nevertheless, DMT signed the MoA2 document.

MoA2

4.26 MoA2 was signed on 29 November 1996 between the DoH and DMT, represented by Mr. Sombath (the leader of the Thai joint venturers) and Mr. Kramer (a representative of the Claimant on the DMT Board and the General Manager in Bangkok at all material times). MoA2 amended the Concession Agreement of 21 August 1989 and MoA1 of 27 August 1995.

- 4.27 The Claimant, however, contends that its own claim against the Respondent in international law, based on the BIT, was not extinguished by MoA2 because it had not been a party to MoA2. It was merely a minority shareholder in DMT. Alternatively, the Claimant submits that the MoA2 was entered into under duress exerted on DMT by the Respondent. Consequently, the waiver clause is inoperative.
- 4.28 MoA2 states in its Preamble that DMT had incurred adverse financial conditions as a result "*of the government's inability to comply with terms and conditions stipulated in the Tollway Concessions Agreement*". MoA2 also records that DMT had submitted a proposal to receive a concession for the Northern Extension of the Tollway, which had been accepted by the Respondent through DoH and that a special committee had been set up by the then Deputy Prime Minister to propose measures to the Council of Ministers.
- 4.29 A summary of MoA2 provisions is as follows, taken from the Claimant's Principal Memorial, paragraphs 124 and 125. Its accuracy was not questioned by the Respondent.

"124 MoA2 adapted Clause 25 and Appendix D of the original Concession Agreement by the inclusion of Appendix F, which contained traffic and revenue forecasts on the basis of a particular model created by IFCT in May 1996. These forecasts and model had been based upon assumptions agreed between DMT and the Government, including as to:

- 4.5 the pattern of current and future tolls; and
- 4.6 the traffic structures and systems in Bangkok as a whole and the role of the Tollway in them.

On their face, the principal commercial provisions of MoA2 were to:

- (a) Extend the Tollway by the addition of the Northern Extension, the purpose of which (and of a further extension to be constructed by the

DoH itself as a continuation of the Tollway) was to solve traffic congestion on the VRR in the area of Don Muang Airport (the “**airport bottleneck**”) to provide better access to the airport and to the North of Bangkok. This latter factor was a particular priority for the Respondent in view of the impending Asian Games, which were to be held in Bangkok in December 1998. The cost of this was to be funded by an injection of Baht 3 billion new share capital by the Respondent plus Baht 700,000 cash from operations (clauses 1.2.1, 17.2); and

- (b) Solve DMT’s “adverse financial condition as a result of the Government’s inability to comply with the terms and conditions stipulated in this Tollway Concession Agreement”. The principal measures agreed in this respect were:
- (i) the arrangement by the Respondent (through its Ministry of Finance) of a “soft” loan of Baht 8,500 million (clause 17.1);
 - (ii) the injection of Baht 1.5226 billion new share capital by private shareholders to pay outstanding loan principal and interest (clause 17.1);
 - (iii) restarting the Concession Period (which remained 25 years long) by amending the definition of the “Effective Date” to be the date of MoA2 (29 November 1996); and
 - (iv) increasing the toll rates from those set out in clause 20 of the Concession Agreement to those set out in clause 12 of MoA2 as follows:
 - (1) there was to be a new additional 15 Baht toll for the Northern Extension;
 - (2) the agreed toll fees for the original Tollway were to be increased by 10 Baht upon:
 - (i) completion by DoH (and not DMT) of the DoH U-turns and then again upon
 - (ii) completion of the Northern Extension; and
 - (3) all toll fees for the original Tollway would be increased by 10 Baht every five years (as opposed to increases each of five Baht just on the ninth and fourteenth anniversaries under the original Concession Agreement) and for the

Northern Extension by five Baht every five years.”

- 4.30 The capital investment by the Respondent referred to on MoA2 was to be discharged in terms of clause 2.5.2 “*only for payment of the costs of works under contracts related to the construction of the Concession Highway under the MoA*” (i.e. the Northern Extension). The increased shareholding in DMT by the Respondent meant a dilution of the Claimant’s shareholding.
- 4.31 Mr. Trapp acknowledged in cross-examination that at the date when MoA2 was signed, the Claimant and DMT knew that the “*soft loan*” referred to in the 11 June 1996 document could not be achieved and that it had never been unconditionally approved by the Respondent. The actual loan on offer was a mixed USD and THB loan.
- 4.32 The waiver clauses in MoA2 read as follows:
- “14.1 All claims arising under the existing Tollway Concession Agreement before the date of signature hereof, whether or not the Concessionaire has lodged such a claim against the government are hereby extinguished whereby the concessionaire shall not have any further claim whatsoever.
- 14.2 Any change in the use of the Bangkok airport, the construction of u-turns on the Viphavadi-Rangsit Road, the management of traffic in any manner by Rangsit Road shall not be regarded as an act in competition with the Concession highway according to clause 25.2(d) of the existing Tollway Concession Agreement or an act of the government which causes vehicle loss.”
- 4.33 Clause 14.2 above is highly relevant when the Tribunal has later to consider the Claimant’s legitimate expectations and the Respondent’s actions.

5. EVENTS POST-MOA2

- 5.1 The Tribunal now gives an account of events following the execution of MoA2 in December 1996. Because of the claim that the Respondent committed ongoing breaches which crystallised as a dispute after the coming into force of the 2002 Treaty in October 2004, the Tribunal considers it appropriate to set out the salient narrative to enable the submissions on this claim to be assessed.
- 5.2 The Tribunal's narrative of events prior to the signing of MoA2 is not in the same detail because of the conclusion which the Tribunal reaches in section 8 of this Award, namely that MoA2 effectively settled any claims that the Claimant might have had against the Respondent for all events occurring prior to the date of signing MoA2.
- 5.3 The Claimant alleges that it had a reasonable expectation that the Respondent would carry out the obligations imposed upon the Respondent by the provisions of MoA2. Hence the need for an account of the major events between MoA2 and October 2004. Even so, the Tribunal concentrates on the significant events over this period. Narration of every iteration between the parties would render this award of inordinate length.

Soft Loan

- 5.4 The Tribunal notes that the Respondent did not provide the requirement for the "soft" loan in THB to the Claimant in the terms referred to in MoA2. The Claimant had seen such a loan as important because, if the loan were able to be denominated only in THB, then the Claimant's obligations would not be affected by currency fluctuations such as occurred when the "Asian Crisis" hit – not long after MoA2 had been concluded.

- 5.5 It was acknowledged in cross-examination by Mr. Trapp that the Claimant knew at the time it signed MoA2 that it was not going to receive a soft loan denominated solely in THB.
- 5.6 On 27 December 1996, a Memorandum of Understanding was signed between DMT and the onshore lenders, setting out the terms of a mixed currency loan which DMT was about to take up. A further Memorandum of Understanding between Commerzbank (as the offshore facilities' agent) and DMT on 30 January 1997, ensured that DMT would repay all amounts outstanding to the original offshore lenders. This repayment occurred eventually in July 1997.
- 5.7 Instead of entering into the loan arrangements referred to in MoA2, on 19 June 1997, DMT entered into a THB and foreign currency facility agreement with various financiers. This facility provided for a loan of THB4,000 million at interest rates from 10% to 12.5% for 15 years plus a THB2,000 million guarantee facility in favour of the Government Savings Bank ("**GSB**") by all but one bank. The foreign currency amount provided for a loan of US\$140 million at SIBLR plus 2.5% and THB1,040 million at MLR plus 0.5% for 12 years. The foreign currency agreement also provided for a deferred payment facility for payment of the Claimant.
- 5.8 When, as a result of this refinancing, the offshore lenders' debts to DMT were eventually repaid, a comment from Commerzbank as leader of the lenders was: *"It became very obvious there was only one solution left for the banks while taking into account the Government's continuous tampering with the concession of DMT"*.
- 5.9 Whatever the rights and wrongs of the Respondent's alleged failure to provide a soft loan and DMT's reluctant

acceptance of an alternative funding arrangement, the Claimant was fully aware that a soft loan would not be available and there would have to be further negotiations leading to an eventual financing arrangement. Any failure to provide the soft loan is, therefore, not something which can be considered as giving rise to a claim under the 2002 Treaty.

Refinancing

- 5.10 On 10 May 1997, a share purchase agreement was concluded between the MoF, DMT and the 29 then existing shareholders in DMT. This agreement provided that the Respondent would subscribe for 3,000 million shares in DMT and that a further 1.5225 million shares would be made available for private party subscription. This agreement made it clear that the Respondent's investment was to be used solely to fund the Northern Extension. The private shareholders and DMT were required to see that the Respondent's equity contributions were used only for the Northern Extension.
- 5.11 In July 1997, the Claimant (then Dywidag) made a capital contribution of THB 199,066,670 by way of subscribing for an additional shareholding in DMT. Its percentage shareholding in DMT was reduced to 9.87% as a result of the increased shareholding by the Respondent.
- 5.12 Around this time, the Asian Economic Crisis hit the Thai economy with several dramatic consequences, including closure of financial institutions, a loss of foreign reserves, increased inflation, reduced investment from the private sector, reduction in the Government's budget, an increase in unemployment and a major weakening of the Thai currency.

5.13 As at 31 December 1997, the THB had lost value from THB25 to the USD to THB43.44 to the USD. This meant for DMT that the THB equivalent of its USD140 million loan facility had almost doubled its total debt. In addition, the revenues from daily toll income decreased from THB3.5 million to THB2 million. Moreover, construction costs for the Northern Extension increased.

DMT's Requests for Toll Increases

5.14 As a result of changes made at the last minute to MoA2 by the Office of the Attorney General, as noted earlier in paragraph 4.25 of this Award, the first toll increase to be made under MoA2 was scheduled for 1 October 1997, although the date previously approved by the Cabinet had been 12 November 1996. The agreed increase was to occur on completion by DoH of the U-turns referred to earlier. As at the date of signing MoA2, DoH had committed to completing the U-turns by 1 October 1997. DoH did not complete the U-turns until 2 December 1998.

5.15 In December 1997, DMT had proposed a THB10 increase in tolls to come into effect on 1 March 1998 – invoking clause 25 of the Concession Agreement. Appendix D of the Concession Agreement refers to "*basic economic factors to be used as a benchmark for considering requests of toll adjustment*".

5.16 On 25 February 1988, DMT confirmed to BoI that it waived its rights under the Investment Protection Act 1992. BoI issued a further Promotional Certificate on 6 March 1998.

5.17 On 12 March 1998, DMT wrote to DoH requesting "*fair treatment*" on the basis of clause 25 of the Concession Agreement because of the effect of the economic crisis on

DMT's financial position and asking for an extraordinary toll increase of THB10.

- 5.18 On 20 April 1998 at a meeting between the Committee for Solving Problems of the Implementation of the Connection and Extensions Project of the Din-Dang-Don Muang Tollway ("the **Problem Solving Committee**"), the Committee approved an increase of THB10, in order to remedy DMT's losses incurred as a result of the Economic Crisis, the diminished number of Tollway users and an increase in VAT on tolls from 7% to 10%. This approval was given on the basis of clause 25 of the Concession Agreement. The resolution had no binding effect at DoH level and no positive action ensued.
- 5.19 On 10 July 1998, DoH requested IFCT, a bank that had undertaken a feasibility study for the Ministry of Finance ("**MoF**") during the MoA2 negotiations, to study how much the toll fee needed to be increased in order to be fair to DMT and to restore its financial position in accordance with the Respondent's obligations under clause 25.
- 5.20 The IFCT findings in August 1998 suggested an increase of toll to THB16.50 per vehicle to bring the forecast IRRE back to the level of IRRE forecast at the time of the original investment. This increase was to be in addition to the contractual increase of THB20 per vehicle when the U-turns and the Northern Extension were to be completed. The findings were stated to be a way by which to ease DMT's troubled financial situation and to yield a return on equity at a rate nearer to that shown in Appendix F of MoA2, i.e. 13.35% per year.
- 5.21 On 6 October 1998, DMT made another request to DoH for a toll increase. When the request was unanswered, DMT sent a letter to DoH, noting that the Northern Extension

would be completed on time and asking that the opening Toll for the Northern Extension be THB15. DMT also asked for tolls to increase by THB10 on the main Tollway, because of the 14 months' delay in DoH's completion of the U-turns.

5.22 DMT made further requests for assistance to DoH. Like those referred to above, they were ignored.

Northern Extension

5.23 On 3 December 1998, the main Tollway to the Northern Extension was completed, except for some ramp structures and a direct access ramp to the international airport terminal. Completion of the construction was achieved on schedule by the Claimant with no dissatisfaction about its construction work expressed by either DoH and DMT.

5.24 The Respondent made complaints in its submissions about design delays and faults relating to the Northern Extension. Mr. Trapp for the Claimant pointed to the Northern Extension having been completed on time and stated that DMT had let the design element for the Northern Extension to a local company with no connection to the Claimant. The Tribunal does not consider these submissions relevant.

Changes to Roading

5.25 At around the same time, another contractor to DoH completed the following improvements to the VRR:

- (a) four U-turns;
- (b) a new four-lane local road 50 metres west of the VRR road; and
- (c) a temporary detour road in place during the construction of the Northern Extension was converted to permanent use.

- 5.26 The U-turns on the VRR were finally completed and open to traffic from 28 November 1998.
- 5.27 At the same time, the new local road, 50 metres west of the VRR was opened to traffic. The construction of this local road had been authorised by a Cabinet resolution of 3 March 1998. The Cabinet had requested in this resolution that the MoT take into account the legal aspects and conditions of the contract of the Hopewell project and other projects in the nearby area before implementing the project. Clearly, the main Tollway must have been one of these.
- 5.28 The construction of the temporary detour road in the area of the airport bottleneck was a special request of DoH to DMT during construction of the Northern Extension – a contingency which had not been foreseen. DoH had available to it land formerly belonging to the State Railways after the Hopewell debacle had come to an end.
- 5.29 On 18 January 1999, at a DMT directors' meeting, Mr. Kramer had recorded in the official minutes his concern that the construction of competing toll-free roadways under the pretext of public interest was to the detriment of the Concessionaire and had caused the Concessionaire (DMT) to be in danger of defaulting on its bank loans. It should be noted in this context that the effect of MoA2 was to give the Respondent an almost 40% shareholding - the largest in DMT.
- 5.30 Included in the Northern Extension project was the construction of an exit link from the elevated apron in front of the international airport terminals to the south-bound lanes of the northern extension of the Tollway. This was known as Ramp 4. AAT was required to adjust plans and locations of additional traffic structures inside the area of

the airport. It proved impossible for AAT to locate the exact construction site for Ramp 4 because its budget had not been finalised. A postponement of Ramp 4 was approved by AAT on 29 May 1998.

5.31 On 21 April 1999, Mr. Kramer and Mr. Sombath wrote to DoH regarding DoH's intentions regarding charging tolls on the Northern Extension. They noted the current toll of 30 THB for the original Tollway, and 13 THB for the Northern Extension. They concluded that a rise in tolls to the planned contractual level, let alone an extra 10 THB for compensation for THB devaluation was not feasible – *"Because of an automatic further reduction of the usage of the tollway associated with any further toll fee increases, no matter where in the system"*.

5.32 By 16 June 1999, DMT had completed all works on the Northern Extension but was still unable to obtain from AAT an exact location for Ramp 4.

5.33 The minutes of the DMT Board meeting of 23 June 1999, record the following conclusion:

"With Government actions being as unpredictable as they are and completely beyond the control of private investors into Government infrastructure, private investors have little choice other than to place their trust onto that the Government would eventually treat them fairly in cases where the Government deemed it necessary to change conditions negatively affecting the private investment company.

And DMT is prepared to enter into negotiations with the Government for proper remedy of its financial position in relation to the respective provision in its Concession Agreement and the Cashflow Analysis previously prepared by IFCT on instruction of the Ministry of Finance and appended to the MoA of 29 November 1996."

5.34 On 24 June 1999, as a result of the discussion at the DMT Board meeting, DMT wrote to the Minister of Finance and

the Minister of Transport, proposing a temporary toll reduction.

5.35 DMT requested a meeting with the relevant Ministers, which took place on 30 July 1999. The purpose of the meetings, arranged with the help of the German Ambassador, was to confront the Respondent's Ministers with DMT's inadequate financial position, which, in DMT's view, had been created solely by the Respondent's actions. Despite Mr. Trapp's impression that the Ministers appeared to have accepted that there was a genuine problem, nothing concrete arose from this meeting.

5.36 On 16 September 1999, DMT wrote to DoH requesting a postponement of Ramp 4. Part of the letter stated:

"DMT is on purpose currently requesting postponement of construction and not a deletion of the said Exit Ramp in an effort to avoid that because of this relatively minor issue an agreement of Cabinet must be sought.

Since DMT must in the near future enter into negotiations with the Government (DoH) in respect of the fundamental issue of how to remedy its impaired financial position, and this will invariably lead to the necessity to request the Cabinet for approval of corresponding amendments to DMT's Concession Agreement any submission to the Cabinet in respect of the said Exit Ramp is recommended to be made on the same occasion."

5.37 The Claimant submitted that DMT's letter of 15 September 1999 was a "*pragmatic solution*" on the part of DMT to avoid the wait for a Cabinet decision in relation to what it saw as a minor administrative item. The Claimant also points out that the AAT was part of the MoT, the same ministry as controlled DoH. The Respondent submitted that the Claimant was acting ambivalently.

5.38 During 1999, the Claimant (then still Dywidag) decided to make its own representations to the Respondent to make

up for the alleged unwillingness of DMT to fight for its rights under the Concession Agreement and MoA2.

- 5.39 Also on 16 September 1999, DMT submitted a formal letter to DoH requesting negotiations on the basis of clause 25 of the Concession Agreement. The letter focused on the phrase in clause 25 "*or any other measure deemed appropriate*". It proposed a huge construction operation involving connecting the Don Muang Tollway via a new elevated toll road with two existing DoH toll roads to provide a complete combined tollway system for some 183 km. This proposal was made in the belief that additional income from outside sources would help restore DMT's position.
- 5.40 DMT undertook engineering and design studies at its own expense to present this scheme to the Respondent but, by early 2000, it considered that its proposals were not being taken seriously.
- 5.41 On 25 January 2000, a second formal letter to DoH was submitted by DMT, referring to the first one but with no reference to clause 25. The letter stated that inhouse studies had shown that DMT would need additional income of THB 15,100 million or (discounted with 11.5%) THB 9.468 million in order to provide an IRRE of 13.38% as per Appendix F of MoA2.
- 5.42 On 28 February 2000, the Committee to Oversee and Follow up on the Concession Agreement on Highway No. 31 Viphavadi Rangsit Rd, Din Daeng – Don Muang (the "**Follow-up Committee**") held a meeting chaired by DoH's Director-General at which Mr. Kramer of the Claimant was present. Mr. Kramer proposed deletion of Ramp 4 because it could no longer be justified. He was supported in this view by a representative of the office of the Attorney-

General. The meeting resolved that the construction of Ramp 4 be cancelled and that DoH propose this decision to the Council of the Ministers for approval in principle.

- 5.43 However, DoH did not propose such a resolution and, at the meeting of the Follow-Up Committee on 28 February 2000, the representatives of the office of the Attorney-General stated that the request to have the Ramp deleted was “reasonable” but that the toll rate adjustments could not be made without Cabinet resolution.
- 5.44 By mid-1999, there was immediate need to restructure DMT’s finances, both short and long-term. On 21 December 1999, DMT wrote to the Minister of Finance requesting assistance in DMT’s negotiation with its lenders.
- 5.45 On 15 February 2000, the representative of DMT’s main Thai shareholder, Mr. Sombath, had been unofficially advised by DMT’s lenders that they would resort to bankruptcy action unless DMT could agree to a restructuring proposal before end of March 2000. This stance was taken because DMT had been unable to pay about 50% of its interest debt. DMT eventually concluded a Refinancing Agreement with its lenders on 14 July 2000.
- 5.46 On 28 February 2000, DMT’s main lender – GSB – orally requested DMT to call an extraordinary shareholders’ meeting to agree to the lender’s proposals to restructure. This meeting was held on 15 March 2000 and resolved to accept the lender’s proposal. The idea behind this resolution was to prevent any lender from officially declaring default and starting legal proceedings.
- 5.47 On 13 March 2000, a DoH subcommittee appointed according to the resolutions of the Follow-up Committee meeting of 28 February 2000, requested DMT to submit a

full damage report on the basis of clause 25 of the Concession Agreement.

