IN THE MATTER OB' AN ARBITRATION

UNDER THE 'DNOTRAL ARBITRATION RULES

BETWEEN:

WALTER BAU AICKENGESELLSCHAFT (in liquidation)

Claimant

-and-

THE KINGDOM OF THAILAND

Respondent

RESPONDENT'S MEMORIAL ON JURISDICTION AND REQUEST FOR BIFURCATION

2 October 2006

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I. The Kingdom of Thailand ("Thailand" or "Respondent") respectfully submils this Memorial on Jurisdiction and Request for Bifurcation, together with supporting documentation, in accordance with the Procedural Timetable and Article 21(1) of the UNCTTRAL Arbitration Rules (the "UNCTTRAL Rules").[1]

L miRODTJCTION

2. This arbitration involves the purchase of shares in a Thai company (die Don Milang Toilway Co. (iCDMT"j) by Dyckerhoff & Wldmann AG ("Dyckerhoff & Widmann"), the "*predecessor*" of Claimant, Walter Ban AG (in liquidation) ("Walter Rail"). Walter Ban is a construction company incorporated under the laws of Germany.

3. In 19S9, DMT and Thailand's Department of Highways fTJOH") entered into a Concession Agreement that granted DMT the right to build, operate and collect tolls from a tollway extending from central Bangkok to past the Don Muang Airport. To build the tollway, DMT engaged a construction consortium that included Dyckerhoff & Widmann.

4. Construction of the tollway took approximately five yearn, with operatioiEE commencing in 1994.

5. Claimants investment in DMT—its shareholding—is trivial (only 9.87%).[3] Its relationship with DMT has been richly rewarding nevertheless. Claimant and its predecessor have been paid handsomely by DMT – in fact, tens of millions of dollars (Respondent believes that the figure is over US$ 15G million) – for iheir design and construction services in connection with the tollway.

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t TJNdTRAL Arhrtaticui Rules (1976). Art. 27(1) CTfie *arbitral tribunal shaft have the penver to rule on objections that it furs no jurisdiction, jnchtdrog any objections wiih resped to the existence or validity of the arbitration danse or of the septsvle arbitration agreement.")* (liespondentΛ Legal Authority ("RA-") 1).

2 *See* DMT List of Shareholders duted 13 September 20Q5 (RespondEtirs Exhibit ("R-") 0.

6. In addition, through a series of other arrangements, tedndkg a ^*Financial Advisory Service Agreement*' EMD an "*Operation Advisory Service Agreement*," Claimant and its predecessor have apparently claimed arudfar received from DMT lens of thousands of dollars monthly.[3]

7. On *29* November *1996*, the Concession Agreement was amended by MoA2,* pursuant to which *{inter ahd)* DMT agreed to build extensions to the existing tollway. Dyckerhoff & Wtdmaim again provided design and construction services.[3]

S. MoA2 also extinguished all claims arising under the Concession Agreement before MoA2. In addition, DMT expressly waived the right to bring any claims related to the change in use of foe Don Mtiang Airport

9. On 24 June 2002, Thailand and Germany signed foe Agreement between foe Kingdom of Thailand and foe Federal Republic of Germany for foe Encouragement and Reciprocal Protection of Investments (the "D1T" or foe "Treaty"). The Treaty entered into force on 20 October 2004.[4]

10. Roughly one year later, after becoming insolvent, Claimant filed its Request for Arbitration against Respondent, alleging a dispute within the scope of Thailand/\ agreement Co arbitrate in Article 10 of the Treaty.[7]

i1. Respondent expressly denies Walter Ban's claims.

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2 **These arrangements are** set **out in the financial statements of DMT for The years ended 31 Mantfi 1990, note 3(3) {EM) and 13?I, note 6(3) {K,-3).**

* Tlu& Concession Agreement was first amended by MDAI dated 27 April 5005.

5 **Claimant is presently engaged in an arbitration against DMT for the payment of retained snd additional sums for these services.**

fi *See* ClflunanOs Request for Arbitration dated 21 September 2005 ("Request for Arbitration"), Tj 20; Agreement between foe Kingdom of Thailand and the Pedecal Republic of Germany fnr-the Encouragement and Reciprocal Protection Off Investments, done in Bangkok 24 June 2C02, entered into force 20 October 2004 (the "**BIT**[11] or foe 'Treaty'") (WBI, following Claimant's DVMI annotation of its exhibits).