- 5.48 At the DMT board meeting of 18 May 2000, the damage report was stated to have not been concluded but that provisional figures indicated a substantial sum for damages. It was decided that DMT should, instead of requesting cash compensation or the buy-back of privately-held shares, should aim at receiving additional benefits from the Respondent such as operating other toll roads.
- 5.49 On 31 May 2000, DMT officially submitted to DoH a financial damage assessment report, as requested by the subcommittee of the Follow-Up Committee. The amount of damage was assessed at THB 34541 million or USD 933 million. The damage report also focussed on compensation by the acquisition of additional benefits. Although there had been some response from the Respondent, nothing concrete had emerged from the Report.
- 5.50 The Follow-Up Committee met on 24 January 2001, with no result. On 12 March 2001, DMT proposed to the Director-General of DoH, that high-level, inter-governmental committees should negotiate with DMT. This approach was not successful either.
- 5.51 DMT's shareholders considered there was no compensation element available within the provisions of MoA2. On 28 June 2000, a DMT Directors' meeting was called to accept a final lenders' proposal for restructuring. Mr. Kramer, as the Claimant's-appointed director, did not agree. There was still no sign of any assistance for DMT from the various agencies of the Respondent.
- 5.52 Since February 2000, DMT's problems had continued to be discussed with the Follow-Up Committee but without result. On 19 July 2002, DMT requested from DoH toll increases

from 30 to 40 THB for the original Tollway and from 13 to 15 THB for the Northern Extension. There was a reminder of DMT's letter to DoH of 12 December 2001.

- 5.53 On 23 August 2001, the DMT Board appointed as members of a working group, the Chairman (General Pang), the CEO (Mr. Sombath) and Mr. Kramer. There was an ability for the Thai interests to out-vote Mr. Kramer.
- 5.54 Dywidag and its French Joint Venture partner (**VINCI**) in 2001, decided to lobby at both political and diplomatic levels to solve the DMT problems. The German Ambassador had an audience with the then Thai Prime Minister. On 29 October 2001, the Ambassador handed a memorandum to the Prime Minister prepared by the Claimant.
- 5.55 Following the Ambassador's visit to the Prime Minister, a letter was written (on 9 November 2001) by the Deputy Permanent Secretary of the Ministry of Foreign Affairs to the Permanent Secretary of MoT mentioning the Claimant's proposal and the possibility of arbitration.
- 5.56 On 23 November 2001, the Deputy Secretary-General to the Prime Minister for Political Affairs wrote to the Minister of Finance giving the Prime Minister's direction to take appropriate steps and to report the outcome to the Prime Minister on the first occasion.
- 5.57 On 19 February 2002, the Thai Ministry of Foreign Affairs was preparing for a visit of its Minister to Germany and wanted to be informed by the DoH on the "*loss problem with the Don Muang tollway project*". The visit did not take place.
- 5.58 On 8 November 2002, DMT submitted an updated damage report to Minister of Transport. The letter spelt out DMT's

frustration at the lack of progress at remedying its impaired financial position, ending with the phrase *"If nothing were done for DMT's shareholders would mean an eventual expropriation of their investment, without compensation, without any fault on their part"*.

- 5.59 In December 2002, the Minister of Transport gave a press interview saying that he did not pay attention to DMT's proposal and asked a creditor, IFCT, to negotiate for a reduction of toll fees for a period of one year. He also mentioned his interest to buy back the concession, but only if the price were low.
- 5.60 On 11 December 2002, the Claimant asked the Minister of Transport to meet the top executives of both the German and French minority shareholders. It is not clear whether this meeting eventuated or not.
- 5.61 On 13 January 2003, Mr. Trapp wrote to Mr. Sombath (the CEO of DMT and the representative of the Thai private shareholders), asking them to refrain from negotiations over lowering the toll fees. He suggested the only way to solve the problem would be for the government to take back the concession and compensate the investors and that any policy not to negotiate about remedies had to be seen in the context of the recently improved BIT (signed but not yet in force).
- 5.62 On 26 February 2003, at a DMT Board meeting, Mr. Trapp maintained that the Board could not compromise the basic interests of DMT, despite the fact that there were some members of the Board who preferred to follow the Minister's recommendation.
- 5.63 On 31 March 2003, the German Minister of Economic Affairs and representatives of the Claimant, presented the Claimant's investment case to representatives of the

Respondent. The Deputy Prime Minister assured the German side in public that his government which had inherited, but not created “the *Walter Bau problem*”, would resolve it in fairness.

- 5.64 At a meeting of the DMT Board on 3 April 2003, a traffic consultant’s study was produced, analysing the Minister’s toll reduction proposals and suggesting that DMT’s toll revenue losses would be of the magnitude of THB 9.0 Billion for DMT.
- 5.65 On 14 April 2003, Mr. Trapp and the Claimant’s executive board signed four identical letters to various Thai Ministers requesting a re-purchase of privately-held shares in DMT. The Claimant had also attempted several times to meet with the Minister of Transport.
- 5.66 On 27 June 2003, DMT again sent a letter to DoH requesting the contractual toll increases.
- 5.67 On 2 July 2003, the DMT Board discussed whether a more aggressive tactic should be initiated against the Respondent. Mr. Trapp proposed legal action but the Board resolved to postpone this issue till the next meeting in a month’s time, saying that the toll increase was “*a sensitive issue as it is bound to contradict the policy of the Transport Minister who wishes to reduce the toll fees*”.
- 5.68 On 27 August 2003, the DMT Board proposed a more proactive strategy pending a forthcoming meeting with the Minister of Transport to solve the Ramp 4 problem.
- 5.69 On 5 October 2003, a meeting took place between the Minister of Transport and some high-level public servants with representatives of the Claimant. At this meeting, the Minister promised to submit a proposal to buy back the Claimant’s shares by mid-November and also to liaise with

the Minister of Finance. Even though a proposal had not been reached, on 18 November 2003, the office of Traffic Transport Planning Division replied to the Permanent Secretary of the MoT proposing to buy back the project from DMT and to engage a financial consultant to advise on terms and conditions.

- 5.70 On 26 November 2003, DMT once more requested DoH to allow a toll increase, as required by MoA2.
- 5.71 On 12 January 2004, Mr. Sombath (President of DMT), at a Board meeting of DMT, tried to gain approval for an alternative plan that DMT accept a permanent reduction of toll fees in lieu of an extended concession period and a government-supported "hair cut" of DMT's existing loan. This proposal was heavily attacked by Mr. Kramer and Mr. Trapp because it involved DMT giving up contractual rights in return for something unclear which gave a much lower return for shareholders compared to that provided for in Appendix F of MoA2.
- 5.72 Alarmed by Mr. Sombath's actions, the Claimant wrote to the Minister of Finance, saying that, if the Respondent as shareholder in DMT would support such plans, he would view such report as constituting an act of the government against private shareholders in conflict with earlier assurances.
- 5.73 On 16 January 2004, DoH, in reply to DMT's letter of 26 November 2003, asking for an adjustment of the toll rates as per contract, maintained that the tolls could only be adjusted once the Cabinet had approved the deletion of Ramp 4 which was still "under the process".
- 5.74 On 21 January 2004, an extraordinary shareholders' meeting of DMT voted to accept Mr. Sombath's plan with a majority vote of 81.67%, including that of MoF as

representing the Respondent as shareholder. 15.31% of the shareholders (Walter Bau and VINCI) voted against the motion. 3.02% abstained.

- 5.75 On the same day, the DMT Board meeting instructed its management to follow up the shareholder-approved plan in negotiations with the Respondent.
- 5.76 Shortly after these two meetings, Mr. Sombath modified the plan as approved by the Board of DMT and submitted changes for approval at the next DMT board meeting to be held in two weeks' time. Mr. Trapp strongly protested and again warned of the consequences of such a plan but the board resolved to follow Mr. Sombath's modified plan. On 19 February 2004, DMT's proposals were submitted to the Minister of Transport without Mr. Kramer's signature as General Manager.
- 5.77 In January 2004, in anticipation of a meeting between the Minister of Transport and the German Ambassador to Thailand in February 2004, the Claimant again raised the idea of a share buy-back, which had first been raised through diplomatic channels in October 2001.
- 5.78 On 13 February 2004, the Thai Minister of Transport confirmed to the Ambassador that the Respondent was willing to buy the private shares – perhaps only the foreign ones – but that the par price was too high and that a price of 8 THB per share might be achievable.
- 5.79 On 16 March 2004, Mr. Sombath told the DMT Board meeting that his proposal to the Minister of Transport might not receive a positive result. The Board decided that a legal letter regarding the persistent non-approval for adjustment of the toll rate should now be written to DoH.

- 5.80 On 17 March 2004, DMT gave notice to DoH of a dispute in accordance with clause 31 of the Concession Agreement. The Respondent still took no action to increase the toll.
- 5.81 Negotiations proceeded concerning the sale of the Claimant's shares to the Respondent, resulting in a letter of 4 June 2004 from DMT to the Minister of Transport saying that the shareholders would not accept a share price below 10 THB per share. Therefore, negotiations, as per clause 25 of the Concession Agreement, were requested by DMT.
- 5.82 On 16 June 2004, the management of DMT requested the Board of DMT to approve the commencement of arbitration proceedings but a decision was postponed. DMT and the Claimant made several more political attempts to achieve resolution of the share-purchase proposal. On 30 July 2004, at a meeting between the Ministry of Finance and the Minister of Transport, it was resolved that the Respondent enter negotiations to buy back all foreign shares in DMT and to allow DMT to engage consultants to value the shares. Once valuations were known, a committee would be set up to enter into negotiations to buy back the shares from the foreign shareholders.
- 5.83 Mr. Sombath, on 5 August 2004, wrote a letter to the Permanent Secretary requesting the same treatment for the private Thai shareholders as for the foreign shareholders. Eventually, on 3 September 2004, DMT's Board resolved to request its management to initiate arbitration proceedings against the Thai government. The four government directors on the Board abstained from voting for reasons of conflict of interest.
- 5.84 Consultants were selected for the share valuation. Turnaround for DMT and Intelvision for MoF. There was agreement on terms of reference for the consultants.

- 5.85 On 17 November 2004, the German Minister of Economic Affairs paid visits to the Prime Minister and the Minister of Finance. The Claimant's case was mentioned and both sides were reassured that a "fair solution" was under way and nobody should worry any more. One of those attending the meeting was a Dr. Fischer, a member of the Claimant's executive Board.
- 5.86 When the Northern Extension had been opened for traffic in December 1998, DoH had disallowed the toll of 15 THB agreed to in MoA2, instead allowing only 13 THB, citing the non-completion of Ramp 4 as the reason for the reduction.
- 5.87 The deletion of Ramp 4 (which amounted to 0.89% of the construction cost) was approved by the Follow-Up Committee on 28 February 2000. At the same meeting, it was stated that the Northern Extension toll increases could not be implemented pending Cabinet approval. As will be seen later, the toll increases did not take place until 2007 when MoA3 was signed.
- 5.88 The cancellation of Ramp 4 was finally approved only as part of MoA3 on 12 September 2007, some nine years after the Northern Extension had opened to the traffic. DoH's own assessment when recommending MoA3 to the Attorney-General in August 2006 was: "*The non-construction of Ramp No. 4 will cause DMT to lose toll revenues for the concession period pursuant to MoA2 1996 in the amount of approximately THB756 million while in comparison construction costs would only have amounted to THB 32.5 million.*"
- 5.89 The Respondent argued that the Northern Extension was delayed because of conflicts between the Claimant and DMT. However, the Northern Extension and the direct access ramp to the airport were completed on 2 December

1998 (four months before the contractual completion date). With regard to Ramp 4, the Respondent claims that DMT requested that the construction of Ramp 4 be postponed by the letter from DMT to DoH of 16 September 1999 referred to in Para. 7.32.

6. THE EVENTS OF DECEMBER 2004 AND BEYOND

- 6.1 The Board of DMT had called its last board meeting of the year for 15 December 2004. Mr. Trapp had decided not to attend what he considered to be a routine meeting but after he had received (on 14 December 2004) a call from Mr. Kramer urging his attendance, Mr. Trapp flew to Bangkok from Germany arriving on the morning of 15 December 2004.
- 6.2 On arrival, he was advised that Mr. Sombath had been told by the Minister of Transport to request DMT to consider:
- (a) reducing the toll fees for the original Tollway from 30 THB to 20 THB;
 - (b) not imposing a toll at all on the Northern Extension (at that time the toll was 13 THB).
- 6.3 Such measures would be for a trial period of three months. If and when the forthcoming parliamentary elections scheduled for February were completed, DMT would be compensated for the reductions.
- 6.4 At the meeting, the eight Thai directors (four of them government-appointed) voted for the reduction of the toll fees *"Because they were of the opinion that the experimental reduction of toll fees in this instance will become a favourable opportunity for DMT to be able to negotiate in a more serious manner with the governmental sectors in resolving DMT's financial problems on a long term*

basis." Mr. Kramer and Mr. Trapp voted against the resolution, stating that such a reduction without the lenders' consent would be a breach of DMT's obligations to its lenders. This aspect was considered particularly serious, given DMT's extreme difficulties in the past with its financiers.

- 6.5 Mr. Kramer expressed vehement opposition to the reduction proposal at the meeting. He was confused at the attitude of the Board in contemplating a toll reduction when such had been unanimously rejected by it in 2003. The Board had resolved to commence arbitration proceedings because of the refusal of the Respondent to allow a toll increase and had expressed scepticism about whether any compensation would be achieved.
- 6.6 The agenda for the meeting acknowledged that there had not been time to seek approval to the toll reduction from the lenders. That agenda shows that the DMT directors who voted for the toll reduction (including the Respondent's representatives) saw fit to ignore this precaution. It is highly doubtful, in the Tribunal's view, that the lenders would have agreed to any toll reduction.
- 6.7 Shortly after the close of the Board meeting at about 4pm, the directors were invited to attend a press conference held by the Prime Minister and the Minister of Transport, Mr. Suriya, which was about to be held on the toll plaza some 200 metres adjacent to DMT's office where the Board meeting had been held. Both ministers announced to many TV and other media reporters that the tolls on the Don Muang Tollway would be lowered with immediate effect for the benefit of the public.
- 6.8 On 17 December 2004, the Minister of Transport submitted a request to the Cabinet for approval of the measures

agreed to by the Board. Approval was given on 21 December 2004.

- 6.9 In early January 2005, Mr. Trapp considered that DMT would never be able to receive the dividend expectations envisaged in the original Concession Agreement or in MoA2. Hence, arbitration proceedings should be commenced immediately under the 2002 Treaty which had come into force three months previously. The necessary "cooling off" letter was sent to the Prime Minister by the Claimant on 9 March 2005.
- 6.10 Throughout 2005-2006, whenever a 3-month "*trial period*" had elapsed, DoH would request another extension of the "*trial period*" from DMT. On each occasion, the request was granted by the DMT Board over the objections of the Claimant-appointed directors.
- 6.11 At the annual meeting of shareholders of DMT on 27 April 2005, Dr. Fischer and Mr. Trapp, on behalf of the Claimant, stated both orally and in writing that the management of DMT should undertake all necessary measures to achieve the financial targets of MoA2. They considered the Respondent's past and present actions as tantamount to expropriation. They strongly protested against what they saw as DMT's strategy of wishing to make shareholders, as well as DMT's lenders, responsible for absorbing the financial damages caused to DMT by the Respondents' actions.
- 6.12 On 27 April 2005, Dr. Fischer and Mr. Trapp visited the Permanent Secretary of MoF requesting the implementation of the strategy to buy the Claimant's shares in DMT. No results were achieved at that meeting and, on 13 May 2005, a written proposal was sent to the Ministry of Finance

("MoF") in which the Claimant repeated its former requests that the Respondent buy the shares back at 10 THB.

- 6.13 On 18 May 2005, a letter to DoH, signed by Mr. Sombath on behalf of DMT, stated that the foreign shareholders persisted with their objection to extend the toll reduction period. DMT sought to receive the assistance measures promised in the Cabinet resolution of 21 December 2004.
- 6.14 At DMT's Board meeting of 18 June 2005, Mr. Trapp again appealed to the other directors to stop any further extension of the toll-free and toll-reduction periods.
- 6.15 In June 2005, the Claimant investigated a new diplomatic approach through the Thai Ambassador in Germany. Consequently, Mr. Trapp talked to the Thai Minister of Finance at the Thai Embassy in Berlin on 2 August 2005, with delegates of the German Ministry of Economic Affairs.
- 6.16 On 21 June 2005, a meeting of DMT's lenders and DMT was held with representatives of the MoF and MoT. DMT, represented by Mr. Sombath, asked for a loan at preferential interest rates in order to be able to buy the foreigners' shares and Mr. Sombath offered his own shares as pledge. The meeting did not accept this proposal.
- 6.17 At a DMT extraordinary shareholders' meeting on 14 July 2005, Mr. Sombath, together with DMT's Financial Adviser, Turnaround, presented two plans (a debt restructuring plan and a proposal to the Respondent to extend the concession period and agree on a certain toll-free scheme). These plans were opposed orally and in writing by the Claimant's representatives but the motion was passed with the Claimant and VINCI dissenting.

- 6.18 On 16 August 2005, the majority of directors of DMT, against the vote of Mr. Kramer, resolved to designate Mr. Sombath as its sole negotiator with the Respondent.
- 6.19 A last attempt to obtain relief was made by the Claimant in letters to the MoF of 12 August and 25 August 2005. A letter from the German Minister, Mr. Clement, to the former Deputy Prime Minister remained unanswered, as did the Claimant's letters.
- 6.20 On the occasion of DMT's Board meeting on 16 November 2005, Mr. Sombath presented to the Board a memorandum which outlined an agreement which Mr. Sombath had achieved in private negotiations with the Director General of DoH. This memorandum ultimately became MoA3 but was approved by the Cabinet on 12 September 2007 (almost two years later).
- 6.21 On 28 December 2005, the DMT shareholders in a general meeting approved the wording for what was to become MoA3 against the votes of the Claimant's representatives. The position paper annexed to the official minutes claimed that, whereas MoA2 would have resulted in an IRRE of 9.15% with repayment of the investment in 2012, even on paper MoA3, would result in an IRRE of 5.98% with repayment of the investment in 2022.
- 6.22 Some tolls were re-introduced on the Tollway in April 2006, although not to the level existing at the time of the December 2004 reduction of tolls.
- 6.23 A new flyover was built at the Ladprao Intersection of the VRR, increasing the capacity for through traffic at the location. Another similar flyover with similar consequences was built at Sutchisan Intersection in May 2004.

6.24 In December 2006, the Claimant agreed to sell its shares in DMT to Mr. Sombath and his son for the price of €10 million. The shares were acquired by an Australian investor, Babcock & Brown Ltd, in October 2007 for €13.7 million.

MoA3

6.25 Although the Claimant had sold its shares before MoA3 was signed on 12 September 2007, it is important to summarise the effects of that agreement. Simply put, MoA3 extends the concession period by 12 years to 2034 and provides a new schedule of agreed toll rates over the lifetime of the concession. DMT is entitled to increase the tolls unilaterally in accordance with the toll schedule so there is no danger of the Respondent being able to interfere with the contractually-agreed toll rates. The next increase will occur on 22 December 2009.

6.26 The recital to MoA3 records that DMT was represented by Mr. Sombath and Mr. Kramer (still a director of DMT), as duly authorised to bind DMT. The recitals including:

“Whereas the Council of Ministers passed resolutions on April 11, 2006 to acknowledge the agreement on a solution to the loss problem of the Concessionaire between the DoH and the Concessionaire as proposed by the Ministry of Transport, and consigned the principle to the Ministry of Transport to enter into another negotiation with the Concessionaire again for amending of the Tollway Concession Agreement so as to ensure appropriateness and clarity as well as more mutual benefits, which would then be proposed to the Council of Ministers for further consideration, as per the details in Appendix B attached hereto.”

6.27 In MoA3, DMT agreed to cancel:

“...all claims, law suits filed with courts and/or submissions of disputes to arbitration which have arisen or which may arise from any of the following causes: 6.1 Construction of the Local Road, 6.2 disapproval of increases and toll fees in the past, 6.3 failure to arrange a soft loan at the agreed terms in

the past, 6.4 construction of detour lines on the VRR, 6.5 delayed returns of various performance bonds, 6.6 construction of flyovers at the land for Phrao intersection on VRR which is a project of Bangkok Metropolitan Administration, 6.8 relocation of the Bangkok International Airport to Suvarnaphumi Airport and 6.9 Construction of the Exit link from the international passenger terminals of the Don Muang International Airport towards the south (Bangkok inbound) or southbound Exit Ramp (Ramp No.4)”.

- 6.28 The significant achievements of MoA3 included the cancellation of Appendix F of MoA2, the deletion of Ramp 4 without compensation for cancellation of this and other named works, a new regime for tolls and an extension of the life of the concession.

7. THE EFFECT OF CLAUSE 25 OF CONCESSION AGREEMENT

- 7.1 Clause 25 of the Concession Agreement will now be discussed. It provided a mechanism whereby DMT can request the approval of toll increases. The Tribunal’s views on the interpretation of Clause 25 will have later relevance when assessment of the Claimant’s alleged legitimate expectations is made.

- 7.2 The relevant parts of Clause 25 provide:

“Adjustment of Toll Rates and Concession Period”

- 25.1 The Company may request the DOH to adjust the toll rates being in force at the time so that the toll rates are fair to the Company in light of changes to the economic situation.