7 The Request for Arbitration *was* filed on 21 September 2005.

12. Claimant complains that numerous ants and omissions by the Respondent during the life of the Concession, including (and in spits of the terms of MoA2) changes in the use of the Don Muang Airport and acts and omissions that occurred before MoA2, allegedly breached obligations owed to DMT (not CMmimt itself} under the Concession Agreement It further complains that as a result of these breaches, DMFs general economic health has deteriorated and there has been a decline in the anticipated return on the investment[8] Despite the fact that there are more than fifteen Years left in the Concession, Walter Ban speculates that the value of the investment has been *asubstantially and xrr&vsmibly impaired.*^

13. The Claimant is obviously aware that the mqjonly of the events about which it complains in the Request occurred well before ratification and entry into force of the Treaty. Nevertheless, there is no discussion in the Request of this aspect of the case; no explanation of how events taking place prior to the Treaty can be the subject of this arbitration. Without acknowledging the elephant in the room, Claimant halfheartedly asserts that the Respondent breached the Treaty's predecessor (the "1961 Treaty").[10] However, only the BIT has investor-recourse to arbitration against the state, and hence it is the only treaty relevant to this arbitration.

14. A more fundamental defect of the Request for Arbitration is the absence of any reference to the requirement – under both treaties – of Thai approval of the investment before it qualifies for treaty protection. hi feet, the Request is silent on this point

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8 *See* **Request for Arbitration, 112.**

9 *Idr'ft* **13 and 63[b)(m).**

10 **Treaty between the Federal Republic at Germany and the Kingdom ofThailand Condensing tie Promotion and Reciprocal Protection of Investments don& in Bangkok 13 December *1961* (the Wl961 Treaty^} (WB2).**

15. 'Oils requirement is hardly a secret Indeed, in a direct reference to this requirement, one German Government website confirms that the BIT "*protects only approved investments*" (*see* t 67).

16. Fatally, Walter Bairs investment has never been the subject of such an approval

17. So, in many respects, the Claimant's Request is more notable for what it does not say, rather than what it does. It does not explain how acts complained of prior to the Treaty can form toe subject of a claim. It does not address the absence of approval for die investment, a fundamental requirement under the Treaty. Nor does the Claimant provide any explanation (other than bold assertion) as to how the events complained *of*, which it largely characterizes as breaches of contractual obligations owed by Respondent to DMT (not Claimant), constitute breaches of the Treaty.

IS. The Tribunal will also note that much of the investment (in the broadest sense of the term) was, in fact, effectuated by Bydcerhoffi & Widmann, not Walter Bam Walter Ban is put to strict proof of its rights fa rely upon any investment of this different entity (which is simply described as a "*predecessor*" that "*subsequently merged into Waiter Bau*" in the Request for Arbitration).[11] This is not an idle debate. The Treaty prefects "*Investments by Investors*" and thus requires proof of entitlement by any third party (to the Investment when made) to establish its rights to protection in respect of that Investment. This includes ptroof of how and when Walter Bau acquired rights in respect of toe same.

19. The Claimant's Request suffers from a number of other failings, which arc set out in Section Id subsequent to discussion of the fundamental issues of absence of approval and

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11 Request for Arbitration ¶ 4.

u *See, e.g.*, Treaty, Artidea 2(3) and 4(2) fWBl).

lack of jurisdiction *ralione temporis*. As will be seen, this Tribunal has no jurisdiction over any of Claimant's claims (nor, hence, over any relevant counterclaims Respondent might wish to raise).

H. GENERAL PRINCIPLES APPLICABLE TO THE TRIBUNAL'S DETERMINATION OF JURISDICTION

A. CONSENT TO ARBITRATION AND APPLICABLE LAW

20. Article 10 of the BIT provides, in relevant part:

> *"(1) Disputes concerning investments between a Contracting Party and cm 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 (he date on which it has been raised by one of the parties to the dispute, it shall, at the request ofeither party to the dispute he submitted for arbitration... ."*[13]

21. The consent to arbitration expressed by Thailand in Article 10 of the BIT is conditioned on a claimant's satisfaction of the conditions set Jbrth in the Treaty. For example, the definition of *"investor"* in Article 1 of the BIT imposes nationality requirements that must be met in order for a claimant to qualify for Treaty protection. hi a similar jashion, only those investments that have been specifically approved by the Thai authorities are accorded treaty protection under Article 2(2) of the Treaty.

22. The BIT, being an international treaty, is an Instrument governed by international law, to be construed in accordance with the rules of interpretation applicable to treaties as embodied in Articles 31-33 of the Vienna Convention on the Law of Treaties ("Vienna Convention").[14]

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13 WBl,

14 Sre *Vienna Convention on the Law of Treaties*, done at Vienna (23 May 1969) UNTS Yfli 1*IS5*, 3313 Art. 2(iX&) ("*treaty*' /new# *an international agreement concluded hetecen States in written form and governed by irfternattonal law*.") (RA-2). *See also Emilio Agustln Maffestnt* ij. *Kingdom of Spain (Decision 07t Jurisdiction)* (25 Jammy 2000) ICSID Cast Λo. AR3/9?'7 % 27, reprinted in £001} 16 *ICSID Jtev.*-

23. Although Thailand is not a party to the Vienna Convention, the Yietina Convention's terms are applicable to the extent that it embodies general principles of international faw.[JS]

24. Thus, in order to assess whether Walter Ban has met the conditions specified in the Treaty such that Thailand may be bound to arbitrate to this case, the relevant provisions of the BIT must be interpreted according to ihc rules of interpretation applicable to treaties.