The Basic Economic Factors as listed in Appendix D have been used for the original financial planning and deviations of comparable economic factors from those listed in Appendix D shall be taken into account by the DOH in considering the requested adjustment to the toll rates. The purpose of such adjustment shall be to restore the financial position of the Company otherwise affected.

25.2 At the request of the Company the DOH shall agree to enter into negotiations with the Company to remedy negative effects on the Company's financial position by means of toll rate adjustment or extension of the Concession Period or the delay of the start of remuneration payable to the DOH according to Clause 26.1 or any other measure deemed appropriate by the parties due to: [...]

7.3 The Claimant's contention is that clause 25.1 allows DMT to request adjustment of toll rates when changes to the economic situation occur. This clause makes reference to the Basic Economic Factors in Appendix D of the Concession Agreement which are to be used as a benchmark for considering requests for toll adjustment.

7.4 Appendix D provides as follows:

"Basic Economic Factors"

The below listed Basic Economic Factors have served as a basis for the computation of the Initial Toll Rates and the schedule increases thereof in the ninth and fourteenth year of the Concession Period, respectively, with the objective to always keep the Company in the position to fulfil all its financial obligations entered into for the sole purpose of constructing, operating and maintaining the Tollway.

The Basic Economic Factors consist of:

- Average Daily Traffic (ADT) and estimated growth thereof
- Interest rate for Baht denominated loans
- Escalation of construction, operation, maintenance and repair cost
- Extra of average longtime change of value of Thai Baht to Deutschmark
- Taxes

For certain Basic Economic Factors assumptions in regard to possible changes in time have been made in order to arrive at a realistic forecast of the operational results.

1. Average Daily Traffic and Estimated Traffic Growth Thereof

For the purpose of reference the Average Daily Traffic in accordance with a study made by the

Department of Highways for 1988 (Estimated ADT 1988) and the Growth of the Traffic as listed in Section 5.1.2 of the Report on Viphavadi – Rangsit Toll Road Project by the Working Group on Toll Highways, Department of Highways, October 1986 have been selected.

2. Interest Rate for Thai Baht Denominated Loans

For the financial forecasts during the Concession interest rates for loans raised on the Thai capital market have been assumed as follows:

Bank of Thailand (BOT) interest rate for interbank overnight borrowings : 8% p.a.

Additional fixed charge on top of this BOT interbank loan rate for longterm loans to private parties : 4% p.a.

Total interest rate for longterm financing: 12% p.a.

(The official overnight interbank loan rate of the Bank of Thailand is daily published in the papers and therefore taken as reference rate.)

3. Escalation of Construction, Operation, Maintenance and Repair Cost

The escalation of the construction, operation, maintenance and repair costs has been estimated to rise in conformity with the officially published "Consumer Price Index" and for the purpose of the financial forecasts during the Concession has been assumed to amount to 3% p.a.

4. Change of Exchange Rate Deutschmark/Baht

For the purpose of the financial forecasts during the Concession an average long time annual loss of value of the Thai Baht against the Deutschmark has been assumed to amount to 3.0% p.a.

5. Taxes

For the purposes of the financial forecast during the Concession fixed tax rates have been assumed as follows :

- Service Tax plus Municipal Tax on amount of Construction Contracts : 3.3%
- Company Income Tax on Taxable Income: 35.0%
- Dividend Tax on Dividends to Foreign Shareholders : 16.0%

No property tax for and Tollway for any service/business tax on the toll revenues has been considered.”

7.5 Clause 25.2 sets out more extensive remedies which can be requested by DMT upon the occurrence of certain events set out in paragraphs (a) to (d) of the clause.

7.6 It was the Claimant’s contention that, under Thai law, both limbs of Clause 25 would be interpreted and applied so as to create an effective obligation on the Respondent which could sound in damages for non-performance of a suitable adjustment to the terms of the Concession.

7.7 The Respondent disagreed with the Claimant’s interpretation of Clause 25, maintaining that the mechanism did not provide for strong and unambiguous rights that DMT could use to require DoH to provide compensation in the event of a breach. Clause 25 is drafted in weak language, referring to rights to “request” and rights to “negotiate”, rather than in strong language which mandated a right to compensation and a stronger requirement to effectuate a toll increase.

7.8 As regards Clause 25.1, Dr. Sompong Sucharitkul, the expert witness on Thai law introduced by the Claimant was of the opinion that:

“DMT is legally entitled to have the toll rates adjusted in accordance with the measurable deviation from the listed factors used to determine the initial rates and scheduled increases. Upon receipt of notification by DMT of such changes, the DoH is under an obligation to give effect to the requested adjustment of the toll rates in order to restore the financial position of DMT to its original viable status.”

7.9 Concerning Clause 25.2, Dr. Sompong opined:

“At the request of DMT, the DoH is under an explicit contractual obligation to negotiate in good faith with the DMT in order to adopt one of the remedial measures available, including fair toll rate

adjustments or extension of the Concession period or the delay of the start of the remuneration payable to the DoH, or any other appropriate measure mutually agreed upon between DMT and the DoH.”

7.10 Dr. Bhokin Balakula, the expert witness on Thai law called by the Respondent was of the opinion that:

“Clause 25.1 states that DMT ‘may request the DoH to adjust the toll rates being in force at the time so that the toll rates are fair to the Company in the light of changes to the economic situation’. This contractual provision provides DMT, not with a right to compensation, but a right for fair consideration by DoH of any request for adjustment falling under this clause.”

7.11 With respect to Clause 25.2, Dr. Bhokin was of the opinion that:

“Under the terms of Clause 25.2, DoH must, at DMT’s request, “agree to enter into negotiations with the Company to remedy negative effects on the Company’s financial position by means of toll rate adjustment or extension of the Concession Period or the delay of the start of remuneration payable to the DoH according to Clause 26.1 or any other measure deemed appropriate by the parties due to [...]”

7.12 Dr. Bhokin agreed that Clause 25.2 requires good faith negotiations, but that DoH had no obligation to agree to any particular measure to ensure that DMT’s income remained in line with any particular projections or values.

The Tribunal’s Interpretation of Clause 25

7.13 Clause 35.7, paragraph two, of the Concession Agreement reads in part:

“This Concession Agreement is executed in Thai and English languages in duplicate with identical wording and the Thai version shall govern in the event of discrepancies.”

7.14 The Tribunal, with the help of its Thai member, determines that the Thai and English versions of Clause 25 do not differ in essence. The event that would trigger Clause 25.1 is

"changes to the economic situation". Therefore, it is incumbent upon DMT, as the party requesting the toll adjustment, to submit to the Respondent that there have been changes to the economic situation. Assuming that the Respondent agrees that there have been changes to the economic situation, the next step is for the parties to discuss whether, and if so, how, the changes cause deviations of the economic factors listed in Appendix D of the Concession Agreement in order to arrive at a toll adjustment that would *"restore the financial position of the Company otherwise affected"*.

7.15 Clause 25.1 only entitles DMT to request the Respondent to consider adjusting the tolls within the parameters contained in that clause. The Tribunal agrees with Dr. Bhokin's remarks that: *"Should DoH act unreasonably in considering DMT's request for compensation under 25.1 or opt not to do anything, DMT has a right to go to arbitration under Clause 31."*

7.16 By the same token, Clause 25.2 (with its clearer language) merely entitles DMT to request the DoH to enter into negotiations with DMT to remedy negative effects on DMT's financial position by means of toll rate adjustment or extension of the Concession Period or the delay of the start of remuneration payable to the DoH according to clause 26.1 of the Concession Agreement, or any other measure deemed appropriate by the parties due to causes specified in subparagraphs (a) to (d) of that clause. In requesting negotiations under clause 25.2, DMT must establish that its financial position has been negatively affected by the causes outlined in subparagraphs (a) to (d) of this clause.

7.17 It must be noted that although clause 25.2 provides for the means to remedy DMT's financial position, e.g. by toll rate adjustment, extension of the Concession Period, etc., unlike

clause 25.1, it does not provide for an economic benchmark for the redress.

7.18 In support of its request under clause 25.1 or 25.2, DMT must furnish to DoH relevant details and justifications and the DoH must give due consideration to DMT's request¹.

7.19 The Tribunal will take the above assessment of the effect of Clause 25 into account when assessing the Claimant's alleged legitimate expectations. However, the general provisions of Clause 25 would be superseded by any express requirements regarding toll increases as were found in MoA2.

8. THE EFFECT OF MOA2

Parties' Submissions

8.1 Against the factual background detailed earlier, the Claimant submitted that, whether or not there was duress vitiating the Agreement so far as DMT is concerned, the Claimant is not bound by MoA2. It was a minority shareholder in DMT and as "*an investor*" under the BIT, it had a claim in international law quite separate from any claim that DMT might have had, were it not for MoA2. The Claimant did not waive any claim in international law.

8.2 The Respondent argued that the Respondent's settlement negotiations with DMT were hard-fought. The Claimant, through Mr. Kramer and Mr. Trapp, had been closely involved with and fully aware of the negotiations at all times. In fact, DMT had been quite enthusiastic about a settlement, as was demonstrated by Mr. Kramer's memorandum of 16 January 1995 – which spoke of an

¹ Concession Agreement, clause 25.3.

“*absolute must for the company*”. Moreover, the Claimant stood to gain by acquiring the contract for the construction of the Northern Extension. It was optimally placed as the only feasible contractor in a position to construct the extension. It was already on site, had constructed the original Tollway and had made a profit from construction as the Respondent emphasised many times in its submissions.

8.3 The Claimant submitted that the position under international law is that an investor is entitled to waive or settle Treaty claims only after it has elevated these claims to the international level. Where this has not yet occurred, the conduct of the parties in relation to domestic waiver arrangements is relevant in determining whether or not there has been a breach of the fair and equitable treatment standard.

8.4 The Claimant relied on an arbitral tribunal decision in *Eureko B.V. v Poland*², which concerned the sale of a Polish insurance company to a Dutch purchaser. After the dispute arose, the purchaser gave notice of its intention to pursue a claim under the Netherlands/Poland BIT which permitted investor-state claims. A purchase agreement was later concluded under Polish law which included an express waiver of all claims which had been lodged by the purchaser which included a Treaty claim made by the Claimant as an investor under the BIT. Relying on the doctrine of non-performance, the Claimant submitted that the waiver was ineffective because Poland had not complied with the remaining provisions of an addendum to the agreement.

8.5 The *Eureko* tribunal held that the waiver had not been conditional upon subsequent performance of other obligations. If it had been, it would have been drafted in a different way. It considered that the exception of non-

² *Eureko v Poland*, Partial Award and Dissenting Opinion of 19 August 2005.

performance relates to the simultaneous performance of particular obligations and that both parties have to perform simultaneously, which they did in that case. Consequently, all contracts and other claims were terminated and not suspended.

- 8.6 The Respondent submitted that, on the basis of this decision, the Claimant cannot say that its waiver of claims was dependent on the performance of some but not other parts of MoA2 by the Respondent.
- 8.7 The Respondent submitted that the Claimant's reference to the *Eureko* case was misplaced in that the Respondent's position is not that MoA2 waived the Claimant's international law rights but rather, insofar as those rights were derived from its own legitimate expectations, those expectations must have been changed by MoA2. Hence, the content of the Claimant's international law rights must also have changed to reflect the reality of MoA2. In other words, the Claimant's expectation at the time it made its investment, including injecting the further capital required by MoA2, encompassed the expectation that the value of its investment would be dependent on the results of further negotiations between DMT and the Respondent pursuant to clause 25 of the Concession Agreement which remained operative but in an amended form.
- 8.8 The Tribunal's view is that, as at the date of MoA2, the Claimant did not have any claim in international law to waive other than its rather theoretical right to have persuaded the German government to bring a claim on its behalf against Thailand under the state-to-state arbitration provisions of the 1961 Treaty. At the time of the signing of MoA2, the 1961 BIT was in force, which did not give an investor the right to make a claim, as did the BIT under consideration in *Eureko*. Moreover, the investor in *Eureko*

had actually made a treaty claim. Although the *Eureko* case allows a claim which has been made by an investor against a state to be settled, the case is not authority for the proposition that an investor can settle a claim which had not yet arisen at the international level, let alone a claim which the investor personally did not have at the time.

8.9 The Tribunal holds in a later part of this Award that the Claimant was not entitled to claim for pre-2004 breaches. Therefore, it had no claim which could have been settled by MoA2.

8.10 Moreover, it is quite inequitable that the Claimant be allowed to disregard a waiver agreement to which it was privy and in respect of which there were no grounds for setting aside on the ground of duress (to be discussed shortly).

8.11 The Tribunal's reasons for the above view can be summarised as follows:

(a) The evidence clearly shows that Mr. Kramer, the Claimant's representative in Bangkok was closely involved with and was principal spokesman for DMT in negotiating MoA2.

(b) MoA2, whilst possibly not ideal from the point of view of either DMT or the Claimant, included benefits for both DMT and the Claimant, as was acknowledged by Mr. Kramer at the time.

(c) The 1961 Treaty, in force at the time of MoA2, dealt with expropriation but had no reference to "Fair and Equitable Treatment" from which requirement the concept of legitimate expectations is derived. Any "*legitimate expectations*" the Claimant might have had changed after MoA2. The Claimant's "*legitimate*

expectations” thereafter were that MoA2 would be fulfilled.

(d) The Claimant received valuable benefits by having an “*easy ride*” into the contract to construct the Northern Extension for which it was paid.

8.12 In any event, the Tribunal considers that the waiver in MoA2 was not dependent on the fulfilment by the Respondent of its MoA2 obligations. The *Eureka* case is apposite in this context. Whilst acknowledging that the Respondent, as a sovereign state, was in a strong bargaining position, the Tribunal does not consider there was duress exercised on DMT by the Respondent of such a nature as to vitiate MoA2.

8.13 The arbitration decision relied on by the Claimant does not help its argument. *Desert Line Projects LLC v The Republic of Yemen*³, contains a number of statements by a distinguished Tribunal to the effect that the fact that a party is under financial pressure, does not necessarily mean that any settlement agreement reached by such party is vulnerable to invalidation for duress. Paragraphs 151-155 of the decision are helpful and encapsulate the present Tribunal’s thinking.

“151 The first general observation is that the fact that a party is objectively under financial pressure does not necessarily mean that any agreement reached with such a party is vulnerable to invalidation for duress. Such a notion might in fact compound the vulnerability of such a party by making it difficult if not impossible for it to make reliable commercial arrangements. A contractual excuse of duress requires some element of abuse by the other contracting party. The commentary to the well-known Harvard Draft of 1961, L. SOHN & R. BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, p. 191, contains a

³ *Desert Line Projects LLC v The Republic of Yemen* ICSID Case No. ARB/05/17 Award of 6 February 2008.

passage which well describes the assessment Arbitral Tribunal must make:

Since economic duress of a sort may be present in virtually any settlement, it must rest with judicial decision to draw the line between, on the one hand, economic compulsion exercised by the respondent State over the claimant in order to force him to settle, and on the other hand, the normal operation of economic forces.

- 152 The second general observation is that a party may fail to make payments expected by another party without necessarily exposing itself to a claim of duress. Settlement agreements are routinely concluded by parties who believe that their co-contractant owes them more, but nevertheless accept a lesser amount because they wish, or indeed acutely need, to receive quicker payment. If all such agreements were voidable for duress, commercial relations would be chaotic.
- 153 One party may be able to endure very long delays of payment of vast sums because of the abundance of its general resources, while another may be seriously affected by a contractual dispute due to weaknesses on other business fronts which have nothing to do with the non-paying cocontractant. The claim of duress requires clear proof.
- 154 Counsel for the Respondent observed reasonably that settlements frequently involve the relinquishment of a perceived right. One of the parties may accept such an agreement even though it has a judgment in its favour. It may believe that the other party's obstreperousness in creating enforcement difficulties, or in pursuing frustrating appeals, is in bad faith. Still, such settlement agreements are not automatically considered susceptible to annulment by virtue of coercion. To the contrary, such settlements are routinely not only upheld, but encouraged.
- 155 The difficulty with this argument is that it fails to perceive the line between the ordinary economic pressure created by delay in the payment of debt (which may be acute, and nevertheless amenable to legally cognizable settlement), on the one hand, and, on the other, the kind of compulsion that can be created by a superior force in a hostile environment, where the scales of justice have been manifestly compromised. As Professor Detlev Vagts put it, in "Coercion and Foreign Investment Rearrangements," 72 AM. J. INT. L. 17, at 30 (1978):

"Fear – like fraud, undue influence, infancy, or insanity – vitiates the informed, intelligent, and adult consent which contract theory in its classical forms demanded almost everywhere. Force is also illegitimate in terms of any theory that leaves the settling of trade terms to the operation of a market; violence is the antithesis of the ordinary market."

156 These words were written in the days before the advent of modern generation of BITs; but they could hardly have been more apposite if they had also described coercion and fear as the "antithesis" of the promotion and protection of foreign investment.

8.14 The Tribunal in *Desert Line*, not surprisingly, found that there had been duress exerted on the claimant in the form of threats and attacks on the physical integrity of the claimant and its investment. Agents of the respondent had besieged the claimant's construction site and arrested three managers, including the son of the chairman of the claimant. There had been failure to provide to the claimant the protection and security it had requested from the respondent. The claimant had been subjected to harassment threats and theft by armed third parties. The chairman of the claimant had been advised to leave Yemen because his life was in danger.

8.15 At paragraph 186, the Tribunal said:

"Settlement agreements should not be lightly disregarded and the circumstances of this case go egregiously far beyond the bounds of ordinary relations, let alone those of "every settlement ever reached". The Tribunal finds that the settlement agreement was imposed on to the Claimant under physical and financial duress. It is not the result of fair and sincere negotiation among the parties".

8.16 In the present case, the conduct of the Respondent complained about by the Claimant (even viewed in its worst possible light) comes nowhere close to the extreme and frightening conduct to which the claimant in the *Desert Line* case had been subjected. Negotiations for MoA2 were not

all one-sided. There were advantages in MoA2 for DMT and the Claimant as it finally emerged. MoA2 may possibly have been weighted in favour of the Respondent, which made last-minute changes to agreed drafts, but that conduct alone would not amount to duress. As was pointed out by the Tribunal in *Desert Line*, financial embarrassment by a claimant is often the reason for a claimant entering into a settlement agreement. The claimant here was certainly suffering financial embarrassment. It is notorious that settlement agreements are rarely ideal from the point of view of either party. Both parties lose something, but that is often said to be the hallmark of a good settlement.

8.17 Accordingly, the Tribunal is of the view:

- (a) The Claimant cannot make a claim based on any conduct of the Respondent prior to the signing of MoA2. The Claimant is bound by the settlement reached by that Agreement by DMT.
- (b) MoA2 is not liable to be set aside on the grounds of duress.

8.18 It follows from the Tribunal's decision in this area that the Claimant cannot make any claim arising from actions of the Respondent occurring before the signature of MoA2. Such of its claims as are admitted to the extent allowable by the Tribunal's findings, must be based solely on the Respondent's conduct after the date of MoA2. As will be discussed later, there might be claims based on ongoing infringement by the Respondent of its obligations under MoA2, crystallising into a breach after the date of entry into force of the 2002 Treaty. Allegations to this end will be considered by the Tribunal later in this award.

9. JURISDICTION RATIONE TEMPORIS

9.1 In its Partial Award of 5 October 2007, the Tribunal found that it has jurisdiction *ratione materiae* in this arbitration. In other words, the Claimant had an “investment” which was within the coverage of the 2002 Treaty.

9.2 The Tribunal’s Partial Award was based on its interpretation of Article 8 of the 2002 Treaty, which provides:

“Article 8 -

This Treaty shall also apply to approved investments made prior to its entry into force by investors of either Contracting Party in the territory of the other Contracting Party consistent with the latter’s laws and regulations.”

9.3 However, whilst accepting the Tribunal’s ruling on jurisdiction *ratione materiae*, the Respondent submitted at the substantive hearing that the Tribunal has no jurisdiction *ratione temporis* in respect of disputes which arose before the coming into force of the 2002 Treaty on 20 October 2004. Both parties are in agreement that the Tribunal has jurisdiction in respect of disputes which came into being after that date.

9.4 The arguments on the jurisdiction *ratione temporis* centre on the reference in Article 10 of the 2002 Treaty to “disputes concerning investments between a Contracting Party” and “an investor of the other Contracting Party”. Article 10 goes on to define the procedure for appointing an Arbitral Tribunal in the event of a dispute not being resolved by prior negotiation.

9.5 It is important in the context of the present argument to note

- (a) The 1961 Treaty did not give investors the right to make investor-state claims but provided only for state-state claims in its Article 11.