25. In this veto, the Tribunal must have regard to the will of the state parties to the BIT to impose certain restrictions on their protection of investors and investments. As the ICSID Tribunal *mAmco Asia* \ *Indonesia* stated:

> *"like any other conventions, a convention to arbitrate is not to be construed restrictiveiy, :orf as a matter of fad, broadly or Itherdly. It is to be construed tn a way which leads to find out and to respect the common will of the parties : such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of interned* **low** *and to international law."*[1*]

FILJ **212** *ifLfkff ail other provisions of the BIT and in the absence qf other specified applicable* **ratej** *of interpretation, Article X fcontaining provisions on Settlement of iTivestment (fispufesj must be interpreted in the* **mower** *prescribed hy Article 31 of the [Vienna Convention].*"} **(RA-3);** *Grand Hfv&r Enterprises Sir Nations, Ltd. et alr y. United States of America (Decision on Objections to Jurisdiction)* (20 July 2fl06) NAFTA/UNCTTRAL Arbitration /\ **34** *If NAFTA Is* **on** *international agreement, to be construed in accordance ^hh the ordinary rules of treaty construction os indicated in Articles 31 and 32 of the Vienna Convention* art *the Law of Treaties.^}* **(RA-4).**

15 *Bee Golder y United Kingdom* **(21 February 1975) ECHR Sftr. A, No. IS /\ 29 (even though the Vienna Convention was not then in force, relying ^ its rides gf interprctattoii as hey** *"erntneiape i& essence generally accepted principles qf international tdw**)* **(S-A-5);** *Case Concerning KasiBl1/Sedudt* Island {Botswana* **v.** *Ntuttibiti)* **1999 IC1 {Judgnient of 13 December 1999) reprinted in 39** *JIM* **310 (2000) /\ 13 (although neither Botswana nor ttaroibiai were pries to the Vienna Convention, the court noted that both considered it applicable** *ztInasmuch as it refects customary international tdw**)* **(RA-6); De Arechaga, "International** *h&vi* **to die Past Third of a Century" (t97S) 359** *Recited des COUPS* **I, 42 f fsgaf** *rsle# conccrning the interpretation of treaties constitute one of ihe Sections of the Vienna Convention which were adopted without a dissenting vote* **of** *Ihe Conference and consequently may be considered as declaratory &f existing Ian.**)* **(RA-7).**

)d *Aniea Asia Corporation y Indonesia (Award on Jurisdiction)* **(25 September 19S3) ICSID Cass 2to, ARB/B1/1 reprinted in (1934) 23** *1LM* **351, 359 (original emphasis) (RA-S).**

26. Tfre Tribunal may, of course also consider relevant decisions by other international arbitral tribunals and courts.

R PRESUMPTIONS AND BURDEN OF PROOF

27. According to Article 24(1} of the UNCITRAL Rules, "*[e]ach patty shall have the burden ofproving the facts relied on to support his claim or defence.*"[17]

28. It is a general principle of international law that a claimant must prove that the dements necessary to establish jurisdiction are present[34]

29. Notably, there is no presumption in favor of jurisdiction, particularly in a case in which a sovereign state is involved.[35] As the ICSID Tribuna! *mMihalyv. Sri Lanka* noted,

> "rite *question ofjurisdiction of an international instance involving consent of a sovereign State desemes a special attention at the outset of aizy proceeding agonist a State Forty to an international coiivention creating the jurisdiction!*"

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17 RA-d.

18 *See Khflberfy-Glark C&rp. v. Bank Markasi Iran (Award No. 45-57-2)* (25 May 1983) *2 Iran-US CTR* 334, *3 (dismissing claim bseauat *Claimant* to* *faikd Jo demonstrate thd we have jurisdiction'*) CKA-9); *Lili Tour* v. *The Oovsrrunent* of *the Islamic Republic if Iran (Award No. 413-483-2}* (1 March 19S9) ⋀ (?± aval table from West!aw {*lLIt was the particular bwdvn of ?fr£ Claimant to inilialfy substantiate hsr Claim wtih adequate supporting evidence of 01S. nationality uf herself and far children during the relevant periods . The Clahnt therefor⋀ fail? for lat& of proof of die jurisdictional requirements... .*") (RA-lO)i *Creditcorp MermUonbly hue, v. Iran Carton Co. (Award No. 443-965-2)* (12 October 1989). ⋀ 6 available Goni Westlaw (dismissing claim because the claimants h&d Ftuled *"to Jwejr *the foirtfen of proving that the Claim in this* Case *[was] a claim of a national of the United States, as requiredjhr the Tribunal to assume jutisdtedon.*") (RA-11). Ses *also Military and Paramilitary Activities in and against Nicaragua (Nicaragua yr United States cfAmerica) (Jurisdiction and Admissibility}* (1984) *ICJ RepA'* 301 *(fit is the litigant seeking ta establish afoot who beers the burden ofproving jtP)* (RA-13).

* *Southern Pacific Properties (Middle East) Ltd. (SPP(M£)}* v. *Arab Republic of Egypt (Decision an Jurisdiction)* (14 April 1938) ICSID Care No. ARB/S4/3 ⋀ 63 reprinted in (1995) 3 *ICSID Pep* 131 [RA-*Uf*

10 ***Mihafy International Corp. vr Democratic Socialist Republic of Sri Lanka (Award)* (15 March 2002) ICK3D Case No. ARMlO/2 ⊞ 56 reprinted in (2002) 17 *ICSID Rsvr-F1LJM2* (RA-I4).**

m. NO BASIS FOB JURISDICTION

30. In defining the tan "*investment f* both the BIT and the 1961 Treaty distinguish between "*shares of companies*" and "*business concessions under public Jaw*" as different types of investments.[2t]

31. This distinction comports with fee ordinary meaning of fee word "*investment;*" which BSack's Taw Dictionary defines as "I. *an expenditure to acquire property or assets to produce revenue; a capital outlay; 2. the asset acquired or the sum invested.*"[**]

32. Water Ban has made only one investment falling within the treaties' definition of "*invartmenf ;* its purchase of shares in the company DMT.[23]

33. Accordingly, to fee exteat that Claimant alleges Respondent breached treaty obligations feat were owed to Claimant's "*investment*' (*e.g.* Article 4(1) of fee BIT provides feat "*[investments by investors of either Contracting Forty shall eriioy full protection and security ...*")[24], such obligations must he understood as applying to Walter Ban's shareholding.

34. The obligations tindbr the 1961 Treaty and fee BIT feat Respondent has allegedly breached are summarised in the table below.[25]

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at BIT, Art 1 (disthaguaBfimg between "*shares of campania f* ' fled "*business cancer&ims under public lav?*") (WS1); 1961 Trealy, Art. 8 (dUtinguisblrag between "*shares or other kinds of interest in companies*" and "*business concessions mtdsr public law*") (WB2).

a BEack's LawDicdcnsry (&h ed. 2004) CPA-15).

ai *See* Request far Aibitraticn, ff 4 (*fWafter Bau Js Investment in the Todway was through the purchase of shares in s concession company, the Bon irfuang Taifwqy Co.* ("DMT") *by its predecessor Bycherhoff & Wfdmann AO which was subsequently merged htfa Waher Bav.*'[1]} and ¶ 109 *fWalter Bait offered to sdi its shares to the Geveritmentfor a purchase price equal to 90% of the nominal investment ...*").

n Emphasis added (WE1).

25 This chart is based on ffff 128-130A *of* tho Request for Arbitration.

Substantive Description	BIT Provision	1961 Treaty Provision	(a) Delay Opening Tollfvay	(b) No cLange to toll rates/broach \ MoA2/No soft loan	(c) Build competing roads	(d) Blockmg luer&nseg\ reducing tolls	(e) Moving to new airport	(f) Non respect cf minority dght/failure to observe internal systems
Fair & equitable treatment	2(3)	Via 1(2) & Dutch /UK/ Qmese treaties?	✓	✓	✓	✓	✓	✓
Mo arbitrary or discriiiimjatoory measures	2(4)	2 (no discrirmnation)	✓	✓	✓	✓	✓	✓
Full protection and security	4(1)	3(1) (most constant)						✓
No nationalization or expropriation	4(2)	3(2)		✓	✓	✓	✓	✓
Observe obligations	7(2)	7	✓	✓	✓	✓	✓	✓
National and most feyored nation ("MFN") treatment	3d) & P)	1(2)	✓	✓	✓	✓	✓	✓

[W] While this is in many respects a ramcnent of general application, Claimant dots not plead lAfluat acts and emissions allegedly eonititiitB breath of Articles 3(1) and (2) of the BIT.

35. As discussed in the section that fellows, tiers is no basis for jurisdiction over any of Walter Ban's claims because Walter Ban failed to seek fee requisite approval Irani Thai authorities for treaty protection. This fact alone condemns the arbitration. Nevertheless, out of an abundance of caution, Respondent raises herein additional objections to jurisdiction.