- (b) Article 14(3) of the 1961 Treaty provides "*In respect of investments made prior to the date of termination of the present Treaty, the provisions of Articles 1 to 13 shall continue to be effective for a further period of ten years from the date of termination of the present Treaty.*" The 1961 Treaty was terminated upon the date of the entry into force of the 2002 Treaty (see Article 11(2) of the 2002 Treaty).
- (c) Accordingly, because of (b) above, it is still possible for a state-state claim to be made under the 1961 Treaty until October 2014.
- (d) There is no express restriction in Article 10(1) of the 2002 Treaty against claims which arose before the date of commencement of the Treaty.
- (e) The reference to "disputes" in Article 9 of the 2002 Treaty (which deals with disputes between the Contracting Parties) is not expressed as broadly as Article 10 which refers to "*disputes concerning investments*". Article 9 refers to "*disputes concerning the interpretation or application of this Treaty*".
- (f) Article 9 of the 1961 Treaty applies to "*approved investments made prior to its entry into force (i.e. 10 April 1965) but not earlier than 26 October 1960*". Presumably, the latter date is that when Treaty negotiations commenced or agreement to the Treaty had been reached in principle.

9.6 In summary, the Claimant submitted:

- (a) There is nothing in the ordinary meaning of the phrase "*Disputes concerning investments*" in Article 10(1) of the 2002 Treaty to limit the scope of the

Tribunal's jurisdiction to disputes arising after the date of commencement of the 2002 Treaty involving an "investor" qualified as such under Article 8 of that Treaty.

- (b) There is no question of the application of the principle of non-retroactivity to Article 10, since the 2002 Treaty was in force when the arbitration process was commenced by the Claimant. Article 10 is to be interpreted in the context of there being successive BITs.
- (c) Article 7(2) of the 2002 Treaty extends investor-state arbitration within the meaning of Article 10 of the 2002 Treaty.
- (d) Under international law, absent any specific provision to the contrary, the Tribunal has jurisdiction where wrongful acts giving rise to a dispute, have their origins in earlier events. They are within the temporal jurisdiction of the Tribunal if consummated after the critical date. This proposition is relevant to allegations of "*creeping expropriation*" and to the claim that the Respondent failed to fulfil the Claimant's legitimate expectations, thereby breaching the 2002 Treaty requirement of "*fair and equitable treatment*" of the Claimant.
- (e) Alternatively, the Tribunal can consider conduct preceding the date of implementation of the Treaty in order to establish a factual basis for breaches after the implementation or to provide evidence of intent in respect of any such later breach.

9.7 The Claimant went on to submit that the Respondent had been aware at the relevant time of the necessity to include a specific exclusionary provision in the Treaty if it had

wished to limit jurisdiction *ratione temporis*. The Respondent had concluded other BITs which expressly excluded claims carrying out of disputes, claims and events which had arisen before the date of the entry into force of the relevant Treaty.

9.8 The Respondent's counter-submission, in summary, was that, under the principle of non-retroactivity enshrined in the Vienna Convention on the Law of Treaties ("Vienna Convention"), (Article 28), disputes arising before the coming into force of the 2002 Treaty cannot be entertained under that Treaty. Further, there can be no relevant continuing or cumulative breach occurring before the coming into force of the Treaty which can support a claim. The onus of proof of retroactivity lies on the Claimant.

9.9 The Respondent invoked Article 31 of the Vienna Convention which requires a good faith interpretation of "*the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". The general rule is that retroactivity has to be expressly stated or implied. The Respondent cited in this context the official commentary on Article 28 of the Vienna Convention and the International Court of Justice ("**ICJ**") case of *Ambatielos*⁴.

Parties' Detailed Contentions:

(a) Interpretation of Article 10

Claimant

9.10 Central to the Claimant's argument is the decision of the Permanent Court of International Justice ("**PCIJ**") in the *Mavrommatis Palestine Concessions* case, a judgment of 30

⁴ *Ambatielos (Greece v United Kingdom)* 1953 ICJ Rep 19.

August 1924⁵. According to the Claimant, that decision laid down a principle that an unqualified submission of a state to an arbitral tribunal's jurisdiction occurs with respect to disputes relating to conduct both before and after the entry into force of the Treaty in question. Unless expressly stated, there is no implication of a temporal limitation in a broad jurisdictional provision.

9.11 In *Mavrommatis*, the PCIJ was concerned with a grant of conflicting concessions in Palestine in alleged breach of the Palestinian Mandate. The relevant jurisdictional clause in the Mandate referred to "*any dispute whatsoever which may arise*" and the dispute had arisen after the Mandate had come into force. It was argued that the facts giving rise to the dispute must also have come into existence after the Mandate had come into force. The PCIJ rejected that argument, saying:

"The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether as regards tests of time jurisdiction exists, whereas any definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of the dispute".

9.12 In the Claimant's submission, the *Mavrommatis* decision gave rise to the practice of incorporating temporal limitations and reservations in jurisdictional clauses in BITs. Many instances of this practice were cited on the part of the Respondent and of other States. If the Respondent had inserted such a reservation (as it had done in other BITs), the Tribunal then would not have had jurisdiction; but there was no such limitation and, consequently, the Tribunal has temporal jurisdiction.

⁵ *Mavrommatis Palestine Concessions Case (Greece v United Kingdom)*, PCIJ, Judgment of 30 August 1924, Series A, No. 2.

9.13 The Claimant referred in considerable detail to the Respondent's own practice of incorporating temporal limitations in its own BITs which had been accomplished since 1997. For example, the *Thailand/Argentina* BIT, signed in 2000 and in force in 2002, provided:

"This agreement shall apply to all investments whether made before or after the entry into force of this agreement. But the provision of this agreement shall not apply to any dispute or difference which arose before its entry into force."

9.14 The Claimant referred to what it considered to be a recent application of the *Mavrommatis* principle by the ICJ in the *Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia-Montenegro)*⁶.

9.15 The Genocide Convention, like Article 10 of the 2002 Treaty, did not contain any limitation on the scope of jurisdiction *ratione temporis*, nor did the parties make any reservation to that end. *Yugoslavia* had submitted that the ICJ could deal only with events after the date when the Convention had become applicable between the parties. The Court held that the Convention "...does not contain any provision, the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis* and nor did the parties themselves make any reservation to that end." Accordingly, the ICJ felt able to find such jurisdiction and held that such a finding was in accordance with the object and purpose of the Genocide Convention.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Decision on Jurisdiction, 11 July 1996, (ICJ).

Respondent

- 9.16 In its submissions in opposition, the Respondent placed heavy emphasis on Article 28 of the Vienna Convention which provides a presumption against retroactivity on the following terms: “*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*”. It submitted that there is nothing in the 2002 Treaty that evidences an intention of the parties to depart from the normal position of prospective treaty application, apart from Article 8 which extended coverage to pre-existing investments.
- 9.17 The Respondent derived support from the Commentary to Article 24 of the Final Draft Articles on the Law of Treaties of the International Law Commission (“**ILC**”).
- 9.18 The Respondent submitted that the jurisdictional clause of the 2002 Treaty was attached to the substantive clauses in the 2002 Treaty as a means of securing their due application. Therefore, the present case was one of those cases where the ILC Commentary considered that the *Mavrommatis* principle should be displaced and that the non-retroactivity principle operated to limit *ratione temporis* the jurisdictional clause.
- 9.19 As to whether a dispute had arisen before the due date, counsel for the Respondent pointed out that the German Ministry of Foreign Affairs had sought, through diplomatic channels, to have the Claimant’s dispute resolved in 2001 – well before the 2002 Treaty came into effect.
- 9.20 The thrust of the Respondent’s submission was that the 2002 Treaty looked solely to the future with the exception of

admitting “investors” who had attained that status before the entry date. The preamble emphasises the intention to create future favourable conditions for investments by investors of either state in the territory of the other state. Though the Respondent acknowledged that Article 8 applies the protection of the Treaty to “*investments*” made before the Treaty came into force, there was nothing in Article 8 that pointed to the application of the Treaty to “*disputes*” that arose before the Treaty came into force.

9.21 The Respondent relied on the decision of an ICSID Tribunal in *Impregilo SpA v Islamic Republic of Pakistan*⁷. The relevant treaty in that case contained a clause of similar effect to Article 10 of the 2002 Treaty under consideration (i.e. “*any dispute arising between a Contracting Party and the investors of the other*”). Referring to this language, the Tribunal decided that “*...such language – and the absence of specific provision for retroactivity – infers that disputes that may have arisen before the entry into force of the BIT are not covered*”. The Respondent relied also on decisions of tribunals in *Feldman v Mexico*⁸ and *Mondev International Ltd v United States*⁹, *MCI Power Group LLC and New Turbine Inc. v Ecuador*¹⁰, *Generation Ukraine v Ukraine*¹¹ and *Kardassopoulos v Georgia*¹².

9.22 The Respondent submits that the Claimant (on which the burden of proving jurisdiction *ratione temporis* lies) was, in effect, endeavouring to reverse the presumption contained in Article 28 of the Vienna Convention.

⁷ *Impregilo SpA v Islamic Republic of Pakistan* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

⁸ *Feldman v Mexico* ICSID Case ARB (AF) 99/1, 16 December 2002.

⁹ *Mondev International v United States* ICSID Case ARB (AF) 99/2, Award of 11 October 2002.

¹⁰ *MCI Power Group LLC and New Turbine Inc v Ecuador* ICSID Case ARB/03/6, Award of 31 July 2007.

¹¹ *Generation Ukraine v Ukraine* ICSID Case ARB/00/9, Award of 16 September 2003.

¹² *Kardassopoulos v Georgia* ICSID Case ARB/05/18, Award of 6 July 2007.

- 9.23 The Respondent also contended that to analyse the Treaty practice of State parties is not an aid to treaty interpretation, citing the decision of another ICSID Tribunal in *Aguas Del Tunari SA v Republic of Bolivia*¹³. There, that Tribunal considered that the Treaty practice of the parties is “necessarily of limited probative value to the task of interpreting the BIT”. The official commentary to the Vienna Convention supports the Respondent’s view when it says “the general rule however is that a treaty is not to be treated as intended to have retroactive effects unless such an intention is expressed in the treaty or was clearly to be implied from its term.” This view was endorsed and acted upon by the International Court of Justice in the *Ambatielos* case¹⁴.
- 9.24 Counsel for the Respondent referred also to the recent decision of the tribunal in *Société Générale v The Dominican Republic*¹⁵. The Tribunal in that case agreed with the respondent that the wording of the relevant Treaty had not established an intention sufficient to rebut the Article 28 Vienna Convention presumption. Counsel emphasised that, for the basic rule on non-retroactivity not to apply, a clear intention of the parties to the 2002 Treaty would have had to have been demonstrated which did not happen.
- 9.25 Counsel for the Respondent submitted that *Mavrommatis* had been decided at a time of a “flowering of public international law” with new tribunals being established. The PCIJ, conceived in the aftermath of the First World War, provided an expansive ruling in *Mavrommatis* whereby it would accept jurisdiction over cases referred to it after its establishment unless the state had expressly limited its

¹³ *Aguas del Tunari S.A. v Republic of Bolivia* ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction of 21 October 2005.

¹⁴ *Ambatielos*, above n 4.

¹⁵ *Société Générale v The Dominican Republic* UNCITRAL Arbitration, Decision on Jurisdiction of 18 September 2008.

submission *ratione temporis*. Not surprisingly, this led to a number of states expressly limiting the temporal jurisdiction.

Claimant's Reply

- 9.26 In reply, in oral submissions at the hearing, Professor Crawford for the Claimant categorised the case law on temporal jurisdiction as “*uneven*”, and submitted that the various arbitral tribunals had been trying to “*sort out over a period of time*” the implications of general dispute settlement clauses. He submitted the trend was in favour of a broader rather than a narrower reading of jurisdictional clauses.
- 9.27 In his oral presentation, Professor Crawford did not suggest that the substantive provisions of the 2002 Treaty had any retrospective effect. He cited Article 7(2) of the 2002 Treaty which imposed an obligation “*to observe any other obligation it has assumed with regard to investments of its territory by investors of the other Contracting Party*”. He submitted that Article 10(1) was a procedural and not a substantive provision.
- 9.28 Professor Crawford distinguished *Impregilo* since it had been a contractual dispute between a Pakistan state-owned entity and an Italian contractor. The cause of the contractual dispute occurred entirely before the entry into force of the only BIT. There were no successive BITs. When dealing with contractual disputes, a tribunal is stuck with the State’s own characterisation of the contractual entity. General international law is irrelevant to questions of contractual liability. Consequently, the *Impregilo* tribunal had held that it had no jurisdiction *ratione personae*. It did not have to consider any exclusive jurisdiction clause because it had no contractual jurisdiction

to start with. The Tribunal in the *Impregilo* case held that it had jurisdiction only from the date when the Treaty came into effect. According to Professor Crawford, the case can be contrasted with the present because of the pre-existing Treaty, and the fact that the claimant's contract in *Impregilo* was with a third party (albeit a state-owned enterprise) and not with the state itself.

(b) Successive Treaties

Claimant

9.29 The Claimant next submitted that, should the Tribunal prefer a narrower or alternative basis for jurisdiction, the Tribunal should note that there were two successive Germany/Thailand treaties with similar objects, purposes and provisions. This circumstance provides a basis to founding jurisdiction *ratione temporis*.

9.30 This argument relied heavily on a decision of an ICSID Tribunal in *Tradex Hellas SA v The Republic of Albania*¹⁶.

9.31 To the objections that that case can be distinguished from the present because:

- (a) it concerned the relationship of two successive domestic laws of Albania and not of two successive treaties; and
- (b) there being no Treaty involved, the Vienna Convention had no application, the Claimant replied as set out in the next three paragraphs.

9.32 The Claimant submitted that there is nothing in the *Tradex* decision to indicate that the Tribunal would have decided

¹⁶ *Tradex Hellas S.A. v The Republic of Albania* ICSID Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996.

otherwise had it been faced with two BITs made on the same dates as the domestic laws which the Tribunal had to consider.

9.33 The Claimant further submitted that it does not matter whether consent to jurisdiction is established by treaty, formal law or otherwise howsoever. *Tradex*, whilst based on domestic law dealing with foreign investment, was apposite because it involved the application of public international law by virtue of Article 42(1) of the ICSID Convention which was encompassed by the second of the two successive domestic laws.

9.34 In the *Tradex* case, Article 2 of the second domestic law provided for “*fair and equitable*” treatment of investors by Albania. This provision was considered to be retrospective.

9.35 In Article 8, a procedural provision was applied to earlier disputes under the previous legislation. The submission to jurisdiction provision was not drawn as widely as Article 10(1) of the 2002 Thai/Germany Treaty. The Tribunal stated at page 191

“The prospective application of Article 2 is easily reconcilable with the application of Article 8 to earlier disputes because it occurs frequently that Courts and Arbitral Tribunals have to apply certain substantive rules of law which were in force during the relevant period, though they have been replaced by new rules as from a certain date. Accepting ICSID jurisdiction of the present dispute under Article 8 therefore, by no means implies that the substantive protection rules and 1993 law would be applicable in the consideration of the merits of the case.”

9.36 A further decision of relevance, according to the Claimant, is *Jan de Nul v Arab Republic of Egypt*¹⁷. The case raised the relationship between successive BITs, both of which had contained an investor-state arbitration clause. While the

¹⁷ *Jan de Nul v Arab Republic of Egypt* ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006.

1977 BIT was in force, a dispute had arisen in relation to the contract between the claimant and the Suez Canal Authority (“**SCA**”). The Claimant had alleged that the SCA had misrepresented the nature of work to be performed. The Claimant commenced proceedings in an Egyptian domestic Court. Subsequent to the Claimant bringing this domestic claim, the 2002 BIT came into force.

- 9.37 The *Jan de Nul* tribunal had to decide whether, and to what extent, it could deal under the 2002 BIT with the alleged wrongdoings of the Respondent in relation to the domestic dispute. That Treaty had expressly excluded disputes which had arisen prior to its entry into force. In its Award on Jurisdiction, affirmed in its Final Award, the Tribunal held that it had jurisdiction under the 2002 BIT over the entirety of the facts on the basis that the facts of the domestic dispute, though pre-dating the international dispute, would ultimately lead to the international dispute.
- 9.38 The *Jan de Nul* Tribunal accepted the distinction that international law distinguishes between jurisdictional and applicable law provisions. Accordingly, the provisions of the 2002 BIT were held to apply to decisions of the local Egyptian courts. The provisions of the 1977 BIT applied to the respondent’s conduct which had occurred prior to the entry into force of the 2002 BIT. Though the dispute was based solely on the 2002 BIT, the substantive provisions of both treaties were held to apply. The earlier treaty was part of the applicable law.
- 9.39 The approach of the *Jan de Nul* Tribunal accords with the Claimant’s submission that, while substantive provisions of treaties do not have retrospective effect, procedural jurisdictional provisions do have effect with regard to disputes based on facts occurring before the entry into force

of the Treaty – all in accordance with the *Mavrommatis* principle.

Respondent

9.40 The Respondent submitted that the 1977 BIT, discussed in the *Jan de Nul* case, was a modern BIT similar to the 2002 Treaty, whereas the Thailand/Germany 1961 Treaty was described by Professor Crawford in his oral presentation as being “*in the first wave of the BIT movement*”. It did not contain any express guarantee of fair and equitable treatment of investors, as did the 2002 Treaty. The decisive point of differentiation between the 1961 Thailand/Germany Treaty and the treaties considered in *Jan de Nul* is that the *Jan de Nul* treaties both contained an investor-state arbitration provision. Accordingly, the same argument about the risk of parallel proceedings arose in *Jan de Nul*, just as it did in *Tradex*. The absence of an investor-state arbitration clause in the earlier Treaty is just such a specific circumstance envisaged by the Tribunal in *Jan de Nul*, such as would lead the Tribunal not to rely upon the 1961 Treaty in a claim brought under Article 10 in the 2002 Treaty.

9.41 The Respondent submitted that *Tradex* was based on an interpretation of domestic law, a different creature from public international law. States may deviate from the principle of non-retroactivity when enacting domestic law. Domestic exceptions from the principle should not easily be transposed into international law.

9.42 According to the Respondent, in *Tradex*, the Tribunal declined to endorse an interpretation which adopted a “*heterodox*” position on non-retroactivity for policy reasons, namely the prevention of parallel proceedings (i.e. UNCITRAL under the first domestic statute and ICSID under

the second). It also submitted that retroactive operation is more readily discernible in domestic law situations of the sort with which the *Tradex* Tribunal had been dealing. International law – as embodied in Article 28 of the Vienna Convention – is less receptive to retroactivity. That Convention had no application in *Tradex*.

9.43 The 1993 Albanian law in *Tradex* provided for ICSID arbitration while the earlier foreign investment laws of 1990-92 provided for UNCITRAL arbitration. In concluding that ICSID arbitration should apply also to investments made under the earlier laws, the tribunal considered that those changes in legislation created a system of protection which had evolved and improved over the years, and it was *"...consistent with this evolution that the new dispute settlement mechanisms, which are more advanced and efficient ... can be used also in relation to investments made and for disputes arisen before the entry into force of such law, the only negative condition being that previous procedures to settle the dispute have not yet been operated."*¹⁸

9.44 The Tribunal here interpolates a comment on the attempts by the Respondent to refer in submissions to a letter from a Dr. Zimmer, formerly of the German Foreign Service. The situation about his proposed testimony was the subject of Procedural Orders from the Tribunal on 6 March, 18 July and 9 August 2007. In short, the Tribunal ruled that, should the Respondent wish to rely on Dr. Zimmer's evidence at the jurisdictional hearing, whether as a witness of fact or as an expert, the Respondent had to produce an amended version of his brief which complied with Article 4.5 of the IBA Rules (if he were to be a witness of fact) and with Article 5.2 of the IBA Rules (should he be called as an expert). Because

¹⁸ *Tradex* above n 16, page 192.

the Claimant required Dr. Zimmer for cross-examination at the hearing, the Respondent was required to bring Dr Zimmer to the hearing and have him produce those documents on which he relied. The Respondent did not comply with any of these requirements which had been made for the jurisdictional hearing. It, therefore, could not rely on his statement for the substantive hearing.

9.45 Dr. Zimmer was apparently instructed by the German Government not to give evidence. The Tribunal, of course, has no jurisdiction to compel a witness: but, in view of the non-compliance with the Tribunal's procedural rulings, the Tribunal cannot have regard to Dr. Zimmer's statement.

(c) Article 7 of 1961 Treaty

9.46 The Claimant next submitted that Article 10 of the 2002 Treaty has no limitation as to when the dispute might have arisen because the Article has to be read with Article 7 (2) which requires the Respondent to "*observe any other obligation it has assumed with regard to investments in its territories by investors of the other Contracting Party*".

9.47 The Claimant argued that Article 7 of the 1961 Treaty extends investor-state arbitration to the 1961 Treaty. The Parties could have avoided this consequence by enacting an appropriate exclusionary provision, but chose not to do so. Various cases under *Most Favoured Nation* ("**MFN**") clauses were cited, although the Claimant acknowledged that Article 7 of the 1961 Treaty was not a MFN clause.

9.48 Article 7 of the 1961 Treaty provides:

"If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties in addition to the present Treaty, result in a position entitling investments by nationals or companies of the other Contracting Party to a treatment more

favourable than is provided for by the present Treaty, such position shall not be affected by the present Treaty. Each Contracting Party shall observe any other obligation it may have entered into with regard to investments within its territory by nationals or companies of the other Contracting Party.”