36. Respondent objects to jurisd iction on the grounds that there is –

- No Approved Investment
  - The 1961 Treaty and the BIT apply only to approved investments.
  - Waiter Bau has never sought, let alone obtained, Thai approval of its investment.
- No Jurisdiction *Rtitfans Tetnporis* under the BIT
  - The BIT does not apply retroactively to disputes or breaches that occurred prior to the Treaty's entry into force on 20 October 2004.
  - The alleged dispute arose prior to 20 October 2004.
  - Even rf the alleged dispute had not arisen prior to 20 October 2004, there would still be no jurisdiction *rations isinporis* over Walter Ban's claims (with limited exception) because the alleged breaches occurred before 20 October 2004.
- No Jurisdiction over Claims under the 1961 Treaty
  - The 1961 Treaty does not provide for investor-state arbitration.
- No *Frimn Fools* Breach
  - The Tribunal must be satisfied that fee claims and facts presented, if proven true, are at least capable of establishing a treaty breach.

- Waiter Ban has failed to particularize the legal basis for ils claims.
- To the extent that Walter Ban's claims stem from Respondent's alleged performance or non-performance under the Concession Agreement (as amended) between tMT and Thailand's DOH, mere breach of contract does not constitute treaty breach. Nor is there a so-called "nmbretla" clause in the treaties that would elevate contractual breaches to the level of treaty breaches.

37. Respondent further puts Claimant to proof of its entitlement to complain of alleged breaches affecting Dyckerfioff & Widmann, for the reasons set out in ¶ 18 above.

38. Respondent reserves the right to raise further issues of jurisdiction if and when new matters, and allegations (if admissible), are brought to its attention.

A. NO APPROVED INVESTMENT

39. Under customary international law, a foreigner's ability to invest in another country is subject to that country's sovereignty.[37] As there is no legal obligation to admit foreign Investment, some countries retain flexibility regarding the commitments they make in an international investment agreement through approval (or screening) requirements.[38]

40. For example, toe Nigeria-United Kingdom BIT (1990) provides:

> "77iij *Agreement shall* to die *extent tbit a written approval is requiredfor cm investment, only extend to investment, whether made before or after the*

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17 **Jeawdd W. Salaciura, "BIT *by* BIT: The Growth of Bilateral Investment Treaties sad Theft Impact on Fcreagrt iTtvestniettt In Developing Countries" (1990) 54 *The International Lawyer* 655, 650 (RA-16). *Sse also* Ibrahim F.L Shihafta, "RcccnC Trends Relating to Efltry of Foreign Direct Investmentf* (1994) *9 ICSID Rev.-FIU* 47, 47, *CFrom the viewpoint of customary tniernaiicncl law, the degree of freedom * Wintry may oHawjhr the entry or admission of foreign itrveattnsM Into its territory jj basically a matter of policy left to the discretion of &aek country without any general legal obligation in this respect.*") (RA-17).**

it ***Sse* United Nations Conference on Trade end Development, *International Investment Agreements: Key Hjzi&t, Pchime I* (September 20041, 76 (countries may wish to retain some flexibility regarding the commitment\ they make in an imsmsEiond investment agreement) and SO (noting that the rij\E to screen has been adopted in a number *of* B3Ts and in the ASEAN Agreement *for* the Fryitiodnn arid Protection of Investments) (RA-1£).**

> *coining into forte of this Agreement, which is specifically approved in writing by the Contracting Party in whose territory the investment has been made or is subject to the laws in force of territory of the Contracting Party concerned and to the conditions, if any, upon which such approval shall have been granted"*[29]

4L Similarly, the STVeden-Makysia BIT (1979) specifies:

> *"The term 'investment' shall comprise every hind of asset ... provided that sack asset when invested:*
>
> *(i) m Malaysia, is invested in a project classified by the appropriate Ministry in Malaysia in accordance with its legislation and administrative practice as an 'approved project'. The classification as an 'approved project' may, on application, be accorded to investments made prior to the dale of the entry into force of this Agreement on conditions to be stipulated for each individual case; and*
>
> *(ii) in Sweden, is invested under Iks relevant laws and regulations either before or after coming into force of this Agreement."*[30]

42. States that include approval requirements in their investment treaties, such as these cited above, agree to be bound by treaty obligations only to the extent that their "domestic" approval requirements are met. An investor's failure to meet these requirements thus constitutes a lack of jurisdiction.[31]

43. As shown below, both the *1961* Treaiy and the BIT require prior approval of an investment in carder for it to be protected Ehorcimder. Claimant – despite the two treaties' clear and unambiguous statement of this requirement – never adverts to this fact It does

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73 *Agmetnent* iefrteifH *the Government ofthe Federal Republic of Nigeria and the Government of the United Kingdom cf Great Britain and Northern Ireland for the Promotion and Protection of ItmstmentsT* done in Abuja (11 December 1990X Art 2{2) (RA-19).

30 *Agreetfisnf bnlw&en the Govermncnt of Sweden and The G&verrmenf ofMalaysia Cancerrdrtg ike Mntuai Protection of Irwerfmems* done in Kuala Lmapur (3 March 1979), Art. 1(1) (RA-201).

31 *See, s.g., Fhtfippe Gruslin* v. *Mafpyxia (Award}* (27 November 2000) 5 *ICSID Reports* 4iO 25.7 (RA-21). In *Gmslvt v. Malaysia*, the lulergcvarnmisatai Agreement jreqnired that the investment he In an "*approved project by the appropriate Ministry* in *Malaysia, in accordance vitth the legisltiiion and the administrative pi'actice, based* zAanMTi." Ihe ICSID Ttibunai upheld Malaysians objection to jurisdiction m fee basis that the claimants investment in spsurEdes listed an the Kuala Lumpur Stock Exchange did nat constitute an "*approved*" prefect as required by fhe tonus of the Inkr ovepupenlai Agreement to meet the definition of *nVBstTnenl*"

not do so for the simple reason that approval was never sought let alone given, in respect of Wafer BaiTs shareholding. The Tribunal has no jurisdiction tinder either treaty.

1. The Requirement for Approval

a. The Approval Requirement in the 1961 Treaty

44. The requirement for prior approval under the 1961 Treaty is set forth in its Protocol, which Thailand and Germany expressly "*agreed should be regarded as* an *Integral part of the said Treaty f*[32]

45. The Protocol states:

> "...
> *(1) To Article I ...*
> *(b) In respect of investments in the territory of the Kingdom of Thailand, the term* 'investment', *wherever it is vsed m this Treaty, shall refer to all investments made in projects classified in the certificate of admission by the appropriate authority of the Kingdom of Thailand in accordance with its legislation and administrative practice as art 'approved project.'"*[33]

46. In other words, a German investment in Thailand earns protection under the 1961 Treaty once – and only once – the investor obtains a "*certificate of admissiorl*" in respect of such investment. The Protocol gives Thailand hie right to decide, "*in accordance with its legislation and administrative practice,*" which investments are eligible for a certificate of admission.

***h.* The Approval Requirement in the Treaty**

47. More pertinent to the current dispute, approval is required for protection under toe BIT.

48. Indeed, correspondence between the German and Thai delegations that negotiated the Treaty *(see* below) shows that retention of the approval requirement was a sticking point for Thailand in negotiations. Respondent thus provides background regarding the

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22 1961 Trent/* FFQEQCGE fWB2).

33 ***Id.,*** (emphasis ttdtSed).

Treaty's drafting history before addressing the specific provisions in the BIT that deal with approval.

(A) The Thai Bclegation Insistcd on Keeping the Approval Requirement in the Treaty

49. During negotiation of the Treaty, Thailand insisted on retaining the approval requirement in the 1961 Treaty so that it could maintain control over those investments it wished to protect In its letter of 1S September 2900, the Thai delegation clearly explained that it wanted to retain the ultimate say as to which investments warrant Treaty protection:

> "2. *Ad Article 1: Prior Approval for Protection of Investment (Certificate of Admission – CA)*
>
> *The Thai side wishes* to *confirm our need for numttaimng this principle in view of the fact that the new investment* low *recently enacted (Foreign Business Law B.K 2542 (1999)) has greatly liberalized oar investment regime and has substantially reduced the government's authority* to *regulate a foreign direct investment (FBI) to serve our development objective. We, therefore, feel it is essential to maintain this prior approval principle in order to ensure that the FDI flowing into Thailand will be channeled into the most needed sectors and will assist in our efforts to achieve early economic recovery. In addition, the Thai side is of the view that the CA granted for the protected investment will serve as evidence of the government's commitment to our obligation under the Agreement*[34]

50. The German side responded as follows:

> "2. *Prior Approval of Investments, Art. 1 para 1 and Protocol Ad Article I*
>
> *The German Government regrets that Thailand continues to see the need for prior approval of investments. Investors' confidence in Thailand's economic development and stability would certainly be increased if Thailand were to renounce to this requirement [sic.]. If Germany has to accept prior approval in Thailand we would continue to suggest the wording submitted earlier last year in our proposal as if (sic.] also covers*

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n Letter No. 0504/3539 from Thailand Ministry of Foreign Affairs to the Embassy of the Federal Republic of Germany, Bangkok, dated IS September 2000 (3-4; nnptiftsis added).

> *the situation in Germany where investments are not subject to prior approval The protocol should contain a similar wording,*[15]

51. Thus, although the German side was reluctant to let Thailand keep a prior approval requirement, it proposed language that would cover both the situation in Germany where no prior approval is needed, and the situation in Thailand where it is. That wording was then set out in the agreed draft discussed in May 2002 which reads:

> *"(2) The Treaty shall apply only to investments that have been specifically approved In writing by the competent authority, if so required by the laws and regulations of that Contracting FartyT*[236]

52. This is the wording that is found in Article 2(2) of the Treaty as ratified.[17]

53. As the drafting history of Article *2(2)* demonstrates, the Thai Government preserved its right under the 1961 Treaty to determine which investments would enjoy treaty protection, and which would not It did so by reserving the right to afford protection only to those investments that are foe subject of a specific, treaty-based approval.