- 9.49 The Respondent submitted on this point, in its pre-hearing submissions on the law that incorporation of a right to arbitrate is never to be taken lightly, *Plama Consortium v Bulgaria*¹⁹. The Claimant’s argument would involve the Tribunal having to rewrite the provisions of the 1961 Treaty by extending investor-state arbitration to the 1961 Treaty. All Article 7 of the 2002 Treaty does is to leave undisturbed agreements made under the 1961 Treaty.
- 9.50 The Respondent discussed several unsuccessful attempts in other cases to utilise MFN provisions for dispute resolution, notably in *Plama*²⁰. In no case cited by the Claimant has a tribunal incorporated a right to arbitrate through the MFN mechanism where none existed before.
- 9.51 In its post-hearing submissions, the Claimant did not make reliance on Article 7(2) a separate ground of submissions in favour of jurisdiction *ratione temporis*. It merely called Article 7(2) of the 2002 Treaty in aid of the interpretation it sought in its submissions on Article 10.
- 9.52 The Tribunal agrees with the Respondent’s submission. All Article 7(2) does is to leave alone any other agreements concluded between the Contracting Parties and other states. The fact that in none of the three instances cited by the Claimant was there a right to investor-state arbitration is determinative.

¹⁹ *Plama Consortium v Bulgaria* ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005.

²⁰ *Ibid.*

(d) Composite Acts

Claimant

- 9.53 The final ground on which the Claimant asserted jurisdiction as a principle that, where wrongful acts continue and the ultimate dispute is a result of a succession of wrongful acts across time, including acts occurring within the clear temporal jurisdiction of the Tribunal, then the Tribunal has jurisdiction over the whole series of wrongful acts, although some occurred before the date of the Treaty coming into force.
- 9.54 The Tribunal is not at this point in the Award concerned with analysing whether there have been wrongful acts which had their origin before the date of the commencement of the 2002 Treaty, but which crystallised into a dispute after that date. That will be the subject of later analysis. However, the Tribunal now considers the arguments in the context of whether it has jurisdiction *ratione temporis* even to consider pre-Treaty acts or omissions of the Respondent.
- 9.55 The Claimant claimed that a number of cases showed the application of the principle. Notably, *Tecmed v Mexico*²¹. The Tribunal there said:

“Conduct, acts or omissions of the Respondent which, though they happened before the entry into force [of the BIT] may be considered as constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal’s jurisdiction.

This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, and particularly if the conduct, acts or omissions prior to December 18, 1996, could not reasonably have been fully assessed by the Claimant in their significance and effects when

²¹ *Tecmed v Mexico* ICSID Case ARB (AF) 00/2, Award of 19 May 2003, page 22.

they took place, either because as the Agreement was not in force they could not be considered within the framework of a possible claim under its provisions or because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with the investment, the key point of which led to violations of the Agreement following its entry into force..”

9.56 Under this approach, submitted the Claimant, the Tribunal must consider each individual alleged wrongful act both discretely and as part of a course of conduct.

9.57 *Société Générale v Dominican Republic* expresses the situation in these words:

“The Tribunal accordingly concludes that to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal’s jurisdiction. This will also be the case if the series of acts results in the aggregate that such a breach of an obligation in force at the time the accumulation culminates after the critical date.”²²

9.58 The Claimant pointed also to a decision of the International Court of Justice concerning legality of the use of the force in the Balkan Conflict, *Yugoslavia v Belgium*²³. In order to avoid a temporal restriction, Yugoslavia had claimed that each air attack constituted a separate wrongful act, giving rise to a number of separate disputes, some of which arose after the relevant date. The ICJ rejected Yugoslavia’s contention that each act constituted a separate dispute and concluded that each individual air attack could not have given rise to a separate subsequent dispute.

9.59 In his oral submissions, Professor Crawford observed that the following *Tecmed* formulation of the standard of “fair

²² *Société Générale v Dominican Republic*, above n 15, para 94.

²³ *Yugoslavia v Belgium* Order of 2 June 1999, Request for the Indication of Provisional Measures ICJ Reports (1999) 124, para 29.

and equitable treatment” is not beyond criticism, since it is expressed at a somewhat optimal standard:

“The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.(...)” “The Arbitral Tribunal considers that this provision of the Agreement (the fair and equitable treatment standard) in light of the good faith principle established by international law requires the contracting parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment”²⁴.

9.60 The statement on “*fair and equitable treatment*” may not have escaped criticism in the literature, as Professor Crawford acknowledged in oral submissions. However, the passage quoted in para 9.55 above seems to have escaped criticism. *Tecmed* allowed that, where consummation of the act occurs after the entry into force of the Treaty, the Tribunal can assess that act in the light of preceding events. The statement in *Société Générale* at para 9.57 confirms that proposition.

9.61 Counsel submitted that the ‘creeping expropriation’ in this case over the years before October 2004 was consummated in the Toll Plaza incident in December 2004 (described earlier) which made it clear that the Respondent was not intending to comply with any set of reasonable expectations in relation to the investment.

²⁴ *Tecmed*, above n 21, page 61.

Respondent

9.62 In reply, the Respondent looked again to the ILC Commentaries to emphasise that the first of the actions or omissions of a series for the purposes of state responsibility *ratione temporis* will be the first action occurring after the obligation came into existence²⁵. It relied also on statements in an article by J. Pauwelyn²⁶, to similar effect. Article 15 of the ILC Commentary states:

“In cases where the relevant obligation did not exist at the beginning of the course of conduct that came into being thereafter the first of the actions or omissions of the series for the purpose of the state responsibility will be the first occurring after the obligation came into existence.”²⁷

9.63 As to *Tecmed*²⁸, the Respondent submitted that the Claimant had neglected to point out that the *Tecmed* Tribunal was clear that the conduct in question, before and after the treaty obligation came into force, belonged to one and the same course of conduct. The event causing loss had occurred after the entry into effect of the Treaty, even if scrutiny of earlier events allowed the Tribunal to characterise the Respondent’s conduct in the way it did.

9.64 As to the *Société Générale* case, the Respondent submitted that that had not been a case of retroactive application of a Treaty, but one where the Treaty could only be applied on the basis of factual background of acts and events that had preceded the critical date. The emphasis on convergence confirms the applicability of this principle to an indirect expropriation that will not apply in a case such as the present, where the Tribunal is faced with a number of

²⁵ ILC Commentaries page 144.

²⁶ J Pauwelyn “*The Concept of a “continuing violation” of an international obligation: selected problems*” *The British Yearbook of International Law*, 1995, p. 446.

²⁷ Cited in J Pauwelyn, *ibid.*

²⁸ *Tecmed*, above n 21.

factually distinct allegations of breaches of the “*fair and equitable*” standard.

9.65 In any event, submitted the Respondent, a close reading of *Tecmed* shows that, while the Tribunal may have looked at events occurring before the entry into force of the relevant BIT, that is not to say that compensation was payable in respect of those acts. The Tribunal in *Tecmed* was concerned with the non-renewal by the respondent state of a permit to operate a landfill site. Whilst there had been events occurring prior to the due date of renewal, the withdrawal of the permit was the act of dispossession. It occurred after the Treaty came into effect and gave rise to the loss. In contrast, in the current case, the breaches are alleged to have occurred throughout the life of the project. Hence, there is a fundamental difference between the facts of *Tecmed* and those of the current case.

9.66 Counsel for the Respondent further pointed out that the 1961 Treaty did not include a “*fair and equitable treatment*” obligation – only a prohibition against expropriation. Counsel acknowledged that the weight of authority was in favour of the notion that a tribunal may have regard in appropriate circumstances to actions that may form part of a composite and continuing act predating entry into effect of the relevant treaty. But this constituted no licence for the Tribunal to “*add up*” actions and say “*Cumulatively, they look like a substantial prejudice. Therefore, we can look at everything*”.

Tribunal’s View on Jurisdiction Ratione Temporis

9.67 Having considered all the arguments, particularly those relating to the presumption against retroactivity, the Tribunal is of the view that Article 10 of the 2002 Treaty does not give the Tribunal jurisdiction *ratione temporis* to

consider disputes which had come into existence before the date of the coming into force of the Treaty.

- 9.68 Whilst Article 8 makes it clear that the Treaty applies to “*investments*” made before entry into force of the 2002 Treaty, that does not mean that investors can claim damages retrospectively for matters which had given rise to disputes prior to that date.
- 9.69 The Claimant has no basis on which to claim damages founded on events occurring before 20 October 2004. The German state could possibly have made a claim (and still could) on its behalf under the state-state arbitration provision in the 1961 Treaty. Under Article 10 of the 1961 Treaty, the provisions of the 1961 Treaty enure until October 2014. There is still a theoretical right, therefore, for claims to be made on the Claimant’s behalf on the state-state basis in respect of the Respondent’s conduct prior to October 2004.
- 9.70 The *Mavrommatis* dictum cited earlier in paragraph 1, may have led to many treaties (including many of the Respondent’s) containing an express provision against retrospective temporal operation. However, such practice can be seen as states acting under an abundance of caution. The practice is not a helpful guide to interpretation of this particular Treaty. This is particularly so when the Treaty replaced had no provision for investor-state claims. As was said by the Tribunal in *MCI Power Group LLC and New Turbine Inc. v Ecuador*²⁹: “*The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties*”. The temporal clause in that case was: “[*This Treaty*] shall apply to investments

²⁹ *MCI Power Group*, above n 10, para 6.1.

existing at the time of entry into force as well as to investments made or acquired thereafter”.

9.71 Where Article 10 of the 2002 Treaty allows, for the first time, investor-state claims, this is a substantive and not a mere procedural provision. The clear intention of the 2002 Treaty was to provide better future protection for investors in the host country than had previously existed. The Respondent had assumed liability for expropriation of investors and their property under the 1961 Treaty. This obligation was increased to add a requirement of fair and equitable treatment (“**FET**”) (of investors under the 2002 Treaty. Another beneficial effect of the 2002 Treaty was to make it easier for an investor to seek redress for expropriation and breach of the FET requirement by providing for investor-state arbitration whilst staying with state-state arbitration for treaty interpretation disputes. That provision of investor-state arbitration is a substantive provision which cannot be seen as or merely procedural and, therefore, as justifying any reversal of the Article 28 Vienna Convention presumption.

9.72 *Impregilo* (cit supra) is an applicable authority. The jurisdictional provision was in similar wording to that in Article 10. Whilst the contract in issue was not with the state itself (as it is here), but with a legal entity which was a state-owned enterprise, the dictum from *Impregilo* quoted earlier, is of general application. It accords with the ICL commentaries, and is adopted by this Tribunal. Other authorities, cited by the Respondent to similar effect, support that view.

9.73 *Impregilo* was referred to approvingly by the *Société Générale* tribunal at para. 79 of its jurisdictional award. In *Société Générale*, a BIT which gave jurisdiction – similar to the present case – to “*any dispute relating to investments*”

did not give the Tribunal retroactive jurisdiction to consider disputes arising before the critical date. As will be discussed later, the Tribunal held that the non-retroactivity principle does not exclude the consideration of prior acts for “*purposes of understanding the background, the causes, or scope of the violation of the BIT that occurred after the entry into force* (para. 87).

9.74 In *Mavrommatis*, the PCIJ noted: “*The Court does not feel called to consider whether the provisions of the Mandate, once they are in force, apply retrospectively to the period before the Mandate*”³⁰. So that case may not be as solid an authority for the Claimant as appears on first impression.

9.75 The ILC article³¹ quoted by the Respondent suggested instances where the so-called *Mavrommatis* principle could be displaced – in these words which the Tribunal respectfully adopts:

“When a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause. Thus in numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedom, the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question.”³² [emphasis added]

9.76 The *Tradex* case does not provide a helpful analogy. The Tribunal in *Tradex* distinguished the substantive provision of Albanian domestic law concerning FET which was prospective and procedural provision which was applicable to the earlier disputes. On the contrary, the Tribunal considers in the present case that the introduction in the

³⁰ *Mavrommatis*, above n 5, p 36.

³¹ Pauwelyn, above n 26.

³² ILC, Final Draft Articles in the Law of Treaties, Commentary to Article 24.

2002 Treaty of investor-state arbitration was a substantive and not a procedural provision.

9.77 The *Tradex* tribunal stated:

“Accepting ICSID jurisdiction for the present dispute under Article 8 therefore, by no means implies that the substantive protection rules of the 1993 Law would be applicable in the consideration of the merits of this case”.³³

9.78 In *Tradex*, if the tribunal had adopted Albania’s position, the claimant would have had to have started two different parallel arbitrations, one under the UNCITRAL Rules and the other under ICSID to exercise its rights. The Tribunal concluded that “(t)he prospective application of Article 2 is easily reconcilable with the application to earlier dispute, because it occurs frequently that courts and arbitral tribunals have to apply certain substantive rules of law which were in force during the relevant period though they have been replaced by new rules as from a certain date”³⁴.

9.79 At no time in *Tradex*, did the tribunal recognize the right of a claimant to ask for retroactive redress of breaches on the basis of substantive law which would have entered into force subsequently to the time of such alleged breaches. Moreover, the Vienna Convention presumption against retroactivity did not apply in the *Tradex* situation.

9.80 In the present case, the Claimant wishes not only to apply retroactively, procedural provisions of the 2002 Treaty but also substantive provisions of the 2002 Treaty which did not exist previously.

9.81 Another point of distinction between the present case and *Tradex* is that, in *Tradex*, foreign investors had been given the right to claim directly against the State under a previous

³³ *Tradex*, above n 16, p 191.
³⁴ *Ibid.*

law. On the contrary, the Claimant here could not directly bring a case against the Respondent under the 1961 Treaty.

- 9.82 The *Jan de Nul* case is of no assistance to the Claimant. There is the crucial distinguishing factor from the present case that the successive treaties in that case provided for investor-state arbitration clauses.
- 9.83 The Tribunal now considers whether the Claimant, if able to prove a series of acts which preceded the date of entry into the Treaty but which achieved consummation as a Treaty breach after that date, can call in aid such acts as relevant to determining liability after the Treaty entry date.
- 9.84 The extract from the *Société Générale* decision (quoted earlier at para 9.57) conveniently encapsulates the relevant principles which this Tribunal considers should be followed.
- 9.85 The following further quotations from the *Société Générale* case amplify that tribunal's thinking:

"87. The Tribunal is persuaded, however, that there might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which only become legally characterized as a wrongful act in violation of an international obligation when such an obligation had come into existence after the effective date of the treaty. The tribunals in *MCI, Feldman* and *Mondev*, while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless did not exclude the consideration of prior acts for "purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force" or the relevance of prior events to breaches taking place after the treaty's entry into force."

"90. It follows that the Tribunal must be satisfied that there could be a breach of obligations under the Treaty for jurisdiction over treaty violations to be established, and this again can only happen once the obligation has come into force. The actual determination of which acts specifically meet the

continuing requirement is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place. At the jurisdictional stage only the principle can be identified.”

“91. The same reasoning applies to composite acts. While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court. As noted in Article 15 of the Articles on State Responsibility, the series of actions or omissions must be defined in the aggregate as wrongful and when taken together it “is sufficient to constitute the wrongful act”. But of course the latter determination can only be made when the obligation is in force.” [Emphasis added]

“92. In situations of this kind, the preceding acts might be relevant as factual background to the violation that takes place after the critical date, and this is the meaning that the cases discussed above will have in considering that factual background and its relevance to explain later breaches. As the Respondent has rightly recalled, this explains why in *Tecmed*, while often believed to have assumed jurisdiction over acts preceding the treaty, this was only to the effect that such acts represented “converging action towards the same result”. In such a situation, the obligations of the treaty will not be applied retroactively but only to acts that will be the final result of that convergence and which take place when the treaty has come into force.” [Emphasis added]

9.86 The *Mavrommatis* case already referred to supports this approach where it is said:

“even supposing that it were admitted as essential that the act alleged by the Applicant should have taken place at a period when the Mandate was in force, the Court believes that this condition is fulfilled in the present case. If the grant of the Rutenberg

Concessions, in so far as they may be regarded as incompatible, at least in part, with those of Mavrommatis, constitutes the alleged breach of the terms of the Mandate, this breach, no matter on what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it.³⁵ [Emphasis added].

9.87 Each Party referred extensively to Articles 14-15 of the ILC Draft Articles on State Responsibility and the Commentary to those Articles. The Tribunal has paid particular attention to the citation of the Commentary given by Respondent at para 359 of its Defence Memorial of 1 April 2008:

"the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence." [Emphasis added]

9.88 In the present case, the Tribunal is considering what the ILC Draft Articles call "*Breach consisting of a composite act*" or what the Claimant alleges to be "*the continuing/composite wrongful acts of the Respondent*".

9.89 While actions and omissions of Respondent occurred which could have constituted breaches of the 2002 Treaty, had it been in effect between 1996 and 2004, some such situations were remedied before the entry into force of the Treaty and have not been taken into consideration by the Tribunal. The Tribunal refers in particular to claims for delays in the turning of the flyovers, for delays in issuing adequate instructions, for increases in the amount of work to be done, for failure to turn over the land necessary for the works.

9.90 As to the Respondent's argument that there cannot be a succession of acts for there to be a breach of legitimate expectations, *Tecmed v Mexico* and *Société Générale v*

³⁵ *Mavrommatis*, above n 5, page 35.

Dominican Republic provide good arguments against that position, more particularly the following quote from the latter case:

"[...]to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of Treaty obligation in force at the time it occurs, it will come within the Tribunal's jurisdiction. This will also be the case if a series of acts results in the aggregate in such breach of an obligation in force at the time the accumulation culminates after the critical date."³⁶ [Emphasis added].

- 9.91 Distinction therefore has to be drawn between breaches which crystallised before October 2004 (during the period of the 1961 Treaty) and ongoing conduct before that date which crystallised into a dispute after that date. Put in the words of the *Société Générale* tribunal, the Treaty will apply only to acts that will be "*the final result of converging action towards the same result*".
- 9.92 As discussed in 9.46 et seq, Claimant's argument about Article 7 of the 1961 Treaty can be shortly addressed. The Respondent's submission is unanswerable. The Claimant is inviting the Tribunal to rewrite the Treaty which cannot be done.
- 9.93 Accordingly, whilst holding that the Tribunal has no jurisdiction to consider disputes arising before October 2004, the Tribunal will consider whether the circumstances arose which qualify in terms of the dicta quoted above from the reasoning of the *Société Générale* tribunal which correctly encapsulates the concepts involved.

³⁶ *Société Générale v Dominican Republic*, above n 15, para 94.

10. "CREEPING EXPROPRIATION"

10.1 The Claimant's pre-hearing submissions were extensive as to whether the conduct of the Respondent, viewed cumulatively over the years, amounted to "creeping" expropriation of its rights as an investor. Professor Crawford referred to this topic in oral submissions. However, in its post-hearing submissions, the Claimant focussed on establishing that the Respondent had breached the "fair and equitable treatment" ("FET") requirements of the 2002 Treaty, whilst not abandoning the expropriation argument.

10.2 The 1961 Treaty in Article 3(2) offered protection against expropriation³⁷. The 2002 Treaty did likewise, but more expansively, in Article 4(2)³⁸. Article 2(3) of the 2002 Treaty promised investments by investors and their returns "FET" and "full protection". The 1961 Treaty did not have any equivalent provision obliging it to accord FET to investors and/or investments.

³⁷

Article 3

(2) Nationals or companies of either Contracting Party shall not be subjected to expropriation of their investments in the territory of the other Contracting Party except for the public benefit and against just compensation. Such compensation shall be actually realizable, freely transferable, and shall be made without undue delay. Adequate provision shall have been made at or prior to the time of the expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law.

³⁸

Article 4

Protection and Compensation

(2) Investments by investors of either Contracting Party shall not be expropriated, nationalized or subjected directly or indirectly to any other measure the effects of which would be tantamount to the expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry interest at the market lending rate from the date the payment is due until the date of actual payment; it shall be effectively realizable and freely transferable. Appropriate provision shall be made at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any expropriation, nationalization or comparable measure, as well as the compensation thereof, shall, at the request of the affected investor, be subject to review by due process of law.

- 10.3 Given the Tribunal's decision that there is no jurisdiction *ratione temporis* in respect of disputes prior to October 2004, the Tribunal concentrates on examining alleged breaches under the 2002 Treaty – particularly, the alleged situations when a series of actions pre-Treaty is said to have crystallised into a dispute on a date after the Treaty had come into force. The Tribunal considers it necessary, nevertheless, first to consider the legal concepts involved in the concept of “creeping” or “indirect” expropriation.
- 10.4 Counsel cited various formulations of indirect expropriation, which are all dependent on the circumstances of the particular case. In *Metalclad Corp. v Mexico*³⁹, it was said that an expropriation occurs where the state's actions have “...the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected economic benefit of property, even if not necessarily to the obvious benefit of the host state”.
- 10.5 In *Vivendi v Argentina*⁴⁰, the Tribunal said: “The weight of authority... appears to draw a distinction between only a partial deprivation of value (not an expropriation) and a complete or near complete deprivation (expropriation)”.
- 10.6 In *Vivendi*, the purpose of a State's interference was noted by the tribunal thus: “A state's purpose in implementing measures alleged to amount to indirect expropriation is irrelevant to a finding of whether expropriation has occurred”.⁴¹
- 10.7 In *LG & E Energy Corp. v Argentine Republic*⁴², the tribunal stated that interference with an investor's capacity to carry on business is not sufficient to establish expropriation where

³⁹ *Metalclad v Mexico* ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.

⁴⁰ *Vivendi v Argentina* ICSID Case No. ARB/97/3, Award of 20 August 2007.

⁴¹ *Ibid.*

⁴² *LG & E Energy Corp v Argentine Republic* ICSID Case No. ARB/02/1, Decision on liability of 3 October 2006.

the investment continues to operate, even if profits are diminished.

- 10.8 Professor Crawford for the Claimant in oral submissions acknowledged that an indirect expropriation requires a substantial deprivation to have taken place, although such deprivation does not need to be complete. He likened what happened to the Claimant here to "*death by a thousand cuts*".
- 10.9 In *Generation Ukraine v Ukraine*⁴³ the tribunal described "*creeping*" expropriation as: "*A form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates a situation whereby a series of acts attributable to the state over a period of time culminates in the expropriatory taking of such property.*" There does not have to be a formal taking of property or rights (see *CME Czech Republic DV v Czech Republic*⁴⁴).
- 10.10 "*Creeping*" expropriation was described in *Parkerings v Lithuania*⁴⁵ as "*The negative effect of government measures on the investors' property rights which does not involve transfer of property but a deprivation of the enjoyment of the property*".
- 10.11 Taking all the above formulations into account – and they all say much the same thing – the Tribunal finds difficulty in categorising the conduct of the Respondent post-October 2004 – and its conduct leading up to that date – "*creeping expropriation*" of the Claimant's investment.
- 10.12 Indirect or "*creeping*" expropriation against the Respondent has not been proved for the following reasons.

⁴³ *Generation Ukraine*, above n 11, para 20.22.

⁴⁴ *CME Czech Republic DV v Czech Republic* Partial Award of 13 September 2001.

⁴⁵ *Parkerings v Lithuania* Award of 11 September 2007, at para 2437.

- 10.13 There was no expropriation of the Claimant's contractual rights as a shareholder in DMT. The Tollway is still operating and will continue to operate for many years to come with DMT as the concessionaire. As in the *LG & E Energy* case, the investment continued to operate, even though profits may have been diminished by the actions or inaction of the Respondent.
- 10.14 The Respondent did try (maybe not all that effectively) by means of MoA2, to redress some of the alleged wrongs done to the Claimant, as it had acknowledged in the Preamble to that document. It later conducted – albeit painfully slowly – negotiations which culminated in MoA3 – which, again, contained in its provisions acknowledgment by the Respondent's Council of Ministers of an agreement on a solution to the loss problem of DMT⁴⁶.
- 10.15 Even at the time of the Toll Plaza incident or "*Opera*" in December 2004, the then Prime Minister told the Claimant's representatives that DMT's problems would be "solved". Although Messrs Trapp and Kramer treated this statement with scepticism, eventually, MoA3 contained the statement noted earlier. MoA3 attempted to remedy the negative effects on DMT's financial position by means of toll adjustments and an extension of the concession period. Toll adjustments no longer needed the Respondent's approval obtained through the rather tortuous and uncertain medium of Clause 25 of the Concession Agreement. By the time the Claimant sold its shares in DMT, the negotiations which culminated in MoA3 were on foot.

⁴⁶ “[...] Whereas, the Council of Ministers passed resolutions on April 11, 2006 to acknowledge the agreement on a solution to the loss problem of the Concessionaire between the DoH and the Concessionaire as proposed by the Ministry of Transport, and consigned the principle to the Ministry of Transport to enter into another negotiation with the Concessionaire again for amending of the Tollway Concession Agreement so as to ensure appropriateness and clarity as well as more mutual benefits, which would then be proposed to the Council of Ministers for further consideration, as per the details in Appendix B attached hereto.”

10.16 Nor was there the deprivation of the investor's control of the investment to the degree stated in *PSEG Global v Turkey* (ICSID ARB/02/5, 19 January 2007), viz.

"There must be some form of deprivation of the investor in the control of the investment, the management of day-to-day-operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part." (Emphasis added)

10.17 None of the actions of the Respondent reaches the level described in *PSEG Global* above. More than "*many things wrongly handled*" is required to justify a finding of expropriation. A strong interference with contractual rights needs to be shown – see *Sempra Energy International v Argentina*⁴⁷. Many of the alleged misdeeds of the Respondent were inaction rather than affirmative action.

10.18 Accordingly, the Tribunal cannot find "*creeping*" expropriation proved and proceeds to consider alleged breaches of the FET standard.

11. FAIR AND EQUITABLE TREATMENT STANDARD ("FET")

Parties' Submissions

11.1 The Claimant submitted vigorously that there had been breaches of the FET standard as set out in Article 2(3) of the 2002 Treaty. The Claimant did not in final submissions pursue the claim that there was a requirement for FET under the 1961 Treaty. Under the Tribunal's decision on jurisdiction *ratione temporis*, claims under the 2002 Treaty must be primarily focussed on post-October 2004 conduct.

⁴⁷ *Sempra Energy International v Argentina* ICSID Case No. ARB/02/16, 28 September 2007.

11.2 The Tribunal does not need to consider any argument based on a consideration of Article 1(2) of the 1961 Treaty, taken together with Article VII(1) of the Thailand/Netherlands Treaty, Article 5(1) of the Thailand/United Kingdom Treaty and Article 4(1) of the Thailand/China Treaty which incorporated FET provisions. The Claimant did not advance any such argument strongly in its post-hearing submissions. The Tribunal is of the view that nothing in the 1961 Treaty addressed breaches of FET standards. As noted earlier, the 1961 Treaty does not provide for FET of investors and/or investments. More importantly, none of the three treaties with other countries contains an investor-state arbitration provision. It is hard to see in these circumstances how the provisions of these treaties have any relevance to the present claim.

11.3 The Claimant asserted, in general, that the Respondent had breached the FET standard because it acted in an arbitrary and unconscionable manner towards the Claimant and its investment over a long period of time, producing the result that the investment never delivered any return to the Claimant right up to the time when the Claimant sold its shares. Accordingly, the Claimant's legitimate expectations, both at the time of making its investment in DMT and after the conclusion of MoA2, were frustrated.

11.4 The expectations were categorised thus:

- (a) Principle of Reasonable Return on Investment, which in turn was determined by
- (b) Feasibility of the Investment in respect of:
 - (i) its location;
 - (ii) its relationship to VRR;
 - (iii) the surrounding network;

11.5 Numerous cases were cited by the parties concerning the criteria by which breaches of FET, including breach of legitimate expectation, should be assessed. The following summary of FET, in the decision in *Biwater Gauff v Tanzania*⁴⁸ (which the Tribunal adopts as relevant to the present case) includes the protection of legitimate expectations as a specific component of FET:

“Specific Components of the Standard: The general standard of “fair and equitable treatment” as set out above comprises a number of different components, which have been elaborated and developed in previous arbitrations in response to specific fact situations. These have been the subject of detailed consideration in the parties’ submissions. In so far as they are relevant to the dispute here, these separate components may be distilled as follows:

- Protection of legitimate expectations: the purpose of fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment.
- Good faith: the standard includes the general principle recognised in international law that the contracting parties must act in good faith, although bad faith on the part of the state is not required for its violation.
- Transparency, consistency, non-discrimination: the standard also implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.”

11.6 The *Tecmed* decision referred to earlier, required that the State use the legal instruments governing the actions of the investor in conformity with the formulation “*usually applied to such instruments*”. Clearly, the Respondent was required to act in accordance with the terms of the Concession Agreement. As noted earlier, clause 25 regarding toll

⁴⁸ *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Decision of 24 July 2008, at para 602.

increases, is less than helpful from the Claimant's point of view. Yet, the Respondent seems to have accepted seriously obligations - whatever they may have been under that clause - to implement toll rises. From this perspective, it may not matter that eventual acceptance of those obligations may have occurred with less than optimal diligence or speed.

- 11.7 The Respondent, whilst conceding that FET has been interpreted by a number of tribunals as including the right to protection of legitimate expectations, submitted that "*the obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations that the investors may have or claim to have*". The Tribunal considers this as a rather circular and unacceptable argument. The Treaty promised FET and "*legitimate expectations*" come within FET's parameters.
- 11.8 The Respondent submitted that, if the Claimant's expectations are to be protected, then the whole of the Claimant's expectations at the time the investment was made, modified over time, must be taken into account. In particular, MoA2 modified the Claimant's expectations markedly.
- 11.9 Moreover, the Respondent submitted, the Claimant's legitimate expectations as an investor were affected by the following factors:
- (a) The Claimant had only a minority stake in DMT.
 - (b) The Claimant had no special rights of control over DMT under the Shareholder's Agreement.

- (c) The value of the investment was imperfectly protected under the Concession Agreement by clauses 25 and 31.
- (d) The Claimant made a profit on the contracts to build the Tollway and the Northern Extension.

11.10 Professor Crawford argued that the reasonable expectations of the investor, consistent with contractual and other proprietary arrangements, have to be considered over and above domestic law manifestations, because of the principle of parallel protection of rights under the Treaty. He submitted that the various dicta (such as those quoted above) set out a list of administrative practices to which an investor can legitimately expect a host state to conform.

11.11 The legitimate expectations doctrine has been applied to protect the substantive expectations of investors where particular promises have been made – *Eureko v Poland* (cit supra) and *CMS v Argentina*⁴⁹. As was noted in an article by Steven Fietta⁵⁰, “...*The question of whether or not there has been a violation of the standard will turn on what legitimate expectations the investor had in light of the specific assurances given by the relevant state authorities against the background of the domestic legal framework that was to govern the investment*”.

11.12 The Respondent referred to Professor Crawford’s 2007 Freshfields Lecture⁵¹ which emphasised “*In particular, the doctrine of legitimate expectations should not be used as a substitute for the actual arrangements agreed between the*

⁴⁹ *CMS v Argentina* ICSID Case No. ARB/01/8, Decision on Annulment of 25 September 2007.

⁵⁰ Steven Fietta “*Expropriation and the Fair and Equitable Standard: The Developing Role of Investors Expectations in International Investment Arbitration*” *Journal of International Investment Arbitration* Vol. 23, No. 5 p 375 and p 388.

⁵¹ Prof James Crawford S.C. “*Treaty and Contract in Investment Arbitration*” (22nd Freshfields Lecture) London, 29 November 2007.

parties or as a supervening and overriding source of the applicable law."

11.13 The Respondent, accordingly, submitted that, whilst it had made a number of specific representations to DMT in relation to the Claimant's investment which were incorporated within the Concession Agreement as amended, those undertakings were incapable of engendering substantive legitimate expectations.

12. CLAIMANT'S LEGITIMATE EXPECTATIONS

12.1 Legitimate expectations are definitely part of FET to the extent indicated by the authorities quoted earlier. A reasonable rate of return on the Claimant's investment was clearly part of the understanding between the parties, even though no particular rate of return was, or could be, guaranteed.

12.2 In summary, the Tribunal finds:

- (a) The Respondent decided that it needed to have the Tollway built as a "*congestion buster*" but could not afford to construct it out of its own finances.
- (b) The Respondent invited interested investors to participate in the construction project.
- (c) The Respondent could not reasonably have expected that foreign investors would enter into an arrangement of the nature proposed, over such a long period, without being fairly confident of a reasonable rate of return on investment.
- (d) The Respondent conducted various studies, as did the Claimant, on the financial implications based on the expected use of the tollway by the travelling

public. In particular, when considering the project in 1990-1, the Respondent considered a 15.87% rate of return as a reasonable basis on which to sign the Commission Agreement. Both parties entered into the Concession Agreement in the belief of a reasonable rate of return, although estimates varied between 15 and 21%.

- (e) There was confirmation after the Tollway had opened that the Respondent expected there to be a reasonable return for the Claimant: in particular, in his letter dated 22 May 1996 to the Solutions Committee, the Minister of Finance stated that the various alternatives advanced would allow the private Concessionaire *"to achieve a reasonable rate on his investment (14%)*.
- (f) MoA2 reduced the expected rate of return because of the dilution caused by the equity investment of the Respondent in DMT. However, the overall effect of MoA2 was designed to give the Claimant a reasonable return on its investment, despite the happenings which had given rise to MoA2.
- (g) There was no guarantee by the Respondent of any particular rate of return, although, as noted in paragraph (d) above, its initial studies may have indicated a return between 15% and 21%.
- (h) Any rate of return was subject to outside influences and contingencies unknown at the time of the Concession Agreement such as:
 - (i) the Asian economic crisis; and
 - (ii) the extent to which Thai motorists would or would not prefer to use the Tollway as

against a toll-free but slower road. The Dorsch Report did not reveal detailed studies of the likely habits of potential users of the Tollway;

(i) There were inherent difficulties for the Claimant as an investor in the Tollway arising out of:

(i) the Respondent's requirement that at the time of the Concession Agreement was signed, it and Delta should own at least 30% of the shares in DMT which was a special venture vehicle in which Thai interests predominated right from the start. After MoA2, when the Respondent itself became the largest individual shareholder the Claimant's shareholding in DMT became diluted to 9.87 per cent;

(ii) the inherent inefficiency caused by the three-party arrangement for the construction of the Tollway.

12.3 In spite of the fact that there was no guarantee by the Respondent of an explicit rate of return, the Tribunal considers that a reasonable rate of return – reasonable in all the circumstances, including the signing of MoA2 – was part of the Claimant's legitimate expectations and the failure to fulfil such a reasonable expectation was a breach of the Respondent's FET obligations.

12.4 The Tribunal's reasons for the above view can be summarised as follows. They arise from the total factual matrix.

(a) The semi-public nature of the concession rendered it a much more regulated enterprise than an ordinary

commercial business. The mechanism for a reasonable return was contained in the ability to charge tolls.

- (b) The inherent unlikeliness that any investor would contemplate entering into such a long-term arrangement without a legitimate expectation of reasonable return. Huge sums of money were required to be expended on a massive piece of civil engineering which, even if everything had gone according to plan, would produce no return on investment for several years.
- (c) The tolls to be received constituted the only way in which the reasonable return on investment could be achieved. The Concessionaire had no permanent interest in the facility constructed which had to revert to the Respondent's ownership once the term of the concession had expired.
- (d) There had been extensive consideration of the economic viability of the concession by many parties: all envisaged a reasonable return on the investment. Such consideration by the parties extended to MoA2, as can be seen from its Appendix F.

12.5 What constituted a reasonable return on the Claimant's investment will be addressed by the Tribunal in a later section of this award.

12.6 The Respondent (particularly from Mr. Bamford's evidence) suggested that DMT had been reckless to base its decisions, and hence its investment expectations, to either the traffic or revenue streams in the Dorsch 1990 forecasts.

12.7 Hindsight may have rendered the Dorsch pronouncements somewhat optimistic and Mr. Bamford's strictures on them would have greater resonance today than in 1990.

12.8 However:

(a) The Respondent itself believed in the feasibility of the concession. Otherwise, it could never responsibly have expected any overseas investor to have contemplated the scheme.

(b) Documents before November 1990 presented by the Claimant such as feasibility studies, particularly from a well-respected financial adviser, such as Wardley, would make it difficult to sustain the Respondent's charge of a "reckless" investment based on "hubris" (the Respondent's term), made by the Claimant for the sake of achieving a lucrative construction contract.

(c) The foreign bankers who played "hard ball" in the events preceding MoA2 (and who then refused to "take a haircut") were unlikely to have agreed initially to finance a project of this magnitude and complexity, unless they had been satisfied about its economic viability.

12.9 The Concession Agreement is particularly important when assessing the Claimant's legitimate expectations. It was the legal framework with which the Claimant was stuck. The Tribunal has given a critique of the Concession Agreement in an earlier part of this award. Clause 25.1 does not make it clear that an increase in tolls would automatically be granted by the Respondent if a request were made. The Concession Agreement did not vest the power to increase the tolls in the Concessionaire. That power always remained a government prerogative until

changed by MoA3. However, such a prerogative cannot entail a total discretion for the Respondent to disregard reasonable requests for toll increases.

- 12.10 The Respondent submitted that clause 25 provided the framework for the negotiations between the parties which, in fact, ended up in the conclusion of MoA2 and MoA3. The Respondent also submitted that it negotiated with DMT to solve its financial problems in the spirit of clause 25 which required both parties to work out a solution which, once having been achieved, should have satisfied both of them.
- 12.11 The Claimant was a minority shareholder with no special rights of control under its shareholders' agreement. Accordingly, if things went wrong, the value of the Claimant's investment would be dependent upon the outcome of negotiations between DMT and the Government. The Concession Agreement provided for certain rights between DMT and DoH to be backed up by arbitration, if necessary. However, any shareholder dispute between the Claimant and DMT had to fall back on the rather limited relief available to a minority shareholder under Thai company law (which is similar to the domestic company laws of many countries). Once the 2002 Treaty came into force, the Claimant acquired rights as an "*investor*" under that BIT.
- 12.12 The unusual fact of the Tollway being constructed physically on top of a toll-free road (the VRR) is an important factor when looking at the Claimant's legitimate expectations. The Claimant was entitled to assume that the VRR would not operate to the detriment of the Tollway, that toll-free alternatives would not be made too attractive and that the Tollway would always offer a faster, less-congested and more attractive alternative to motorists than the VRR.

- 12.13 MoA2 changed the Claimant's legitimate expectations significantly. The Claimant was entitled to expect that MoA2 would be implemented by the Respondent. The Claimant's legitimate expectation of a reasonable return has to be viewed in that light, bearing in mind particularly the very substantial waiver of claims that DMT had to grant in exchange for whatever benefits it was given by MoA2.
- 12.14 In the Tribunal's view, the Respondent was bound by MoA2 to have allowed toll increases as and when provided by that document. Its inaction for over ten years despite many requests for increases, its use of Ramp 4 as a prevaricating reason for inaction are unjustifiable. Moreover, its actions concerning the improvements to the VRR went well beyond what would be normally considered "*traffic management*" – the term used in MoA2, as will be discussed later.
- 12.15 When the 2002 Treaty came into effect, the Respondent was obligated, under the FET clause, to remedy the parlous situation caused by the lengthy delay in increasing tolls. After 20 October, 2004, there should have been an implementation of the toll increases provided for under MoA2 which were clearly justified under the criteria in the Concession Agreement.
- 12.16 As to the toll reduction of 2004 – following shortly after the Prime Minister's Press Conference on the Tollway itself - the Respondent argued that that reduction had been a business decision taken by DMT – a single step. However, taking into context all the previous actions and omissions by the Respondent (which was the main shareholder in DMT), this was just one more action taken by the Respondent in breach of MoA2 and in disregard of the spirit of clause 25 of the Concession Agreement. The Claimant's opposition expressed at the DMT meeting by Messrs Kramer and Trapp was doomed to fail. Fortunately for the Claimant, its status

as an “*investor*” under the 2002 Treaty survived regardless of DMT’s decision which may have been legitimate under Thai domestic company law.

12.17 The decision of DMT to reduce the tolls may have infringed DMT’s contract with its lenders. There was an obvious need for DMT not to decrease DMT’s ability to service its bank debt – a consideration which seems to have been ignored by the DMT Board (other than by the Claimant’s two representatives).

12.18 When considering whether MoA2 was implemented, the “*soft loan*” in the form stated in MoA2, was known to Mr. Trapp of the Claimant and DMT not to have been available at the time the document was signed. No claim can result from the failure to make the “*soft loan*”.

12.19 DMT suffered a large shortfall in revenue by reason of the failure of the Respondent to make the necessary toll increases, as promised by MoA2. Because of this shortfall, the Claimant, *qua* investor, in DMT, received no dividends.

12.20 The Tribunal finds that the fact that the Claimant may have made a profit from its construction activities is irrelevant to considering its claim as an “*investor*” under the 2002 Treaty. It invested equity capital in DMT – as distinct from any investment in a construction company.

12.21 However, the Claimant, as frequently happens, must have acted with mixed motives. It supported MoA2 as a way of being paid for outstanding construction work. It also was keen to obtain the Northern Extension contract. In strict law, the two activities of the Claimant should be regarded as separate.

12.22 MoA2 was concluded some eight years before the 2002 Treaty came into effect. The Tribunal has to consider what

part, if any, of the unfulfilled legitimate expectations of the Claimant over that period as described in the preceding paragraphs can come within the parameters described in the *Société Générale* case and the *Tecmed* case referred to earlier.