(B) The Treaty Conformed and Extended the Approval Requirement for Prior Investments

54. Pursuant to Article 2(2) of flic BIT, foe Treaty applies only to investments that have been specifically approved In writing by the competent authority.

55. Em accordance with the principle of nonretroactive application of treaties as embodied in Article 28 of the Vienna Convention (discussed In detail in Section IEJ3.I below), Article 2(2) must be understood as applying to investments made after ihe Treaty's entry into force.

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as *Nate Verbals* Itfo. 125/2001 ftem the Embassy of the Federal Republic of Gsmi&ny, Bangkok, to Ibt Thailand Ministry of Foreign AfMrs dated 23 March 200.1 **(R-5;** &TCttf1a&5 added**)**.

3d Draft treaty, Annex I to Agreed Minnies of meetings from 13 to 16 May 2002 between Hial and German **delegations, 3 (R-£).**

r? The Tribunal will have noted Ehuf tbc state parties referred in eoarespondence En a protocol. Ultimately, **however, none was produced**.

56. For investments that were made prior to the Treaty's entry into force, such as that of Walter Ban,[34] Article 8 applies. Article 8 limits the Treaty's application

> *Kto approved investments made ... by investors of either Contracting Party in the territory of the other Contracting Party consistent with the latter's laws and regulations.*

57. The salient difference between Articles 2(2) and S is that Article 8 does not condition the need for investment approval upon requirements of domestic law.

58. Ihua, in respect of the Treaty, whereas the rule for new investments (under Article 2(2)) is that they must he approved only *'Hf so required** by domestic law, the IUJE for all investments made prior to the BIT's entry into foffee (under Article 8) is that they must be approved, irrespective of any domestic law "*requirement*** for approval.[40]

59. This interpretation of Article 8 is confirmed by the fact that, of the provisions in the BIT that reference "*approval*", only Article S does not contain language indicating feat the need for approval is conditioned on the specifications of domestic law or practice.[41]

60. It can therefore be seen that, by the express terms of Article 8, Waiter Ban's investment – its shareholding in DMT ~ required approval of the Thai State.

61. As a practical matter, however, the Treaty's different standards for approval of "new" and "old" investments (under Articles 2(2) and 8, respectively) are immaterial, since, as

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39 *See* Request fbr Arbitration ^ 6 (*"During ife frst years cf the Concession, Walter Bau initially hdd 3J*,343,*000 sfe.tw in DMT, Increasing to 54, SI3,60 ft shorn* by J996, all at a cost ofl 0 Rate per* share.").

i* Emphasis abided fWBI).

40 Hence, Article 8 specifies an absolute requirement for approval in respect of ail investmenta made pHor to the Treaty's entry into force, regardless of whether aueft approval is HSreqirijWp domestically (and TOgardless of whether lh* Investment is madle in Thailand or in Germany, where no prica: approval requirement emiste).

41 In adEtion to Article 2£2), with which tha Tribunal is familiar, Article *1* of the Treaty provides, in relevant part, that

> *"[qjny afrcr&tfon of fhc form in which assets are invested shall not affect ihsir classifiarftoft as investment proved such altered investment is approved by tfoz relevant* Cwtiracihjg *Party if so required by £J taws and regulations.*** (Emphasis added)

discussed below, Thai tew does in fact requite that all investments be approved far treaty protection.

2. Thailand's Appmyal Process

62. Since the entry into force of the 1961 Treaty, many German investors have sought and obtained a "*certificate of at/\nisshtia* from Thailand's Ministry of Foreign Affairs, as contemplated by the Protocol to the 1961 Treaty. This is illustrated by six certificates exhibited hereto, each of which expressly confirms that the relevant investment is:

> "art *'approved project' as defined in paragraph 1 (b) of the Protocol to the Treaty ... signed on the 13th day of December ... and that accordingly the said investment is entitled to Ml protection under the said Treaty as from the date of the present Certificate of Admission and as long as the aforementioned licence remains vdidr*[42]

63. On *22* October 2003, the Ministry of Foreign Affairs issued an Announcement (circulated to ell relevant foreign embassies) Quit modified from that date onwards its approval requirements for investment protection under its investment treaties.[43]

64. In the Announcement, which represents the Thai Government's exercise of its recognized discretion under the treaties, the Ministry of Foreign Affairs confirmed its practice that it would give treaty protection only to direct, as distinct from indirect, investments.