12.23 The Tribunal sees no reason to differentiate the *Société Générale* case from the present on the ground that there was only one BIT involved here which had provided for an investor-state claim. In *Société Générale*, there had been successive treaties, both giving investor-state rights. In the present case, the 1961 Treaty could still form the basis, in theory of a claim on a state-to-state basis, by the German government on its behalf up until 2014. The 2002 Treaty created a more readily-enforceable right to claim which is co-existent with the right under the 1961 Treaty. A case under that Treaty could be taken up by the German government on the Claimant's behalf.

12.24 Clearly, the question of toll increases had been simmering away for most of the eight years from 1996 to 2004. The Northern Extension had been opened for traffic on 3 December 1998. The Respondent refused to levy tolls on the bases mandated by MoA2. It failed to authorise the deletion of a ramp and used this failure to justify no increase in tolls. It did not agree to delete this ramp from the scope of the Concession because it said that the AAT lacked Cabinet approval for this deletion. Yet AAT and DoH both came under the same Minister. The Respondent's witness, Mr. Siripakom, agreed in evidence that the toll could not be increased, as required by MoA2 until the Cabinet had approved the deletion of Ramp 4 which did not happen until MoA3 was signed – after the Claimant had sold its shares in DMT. The Tribunal considers the delay in authorising the deletion of Ramp 4 – and using its non-

deletion as an excuse for not granting toll increases was unjustifiable.

- 12.25 The economic evidence, to be discussed later, shows that the lengthy failure to increase the tolls after MoA2 had a correlation to depressed toll revenues.
- 12.26 The forced toll reduction on 15 December 2004 – announced at the Toll Plaza by the Prime Minister – the occasion which Mr. Trapp described as the “*Opera*” – certainly demonstrated in a dramatic way the longstanding non-fulfillment of the Claimant’s legitimate expectation of a proper toll regime as a means of rewarding its investment. In particular, the consequential formal reduction of the tolls as distinct from the failure to increase them can be seen as a triggering factor for a dispute. This can be seen as an addition to the composite acts which had started before but which continued after the entry into force of the BIT.
- 12.27 The Claimant was entitled to see the incident on the Toll Plaza, more particularly, the Respondent’s consequential and prompt changes to the toll structures – as being the convergence of the various acts of non-feasance by the Respondent over a long period. In particular, instead of increasing the tolls as MoA2 had expected eight years before, there was a reduction of the tolls.
- 12.28 The Claimant was impotent to stop the immediate reduction, despite the concern of Messrs Trapp & Kramer about the move being contrary to DMT’s agreement with its financiers. Messrs Trapp and Kramer did all they could to prevent DMT approving the Ministry of Transport’s request to this effect. They were in a minority in DMT and, as such, had no ready effective remedy under Thai company law. They also had concerns about an Act passed in 1992 called

The Private Participation Act BE 2535. This Act was passed after the Hopewell incident.

- 12.29 Possibly the action by the majority of directors of DMT to go along with the Minister's request for a toll reduction might have been susceptible to court action for relief of minority oppression. The basis for action could have included the inexplicable nature of the Board resolution in the context of years of requests by the Board for toll increases and the possible infringement of both DMT's obligations to the lenders and under the 1992 Act. However, the Tribunal cannot possibly embark on a consideration of how successful such an application could be. The point is relevant, however, when considering the legal framework in which the Claimant operated.
- 12.30 However, whatever contractual or company law remedies DMT or the Claimant may have had are irrelevant in the present case which is strictly one based on the international law rights granted to the Claimant as an "investor" by the 2002 Treaty.
- 12.31 It is true, as was stated in the learned commentary noted in paragraph 11.12, that legitimate expectations cannot be used to override actual arrangements made between the parties. However, given the circumstances of this case where the Respondent has a long history of not performing its obligation under the Concession Agreement, it would be unfair for the Respondent to escape liability by simply availing itself to the protection of domestic law by invoking majority rule in the company, i.e. that the Claimant must be bound by DMT's decision to consent to the toll reduction. This is not to say that normally the parties' rights and obligations under domestic law should not be respected. However, in this particular case, the Respondent (through its representatives on the board of DMT) appears to have

objectives other than its corporate interest in mind when voting to have the toll reduced. The Claimant, as a minority shareholder, would had to have been satisfied with its remedies under domestic company law. There is nothing inherent in its minority shareholding in DMT to justify the exclusion of its international law rights – created in 2004.

- 12.32 The Tribunal has found that the Claimant has status under the Treaty as an “investor”. The definition of “investment” includes shares in a special purpose infrastructure company such as DMT in which the Claimant had a minority shareholding – and was thus able to be outvoted by the majority shareholders. Such an arrangement is not unusual as an investment vehicle in BIT situations. The Tribunal considers that the Claimant should not fail just because of the type of vehicle used to house its investment which became protected by the 2002 Treaty.
- 12.33 MoA3 (although concluded after the Claimant’s exit from DMT) contains the acknowledgment of the Respondent that the problems with both tolls and deletion of Ramp 4 were claims of DMT settled by that Agreement.
- 12.34 The Tribunal considers that the Claimant is not bound by MoA3 for the simple reason that, by the time MoA3 was signed, it was not a shareholder of DMT and, therefore, not an “investor” under the 2002 Treaty. The Claimant was entitled to sell its shares and have its entitlement to compensation solidified as at the date of sale. The relevance of MoA3 to the Tribunal’s decision lies in the Respondent’s acknowledgments on the face of the document.
- 12.35 Another pointer to the commencement of the 2002 Treaty being a defining moment of the Claimant’s claim as based

on the Respondent's failure to implement toll increases, is found in the August 2006 agreement of the Ministers of Finance and Transport to purchase all foreign shares in DMT. A German Cabinet Minister had been assured by the Prime Minister and his Finance Minister 15 December 2004 (after the Toll Plaza incident) that the Walter Bau problems had been "solved". Although valuations had been obtained in 2004, nothing came from this proposal to purchase shares and there was no solution of the Claimant's problems.

- 12.36 In the Tribunal's view, the continued refusal of the Respondent to implement toll increases under MoA2 for eight years – from the date of signing MoA2 until the Toll Plaza event in December 2004 – are "*omissions*" which come within the *Société Générale* formulation. The failure to increase tolls was the culmination of a series of wrongful acts of the Respondent which converged when the Respondent decreased the tolls.
- 12.37 Looking at the cited *Société Générale* formulation as a guide and reference point, the refusal to increase tolls originated long before the crucial date in October 2004; but it continued in existence after that date, thus amounting to a breach of a Treaty obligation in force at the time when it occurred. Even although *Société Générale* concerned a claim of expropriation, the same reasoning must apply to breaches of the FET requirement.

Airport Closure

- 12.38 The short period during which the airport was totally closed between September 2006 and March 2007 could also lead to a claim for damages on the basis of non-fulfilment of legitimate expectation. Total shut-down of Don Muang Airport was well beyond a "change of use" of the airport.

The subsequent reopening can be considered encompassed by the expression “change of use” of the airport.

VRR Traffic Management

12.39 In the period 1997-2006, the Respondent increased the capacity and service level of the VRR and other toll-free roads, including detours and building another permanent road on the former Hopewell land. These actions cause a loss of toll revenue and could not be considered simply “*management of traffic*” which was included in the waiver on MoA2.

12.40 The term “*traffic management*” cannot embrace the creation of a new structure on the VRR. The Tribunal prefers the evidence of Mr. Bates as to the normal understanding of this expression in traffic engineering circles. Appendix F of the Concession Agreement referred to traffic management of the Tollway as covering closed-circuit TV systems, patrolling of highway, emergency telephone, emergency towaway trucks in order to achieve “*smooth uninterrupted traffic flow*”. Moreover, in the list of claims waived in MoA3, there is a reference to the constructing of competing roads.

12.41 At para 4.3 of MoA2 there is a description of traffic management issues which concentrates on supervising traffic on the VRR.⁵²

⁵² **4.3 Traffic Management During the Execution of Construction**

The Concessionaire shall set up a special work unit, the duties of which shall be to plan, establish measures, supervise, oversee and follow up the operation in the area of the convenience and safety of traffic on Viphavadi-Rangsit Road as well as to coordinate with various agencies, conduct public relation activities and resolve urgent and immediate problems and obstructions that may arise, for which all costs and expenses shall be borne by the Concessionaire.

During the construction, the Concessionaire shall, with DOH’s prior approval, make the traffic lanes available or manage the traffic surfaces such that maximum benefits are

12.42 During the negotiations for MoA2, DMT had objected to the words “traffic diversion” which were changed to the less all-encompassing term “*traffic management*” in MoA2’s final version.

Decision

12.43 The Respondent’s argument that “*creeping expropriation*” only, and not breaches of FET, can be defined by a series of acts is not correct. The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations.

12.44 Accordingly, the Tribunal considers there was a breach of FET obligations by the Respondent by reason of the following:

- (a) The lengthy refusal to raise tolls as required by MoA2;
- (b) Those changes to the roading network which went well beyond what can be considered as “*traffic management*”;
- (c) The short-term total closure of Don Muang Airport.

obtained within the existing right-of-way and shall comply with the relevant resolutions of the Commission for the Management of Road Traffic (CMRT).

Any problems or obstacles with the management or operation concerning the management of traffic under the first paragraph and the second paragraph hereof arising from the flaw of the Concessionaire itself shall not be considered as cause for the extension of the construction period under Clause 9.1 of this Agreement.

13. DAMAGES - GENERAL

13.1 Thus far, the Tribunal has concluded that:

- (a) There is no retrospective application of the 2002 Treaty between the Kingdom of Thailand and the Federal Republic of Germany to claim for damages suffered before 20 October 2004, the date of entry into force of that Treaty.
- (b) Any claim which may exist for the period previous to 20 October 2004 would have to be initiated under the provisions of the 1961 Treaty between those two countries, whereby each Contracting Party (not investors) is entitled to request arbitration of such claim until 2014.
- (c) The Concession Agreement of 21 August 1989 remains in effect, subject to the various subsequent amendments which have been made to it over the years.
- (d) Through its active participation in the negotiation of MoA2, Claimant waived any right to claim for damages resulting from any prior breaches under the 1961 Treaty.
- (e) There was no direct or creeping expropriation of Claimant's rights under the 2002 Treaty.
- (f) While the Claimant is not entitled to compensation under the 2002 Treaty for breaches occurring between 29 November 1996 (the signature date of MoA2) and 20 October 2004 (the date of entry into force of the 2002 Treaty), the actions or omissions of Respondent during that period can be taken into consideration if they have had a continuing impact

after 2004 and they were not remedied. Those damages however could only start to run from 20 October 2004 onwards.

13.2 As noted in Section 12, the Tribunal considers that:

- (a) the Respondent's refusal to allow an increase in tolls on the bases mandated by MoA2,
- (b) the reduction of tolls in December 2004,
- (c) the continued improvements to the VRR even after 2004 which went well beyond the "traffic management" exception contained in MoA2, and
- (d) the total shut-down of the Don Muang Airport between September 2006 and March 2007,

were clearly "*continuing/ composite wrongful acts*" of the Respondent which constituted breaches of the FET required under the 2002 Treaty. The first of the above events had effect the moment the 2002 Treaty came into force, on 20 October 2004, and damages should start to be calculated from that date.

13.3 It remains for the Tribunal to evaluate the damages owing to Claimant for such breaches.

13.4 The Parties have provided the Tribunal with very exhaustive expert reports on the issues of traffic and damages valuation. To their credit, the Parties have asked their experts to address in detail every distinct period covered by the Concession Agreement and the Tribunal is grateful for their professionalism and their thoroughness. However, in light of the conclusion reached by the Tribunal, much of the expert analysis has become superfluous.

- 13.5 The parties spent considerable time and effort reviewing traffic forecasts made over the years and which were used as important elements in the negotiations of the various agreements between the Respondent and DMT which took place between 1990 and 2007. In particular, the Tribunal received reports from two traffic experts: Mr. Philip Bates for the Claimant and Mr. James Bamford for the Respondent.
- 13.6 The main issue in those reports was to determine whether the forecasts previously made and the assumptions behind them were robust and reasonable. The experts also examined the impact on traffic of special events such as the late turning of the flyovers, the Asian economic crisis of 1997, the U-turns at Laksi and Bangkhen and the change of use of the Don Muang airport.
- 13.7 The experts arrived at widely divergent conclusions on the reasonableness and robustness of the various earlier forecasts. While such *ex post facto* analyses may be of interest to see whether earlier forecasts proved in reality to be accurate for particular periods, they are of little utility to determine what were the Parties' legitimate expectations at the time they entered into MoA2.
- 13.8 The Tribunal however need not go into a detailed analysis of the different assumptions adopted and conclusions reached by these two traffic experts, whether it has to do with the maximum capacity of the Original Tollway and its Northern Extension, the level of the toll price elasticity (and whether it should be "constant" or "straight line") or the impact of particular events on the revenues of DMT.
- 13.9 In the light of the conclusions of the Tribunal on liability, the reports prepared by Dorsch and Bramley between 1989 and 1993 are irrelevant for the Tribunal's purpose as are the

other projections prepared subsequently to 1996. The same applies to the specific impact of subsequent special events.

13.10 What is relevant for the purpose of the Tribunal is the legitimate expectations of the Claimant at the time of the signing of MoA2 in 1996. Those legitimate expectations are found in the DMT Report of 1 June 1996 produced at the request of DoH⁵³. Those projections, including those for the Northern Section, were not challenged by IFCT in its 2 July 1996 Report prepared at the request of the Respondent nor by the Respondent itself at any time during that period. The Tribunal has no reason to conclude that those projections were not robust and reasonable at the time they were made.

13.11 As mentioned in Appendix A of MoA2 (Art. 6):

“The maximum traffic volume forecasted by DMT is 210,000 vpd in the year 2014. It was the original projection on toll rate of Baht 30 in the year 1998. Therefore, when the toll rate is adjusted earlier to Bath 40 in July 1998, new projection will have to be done which is being carried out by DMT”.

13.12 The figure of 210,000 (which was in effect 209,071 in DMT’s projections but which appears to have been rounded up by IFCT to 210,000) refers to the maximum capacity on the original Tollway. Such forecast was used by both sides in agreeing to MoA2. As to the new projection which was to be made, the Tribunal has not been made aware that it effectively took place. In any event, since damages start to be calculated only from October 2004, such new projection would have had little, if any, effect upon the calculation of damages in this case and can therefore be ignored.

⁵³ DMT’s traffic projections – at least those relating to the Southern Section – are reproduced in appendix A of MoA2.

13.13 The Tribunal will therefore use the traffic projections contained in the DMT Report of 1996 for the calculation of estimated revenues and operating costs of DMT up to 2021.

14. DAMAGES - ASSESSMENT

14.1 The Tribunal's task is now to determine the damages suffered by Claimant from the entry into force of the 2002 Treaty. After a short review of the opinions of the valuation experts, the Tribunal will provide its own conclusions on the subject.

14.2 Mr. Boulton, the expert for Claimant and Mr. Kaczmarek, the one for Respondent, have given priority to two different methodologies for the valuation of damages suffered and have arrived at wildly divergent totals, depending on the assumptions they have adopted (as high as 118.3 million Euros in one case and as low as minus 3.1 million Euros in another case, with a wide variety of figures in between). On 6 October 2008, they submitted to the Tribunal a Joint Statement of Matters Agreed and Disagreed which covered some 37 pages of text.

14.3 The Tribunal does not intend to go through a detailed examination of the respective views of the experts but it owes it to them and to the Parties to indicate why it has decided to choose a somewhat different path than the one suggested by each of them.

14.4 Mr. Boulton favours an Internal Rate of Return on Equity ("**IRRE**") Approach (lost returns), while Mr. Kaczmarek favours an Amount Invested Approach (return of sums invested plus pre-award interest). In their Joint

Statement⁵⁴, the experts describe their respective methods as follows:

- (i) Mr. Boulton's IRRE Approach (lost returns): under this approach, Mr. Boulton calculates what would have been the value of Claimant's historical capital contributions in DMT as of September 2007 on the basis that Claimant would have earned the expected IRRE of the DMT project from the date when the relevant projections were made to the date of valuing the claim (e.g., 15.86% from 1989 or 8.45% from 1996). It is therefore, in essence, a calculation of lost returns, on the basis that Claimant would have earned the expected IRRE on its investment but for the acts and omissions of Respondent.
- (ii) Mr. Kaczmarek's Amounts Invested Approach (return of sums invested plus pre-award interest): this approach is mathematically similar to Mr. Boulton's IRRE Approach. The main difference is that it applies a range of what Mr. Kaczmarek calls "reasonable (non-speculative), observable rate[s] of return to the date of award" (BK1: 57) to the actual sums of money invested between the period when the capital contributions were made and December 2007, instead of the expected IRRE of the DMT project. It is therefore, in essence, a calculation which aims to return the actual sums of money invested by Claimant plus pre-award interest.

14.5 Based on the computations submitted, the Tribunal has come to the conclusion that, although they give different names to their approaches, Mr. Boulton and Mr. Kaczmarek apply two different variants of the same approach. This approach consists of compounding the Claimant's capital contributions to DMT up to the chosen valuation date. The difference between the two variants is the compounding rate retained: a "riskless" or very low risk interest rate in Mr. Kaczmarek's case, the IRRE in Mr. Boulton's case.

14.6 As to Mr. Boulton's IRRE Approach, the Tribunal notes, first of all, that it has not enjoyed the favour of financial management textbooks or arbitral tribunals, concerned with

⁵⁴ Joint Statement of Matters Agreed and Disagreed by Damages Experts, 6 October 2008, pp 2 - 3.

the valuation of damages. It is generally not considered a “clean” economic metric. Mr. Kaczmarek points this out in the Joint Statement of the experts when he says: “*the IRRE is criticized in financial literature for its susceptibility to distort returns because of its built-in reinvestment assumption*”⁵⁵.

14.7 The formula used to compute the IRRE (or any internal rate of return or IRR) automatically assumes that intermediate cash flows are reinvested on the market, but not at a market rate; they are assumed to be reinvested at the IRRE itself. Because the formula used to compute the IRRE is circular, it can only be solved through iterations. There is no way to separate the investment’s profitability itself from the reinvestment gains. However, it is well known that the IRRE overstates the true profitability of good projects, as well as the accompanying reinvestment rates, and understates the true profitability of so-so projects and their reinvestment rates. It is considered more appropriate to assume that reinvestments take place at the market rate of return required on investments of identical risk. In other words, the appropriate rate of return for compounding purposes is the cost of equity (opportunity cost) of similar risk projects/companies.

14.8 It is worth pointing out that the reason for rejecting the IRRE approach is not one of those mentioned by Mr. Kaczmarek. The latter argued that the IRRE is inappropriate as a rate of return for compounding purposes because, at the time of computation, it was an “expected” rate of return, not an assured one; at the time of computation, the expected cash flows were not certain to materialise. Mr. Kaczmarek is of the opinion that using the IRRE implicit in the cash flows forecast (either in 1989 or in 1996) to assess

⁵⁵ Joint Statement of Matters Agreed and Disagreed by Damages Experts, 6 October 2008, p 20.

damages at a later date is tantamount to assuming that these cash flows would have materialised with perfect certainty. This is not the case.

- 14.9 It is true that, at the time of the original investment, there was no certainty that the realised return would be equal to the expected return: Traffic on the Tollway might turn out lower/higher than forecast (even in the absence of Government interference): unplanned but necessary maintenance might have to be performed, etc. However, the realised return might conceivably have turned out higher than forecast, not just lower than forecast. In that sense, the expected return is the average of what might have happened and there is no obvious reason to assume that realised return would have systematically been lower (barring any unplanned Government interference). Mr. Kaczmarek's assertion that a much lower rate, such as a "riskless" interest rate, is of necessity the appropriate rate to be used in compounding is thus unjustified; it is just an ultra-conservative approach. The appropriate reinvestment rate is the cost of equity, not a low rate of interest nor the IRRE.
- 14.10 The valid reason for rejecting the IRRE is that it overshoots or undershoots true expected return, depending on the circumstances at hand, and almost never equals the true expected rate of return.
- 14.11 Secondly, the temporal path of values implicit in the IRRE approach is wrong, so that the compounded investment value computed on any one date (such as 20 October 2004) will equal its fair value only by accident. The approach, such as applied by Mr. Boulton in his numerous appendices, consists in considering all the positive and negative cash flows between 1989 and 2021 (under a number of different scenarios), deducing the average implied rate of return (the

IRRE) and then assuming that the original investment would have started growing in value regularly at that rate right from 1989.

14.12 This is unrealistic and highly artificial. It is well known that value evolves as a function, not of time *per se*, but of cash flows remaining to be realised in the future. It does not evolve linearly through time. Value at any one time is a forward-looking concept and does not depend on how many (past) periods have elapsed; it depends on what remains ahead. By comparison, the compounding-at-IRRE approach makes value at any one time a function, among other things, of the number of elapsed (past) periods. The only method which can accurately track value through time is the Discounted Cash Flow (DCF) method.

14.13 As to Mr. Kaczmarek's Amounts Invested Approach, both experts agreed in their Joint Statement that "*it is more common to use an Amounts Invested Approach where the Tribunal considers that Claimant's calculation of lost profits is highly uncertain or speculative*"⁵⁶. The Tribunal does not believe that the project considered in this case falls into that category. What there is in this case is a project which, by 1996, had, for all practical purposes, become a Public Private Partnership ("PPP") in a quasi-public utility, with regulated tariffs aiming to achieve the purposes mentioned in the Concession Agreement both for Respondent and the Concessionaire. The six awards referred to by Mr. Kaczmarek⁵⁷ as having used the Amounts Invested Approach bear little resemblance with the present case. In all those cases, the projects had either never got off the ground or had been in operation for a short period and remained of a very speculative nature.

⁵⁶ Joint Statement of Matters Agreed and Disagreed by Damages Experts, 6 October 2008, para 2.5.

⁵⁷ Kaczmarek Report of 2 May 2008, p 14.

14.14 Thus, in *Metalclad v United Mexican States*⁵⁸, the Tribunal ruled that "discounted cash flow analysis in the present case because the landfill was never operative and any award based on future profits would be wholly speculative"⁵⁹.

14.15 In *PSEG Global, Inc. et al v Republic of Turkey*⁶⁰, the Tribunal states that "(i)t is an accepted fact of the case that, except for groundbreaking ceremony, there was no mining undertaken or construction started, not even in terms of the necessary preparations to that effect"⁶¹. Later on, it adds: "(r)elying on cash flow tables that were part of proposals that did not materialize does not offer solid basis for calculating future profits either. The future profits would then be wholly speculative and uncertain."⁶²

14.16 In *Tecmed S.A. v United Mexican States*⁶³, was a case in which the claimant argued that its landfill site had illegally been expropriated. The Tribunal states:

"(t)he non-relevance of the brief history of operation of the Landfill by Cytar – a little more than two years – and the difficulties in obtaining objective data allowing application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made – building of seven additional cells – in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant".

14.17 *MTD Equity Sdn. Bhd. & Mtd Chile S.A.*⁶⁴ dealt with a dispute concerning a real estate development project which

⁵⁸ *Metalclad*, above n 39.

⁵⁹ *Metalclad*, above n 39, also at ICSID Review-Foreign Investment Law Journal, page 32 para 121.

⁶⁰ *PSEG Gobal, Inc et al v Republic of Turkey* ICSID Case No. ARB/02/5, Award of 19 January 2007.

⁶¹ *Ibid*, at para 304.

⁶² *Ibid*, at para 313.

⁶³ *Tecmed*, above n 21.

⁶⁴ *MTD Equity Sdn. Bhd. & Mtd Chile S.A. v Republic of Chile* ICSID Case No. ARB/01/7, 21 May 2004.

never got off the ground and where the only transaction was the purchase of land by the claimants.

14.18 In *Siemens AG v Argentine Republic*⁶⁵, the dispute arose in connection with a contract for the provision of an integral service for the provision of identity cards, a contract which Siemens had won through a public bidding process. The contract had a 6-year term and was automatically renewable for two 3-year terms, unless a notice to the contrary was served. Siemens was to receive compensation only during the operational stage of the programme. The programme started to operate partially on 1 February 2000 and was halted by the Government the next day. In spite of months of negotiations, no agreement could be reached on the continuation of the programme and the contract was terminated by Government decree, on 18 May 2001.

14.19 In *Wena Hotel Limited v Arab Republic of Egypt*⁶⁶, the dispute related to 1989-1990 long-term agreements (21 ½ years and 25 years) to lease and develop two hotels located in Luxor and Cairo which were subsequently seized in 1991 by a government agency. The Tribunal ruled that those actions constituted breaches of the 1975 BIT between the U.K. and Egypt and awarded damages to the claimant. However, it said that it was “not persuaded that the DCF method (was) appropriate in this case”. The Tribunal noted in particular that Claimant had operated the Luxor Hotel for less than 18 months, and had not even completed its renovations on the Nile Hotel, before they were seized on 1 April 1991⁶⁷. It concluded that an award based on the DCF method, “would be too speculative”⁶⁸. The tribunal referred

⁶⁵ *Siemens AG v Argentine Republic* ICSID Case No. ARB/02/08, 6 February 2007.

⁶⁶ *Wena Hotel Limited v Arab Republic of Egypt* ICSID Case No. ARB/98/4, 8 December 2000.

⁶⁷ *Ibid*, para 124.

⁶⁸ *Ibid*, para 123.

to both the *Metalclad* case⁶⁹ and to the *SPP (Middle East) v Egypt ICC*⁷⁰ case which “declined to accept a discounted cash flow projection because, inter alia, “by the date of cancellation the great majority of the work had still to be done [...]”⁷¹.

14.20 In the Respondent’s Submission on the Law, (15 September 2008, paras. 258 et seq.), Respondent argued that compensation should not cover claims with inherently speculative elements and cited a number of arbitral awards and authors in support of this statement.

14.21 The Tribunal does not dispute that conclusion but it is however convinced that the present claim is based on far more than “inherently speculative elements”. The Concession Agreement, MoA2 and MoA3 were all preceded by elaborate and sophisticated studies prepared by independent experts at the request of one or other Party or by lenders and these studies were clearly used by those parties as the bases for the determination of the terms of those various agreements. In the Tribunal’s view, it is quite appropriate to use the DCF method to calculate damages owing to Claimant in the present case. DMT meets all the conditions to qualify as investment to which that methodology can be applied. While it is true that it has not achieved its expected financial returns (mainly because of admitted faults on the part of the Respondent), the company is still in existence today. It has remained since 1989 the Concessionaire in charge of the Don Muang Tollway and its subsequent Northern Extension and, under MoA3, that concession has been extended until 2034.

⁶⁹ *Metalclad*, above n 39.

⁷⁰ *SPP (Middle East) v Egypt ICC Award*, Case No. 3493, 11 March 1983, 22 ILM 752 (1983).

⁷¹ *Wena Hotel*, above n 66, para 123.

DCF approach is the best approach

- 14.22 If value and damages must be computed on the basis of what was legitimately expected at any given time, then the DCF method is the most reasonable one to apply. At any given time, the investor might have expected to hold the present value ("**PV**") of remaining cash flows (the price received if it were to sell its interest), plus the compounded value (at the cost of equity) of dividends already received.
- 14.23 It is worth noting that Mr. Boulton himself wrote in his November 2007 report that "*From a theoretical standpoint, DCF is a superior method*"⁷². And also: "*The DCF method's assumption about reinvestment rates is more realistic and relevant because it incorporates the market-determined opportunity cost of capital as a discount rate*"⁷³. Finally: "*The DCF method has certain advantages in that it better takes account of the absolute amount and the timing of cash flows*"⁷⁴.
- 14.24 Equally, Mr. Kaczmarek recognises that the DCF methodology is a valid one to be retained in valuations associated with projects with a track-record of performance. He writes: "*The DCF approach is one of the most common approaches used to value a business. It stems directly from the fundamental financial principle that the enterprise value of a business is equal to the sum of all future cash-flows produced by the business discounted to present value at an appropriate rate reflecting the risks of that business*"⁷⁵. He goes on to extend the approach to the valuation of shares.

⁷² Boulton Report of 28 November 2007, p 18.

⁷³ Boulton Report of 28 November 2007, p 19.

⁷⁴ Boulton Report of 28 November 2007, p 26.

⁷⁵ Kaczmarek Report of 2 May 2008, p 24.

- 14.25 In any event, it is interesting that each expert presented, as an alternative methodology, his own DCF Approach.
- 14.26 As pointed out by the experts and the Parties, none of the methodologies used provides an absolute assurance that the results obtained correspond exactly to the actual damages suffered. But, in the present instance, the Tribunal is convinced that the application of the traditional DCF Approach is the one which leads to results corresponding most closely to what the Parties effectively expected to occur for the duration of the concession. And the circumstances of this case fit very well with the large number of awards where Tribunals have opted for the application of the DCF methodology.
- 14.27 As demonstrated above by the Tribunal, the Claimant had, at the time of the signing of MoA2, legitimate expectations flowing from that Agreement which, through its actions and omissions, the Respondent did not honour. Such actions and omissions led to breaches of MoA2 and the Concession Agreement from 20 October 2004 onwards.
- 14.28 The Tribunal is of the view that the best way to assess damages is to:
- (a) Estimate what would have been the fair value of the Claimant's shares on 3 December 2006 (the date of the sale of those shares) had the Respondent fulfilled its obligations under MoA2; said value, computed in THB, should be converted into Euros at the exchange rate in effect on that day. We will refer to it as the "**But-for value**".
 - (b) Subtract the proceeds of sale of the Claimant's shares on 3 December 2006.

- (c) Add the dividends, if any, which would have been received in 2005 and 2006 had MoA2 been applied; said dividends must be compounded to 3 December 2006 and then converted into Euros.

Cash flows to be considered in the DCF approach to But-for value

- 14.29 Both the return of investment and the return on investment to DMT were to take place through the payment of a string of dividends. Therefore, it is But-for dividends, between 20 October 2004 and 2 July 2021, which must be discounted to compute the value of DMT (and Walter Bau's share in it) on 3 December 2006 (the date of the Claimant's sale of its shares). MoA2 (Art. 11) extended the Concession by 25 years from its signature which took place on 2 July 1996.

- 14.30 These But-for dividends should be based on the forecasts of revenues and costs made at the time of signing of MoA2 (or close to that time). These forecasts, on the one hand, were based on the real situation at the time, that is they took into account the effect of past Government actions (or omissions). On the other hand, the future was "seen through MoA2", with the assumption that it would be applied. Two sets of such forecasts were prepared in connection with MoA2: one prepared by DMT, another one prepared by IFCT for the Respondent. DMT's projections are more optimistic than IFCT's projections. The Tribunal has however found that the reason for the lower projections by IFCT resulted from the fact that it did not include the forecast traffic on the Northern Extension. This does not appear to the Tribunal as a reasonable assumption and it concludes that DMT's projections should be retained as the common denominator.

- 14.31 Mr. Boulton's November 2007 Report shows in Appendix A-7 the expected But-for dividends under DMT's projections. Unfortunately, the financing assumed is the "soft loan" mentioned in MoA2, which both the Respondent and DMT were aware, at the time of signing the MoA2, would not be available at the proposed rates and would have to be renegotiated. The Tribunal has reworked this scenario with the financing costs (interests and capital repayments) associated with the 1997 Financing Package rather than the financing costs associated with the soft loan. These costs are larger and will thus reduce But-for dividends as long as the 1997 actual loan is outstanding.
- 14.32 The projections included in Appendix A-7 are based on DMT's 1996 projections and also assume that the Don Muang Airport would be operating at 50 per cent of capacity starting in 2003, because of the planned construction of a new airport which would draw traffic away. That is a fair assumption, no matter what happened subsequently, including delays in the opening of the new airport and the complete closure of Don Muang Airport from September 2006 to March 2007. In point of fact, it was known, at the time of signing of MoA2, that a new airport was planned and would draw traffic away from Don Muang Airport.
- 14.33 Much time has been spent by the experts and the Parties on the impact of the 1997 Asian economic crisis. The Tribunal is of the view that this should not be factored into the DCF valuation to be performed, any more than the subsequent events relating to the delayed opening of the new airport or the temporary closure of the Don Muang Airport. As argued by the Respondent, the 1996 projections did not constitute guarantees; this is obvious,

otherwise they would not be expectations but firm obligations under the Concession Agreement; but they did constitute legitimate expectations which the Claimant could expect to be materialised by the Respondent, in good faith, through the application of Clause 25 and Appendix B of the Concession Agreement. Those projections extending until 2021 could not be – and certainly were not – seen by the Parties as a representation of year by year reality but as reasonable financial results which could be attained over some 25 years.

The discount rate to be used in the estimation of the December 2006 But-for value

- 14.34 The Parties' respective experts disagreed on the discount rate to be applied in the DCF approach.⁷⁶ The Claimant's expert favours the WACC "*which recognizes the Claimant's own sources of funding rather than those specific to DMT*". The Respondent's expert argues that "*The correct rate to discount dividends (returns to equity holders) is DMT's cost of equity and not the WACC of Claimant (the dividend receiver)*".
- 14.35 The Tribunal has come to the conclusion that the solution proposed by the Respondent's expert should be followed. Because dividends are the cash flows to be discounted, the rate appropriate for their discounting is the cost of equity ("**COE**"), not the WACC. The COE is the relevant rate for equity holders, whereas the WACC blends equity holders and lenders requirements (it would apply to cash flows going to both equity holders and lenders, whereas the COE applies to cash flows going to equity holders only).

⁷⁶ Joint Statement of Matters Agreed and Disagreed by Damages Experts, 6 October 2008, p 25.

- 14.36 In addition, the COE must be DMT's COE, not the Claimant's COE. The COE is a function of the business risk and leverage risk of the cash flows being discounted; these levered cash flows are DMT's levered cash flows, not the Claimant's. As pointed out by the Respondent's expert (ibid), "*a dividend stream to be paid by a company [cannot] have different values depending upon who actually holds or owns the shares of the company*".
- 14.37 DMT's But-for cost of equity in December 2006 must be estimated under the assumption that MoA2 was, and would be, implemented (any doubt about the Government's willingness to implement MoA2 would render the business riskier and would justify a higher discount rate).
- 14.38 DMT's COE in 2006 should not be very different from what it was in 2004; on the one hand, long term Thai Government bond rates increased slightly from 4.86% to 5.12%⁷⁷ but on the other hand DMT's debt ratio and financial risk should have decreased had MoA2 been respected (the 1997 Financing package had set regular principal repayments starting in 1998).
- 14.39 Some estimates of DMT's 2004 COE are available, namely:
- (a) The Turnaround company set DMT's COE at 12%⁷⁸;
 - (b) Intel Vision Securities' WACC estimates implied a "current COE" of 26.5% for 2004 and a 13.14% COE "throughout the remainder of the concession". The computations are not exactly clear and detailed, but the 2004 refinancing and debt reduction detailed in

⁷⁷ See Mr Kaczmarek's 2 May 2008 Report, p 1279 of the Experts Bundle.
⁷⁸ December 2004 Report, p 21.

Intel's Table 6⁷⁹ might be playing a part in the second estimate. The "current estimate" of 26.5% is affected by a high debt to equity ratio in 2004. Although Intel does not explain how this debt ratio was arrived at, it can be surmised that it reflects accounting values; its being high must in large part be due to MoA2 not having been implemented and having depressed accounting equity. Therefore, the estimate cannot be used in a But-for scenario (according to which MoA2 would have been in force). The 13.14% rate, however, may be considered.

(c) Mr. Kaczmarek recommends a 12% COE without offering specific computations.⁸⁰

14.40 A COE of 11-12% might be an appropriate estimate in a But-for scenario under which the Respondent was expected to go along with MoA2's provisions. This is so not only because the Respondent's expert as well as the Turnaround Company were comfortable with 12%, but also because of the following reasonableness check: With the general decrease in rates between June 1997 and December 2006, the Thailand 10-year Government Bond yield had fallen to 5.25% by mid-December 2006. It is usually agreed that a 5% to 6% premium is the premium applicable to the average risk on the market. Assuming that DMT was of average risk, then its normal cost of equity should have been approximately equal to 5.25% + 5.5% (Government long bond rate plus average risk premium), that is equal to 10.75%, closer to 11% than to 12%.

14.41 However, the Tribunal also notes that the 1997 Financing package poses practical computational challenges the solution of which must have an impact on the final selection

⁷⁹ Ibid, p 17.

⁸⁰ Kaczmarek Report of 2 May 2008, p 31.

of a discount rate. The June 1997 Financing Package included loans in THB, as well as a loan in US dollars, and some of these loans were at floating rates. The But-for scenario on which the experts relied to obtain the But-for value of DMT's shares in December 2006 is based on the exchange rate and interest rates that applied in 1997. In order to preserve consistency between these financial conditions and the discount rate, the Tribunal is of the opinion that the discount rate should be based on the Thailand 10-year Government Bond yield observed in June 1997 (10.13%) and a risk premium of 4% reflecting a somewhat lower-than-average risk. The reason for this slightly lower than average risk premium is two-fold: Since 1996, DMT had become a quasi-public utility with the Government as a major shareholder with considerable weight and the implementation of MoA2 should have left it with limited risk to face. The tribunal will therefore retain a discount rate equal to 14.13%.

14.42 As suggested by the experts at the time of the hearing, the Tribunal availed itself of their offer to perform certain additional calculations in accordance with eventual instructions by the Tribunal. The relevant instructions were issued by the Tribunal and calculations were made by the experts on the basis of an 11% and a 12% discount rate. With their joint report of 12 May 2009, the experts provided the Tribunal with the necessary instruments to make its own calculations, if a different discount rate were to be retained by the Tribunal.

14.43 The Tribunal has thereafter proceeded to establish the But-for value on the basis of a 14.13% discount rate and with the assumptions (Pro-rata 2004 dividend/Discounted sale proceeds) used by the experts under their third calculation at paragraph 1.15 of their joint report of 12 May 2009 as

well as with their other agreed assumptions in that same report.

14.44 The net damages due to Claimant by Respondent, after subtraction of the discounted value of Claimant's shares sold on 3 December 2006, amount to 29.21 million Euros.

15. COSTS

15.1 The Claimant tried to negotiate a settlement with the Respondent through diplomatic channels but had no success. It therefore had no option but to proceed with its claim. The Claimant did not prevail on a major portion of its claim because of the Tribunal's decision that it had no jurisdiction *ratione temporis*. The Claimant did, however, succeed on the jurisdictional argument. That argument involved a two-day defended hearing in Hong Kong. The Claimant has succeeded in obtaining an award of damages.

15.2 The Respondent's challenge to its own party-appointed arbitrator, Dr. Suvarn (made just before the jurisdictional hearing), involved additional costs which would not have been incurred had the challenge been made in a more timely way. The Respondent also failed to produce documents in some areas where production might have been expected, e.g. documents on the Hopewell project.

15.3 As noted by the Tribunal in its ruling on security for costs dated 31 October 2007, Articles 9(3)(5) of the 2002 Treaty apply *mutatis mutandis* to investor-state claims. Those clauses, in summary, say that each party is to meet its own costs subject to any ruling from the Tribunal. Articles 40(1) and (2) of the UNCITRAL Rules essentially leave the question of costs to the discretion of the Tribunal.

- 15.4 Limited assistance can be gained from a consideration of costs awards in other BIT arbitrations. All fact situations are different.
- 15.5 The Tribunal notes the difference between the amounts claimed for costs and expenses by either side. Whilst acknowledging that a claimant's costs are usually greater than a respondent's because a claimant has the carriage of the proceedings and bears the onus of proof, the Claimant's costs in this case are more than two-and-a-half times those of the Respondent. In the Tribunal's view, both parties' cases were presented with the utmost professionalism and competence.
- 15.6 In the exercise of its broad discretion as to costs, taking into account all the submissions of the parties and given the Claimant's partial success overall, the Tribunal considers it just and equitable to order that the Claimant pay half the Respondent's costs and that the Respondent pay half the Claimant's costs.
- 15.7 The total costs incurred by the Claimant, including its contributions to the Tribunal's fees and expenses and the hearing costs totals €5,606,443. A like total for the Respondent is €1,993,331. The total is €7,599,774. The Respondent's legal costs were €1,121,000 and the Claimant's legal costs were €3,374,596.
- 15.8 50% of €5,606,443 is €2,803,222. 50% of €1,993,331 is €996,667. The difference, therefore, which the Respondent must pay to the Claimant for costs is €1,806,560.

16. INTEREST

- 16.1 The Respondent shall pay the Claimant interest on the amount awarded at the 6 month successive Euribor rate

plus 2 per cent for each year, beginning on 3 December 2006 until the date of payment of the Award, compounded semi-annually.

16.2 The Respondent shall pay interest on the amount awarded for costs on the above basis beginning from the date of issue of this award.

17. FORMAL AWARD

17.1 The Tribunal therefore adjudges, orders and awards as follows:

- (a) The Respondent is to pay the sum of €29.21 million to the Claimant as damages for the Respondent's breaches of its obligations to the Claimant as an investor under the Bilateral Investment Treaty between the Federal Republic of Germany and the Kingdom of Thailand which came into force on 20 October 2004.
- (b) The Respondent is to pay to the Claimant interest on the amount awarded under paragraph (a) hereof on the basis set out in paragraph 16.1 of this Award.
- (c) The Respondent is to pay the Claimant the sum of €1,806,560 towards the Claimant's costs and expenses in this arbitration.
- (d) The Respondent is ordered to pay interest on the amount to the Claimant in the amount awarded under paragraph (c) hereof on the basis set out in paragraphs 16.1 and 16.2 of this Award from the date of issue of this Award.

Dated at Geneva, Switzerland, Seat of the Arbitration

this *1st* day of *JULY* 2009



Hon. Sir Ian Barker Q.C.
Chair



Hon. Marc Lalonde P.C., O.C., Q.C.



Mr. Jayavadh Bunnag