65. Hence Clause 4 of the Announcement – enumerating those investments that would be approved automatically – speaks only of "*direct investments*". Clause 5 fays down the requirement that "*fajll other direct investments which are* nor *capered by paragraph 4*

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42 **5ee Ministry of Foreign Affairs Certificate of Admission Mo. 0501/C.A. 2 dated 29 July 1?34 included in representative Certificates of Admission (with similar language) dated between 27 October 1972 and 2D February 1991 issued by the Thailand Ministry of Foreign Affairs (R-7t emphasis added).**

43 **Announcement of tile Committee on tee Approval for (he Protection of Divestment between Thailand and Other Comrtries Ho. MFA 0704/1/2003 Comcemrag Foreign Investment Protection under the Agreements on the Promotion and Protection of Investments between tee Government of the Kingdom of Thailand and Foreign Governments dated 22 October BJ3. 2546 (Buddhist calendar equivalent for 2003) (foe** AIUIJQupiaiiaenf'j R-S).

but seek protection under the agreement, must apply for the [certificate] in order to obtain the protection'' (emphasis added). No allowance whatsoever is made for indirect investments.

66. As concerns those direct investments which would be approved automatically, the Announcement declared that effective *22* October 2003, a direct Investment feat was granted (i) a license Sam the Ministry of Commerce, (li) a certificate of promotion from fee Board of Investment ("BOP), or (iii) was in the form of a government concession contract, would be deemed to have a certificate of approval far protection (previously known as a certificate of admission).[44]

67. Thailand's strict requirement that aU investments be approved for treaty protection, as well as the details of fee approval process outlined above, are recognized and acknowledged in Germany. According to the website for Germany's Foreign Trade and Investment Promotion Scheme, which relates to Germany's insurance program far fbrdgti investment, for a German investment made *In* Thailand:

> **[i]he necessaty prerequisites for legal protection are provided by the Germati-Thai investment support treaty that w.ftf into effect on October 20r 2004. Because this treaty protects otih approved investments, a federal guarantee must be available at die time of acceptaiceJ typically in the form of a so-called Certificate of Approval for Protection (CAP.). Based on information from the federal government, a licence according to the Foreign Business Actf a Certificate of Promotion from the Board of Investment or a government concession as a CAP. approved by the Minister of Trade or by the General Director of the Department of Business Development, should also be obtained''*[45]

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44 The Announcement, /\ 4 (R-&).

4i *See* German to English translation of excerpt from Gsrrnsny[3]a websiteibr its Foreign Trade and Investment Promotion Scheme <itip:/jfegaportal.3e> [RA-22; emphasis added].

68. It follows that Waiter Ban's shareholding in DMT was entitled to protection under the 1961 Treaty and the BIT only if foe Ministry of Foreign AQair* granted the shareholding a certificate of admission {or certificate of approval for protection).

3. Claimant Lacks the Requisite Certificate

69. rfaimant has never sought, let alone obtained, a certificate from the Ministry of Foreign Affairs, nr equivalent documentation as described aboye, that would entitle its investment to protecting under the 1961 Treaty and the BIT.

70. The reason is easy to understand. Although the Ministry of Foreign Afi&irs made it easier, following its 2003 Announcement, for direct investments to obtain approval for treaty protection, at all times since the Announcement was issued, Claimant's investment has been a 9.87% shareholding in a company which in Mm has rights under a Concession Agreement.[16] Under any definition, this investment is indirect. and hence not eliiable for protection.

71. As discussed below, countries and industries around foe world generally accept that indirect investments in companies, such as shareholdings, can be considered direct investments only if the investor has thereby obtained control over the foreign company. Bloomberg, for example, defines foreign direct investment as:

> *"The acquisition abroad of physical assets such as plant and equipment, with ooerattnfr control residing in the parent corporation."*[47]

72. Walter Bait cannot reasonably contend that it has control over DMT. Indeed, it repeatedly complains in the Request for Arbitration that it has no control over DMT. For example, Walter Ban says:

AS *Sse* DMT List af Shareholders dated *13* September 2GQ5 (R-1).

47 Bloomberg.COTE, Financial Glossary /\itfp:/jfwwJ/\oi/\ber/\Mm/bi/\esttfglossaiyrt3fg303f.htifl> (RA-23)-

> *"In December 2004, dig Respondent pressured DMT (ogams! the objections of Walter Bau and DMT's other foreign shareholders) ...*[48]
>
> ¥ * £
>
> *"/Tfhe Share Purchase Agreement paved the way for the Respondent to exercise a high degree of control over DMT ...*[49]
>
> * * *
>
> *"By its conduct as shareholder and through the organs of DMT, further or alternatively by the disregarding of Walter Bm's interests as a minority shareholder in DMT ... Respondent is in breach of Us obligations ...*[50]

73. Moreover, Walter Batiks investment meet the internationally prevalent definition – to which Thailand (and Germany) subscribe – of direct investment. In order to identify direct investment as a proxy for control, most countries employ a numerical threshold of ownership of ordinary shares or voting stock.

74. In Europe, the threshold ibr defining a direct investment was traditionally 20%:

> *"The mw European System of Accounts, ESA(95), definitions were introducedfrom the 1997 First Release. The changes were as follows:*
>
> *0* *Prior to 1997 for the measurement of direct investment, an effective voice in the management of an enterprise was taken as the equivalent of a 20 ner* **cent** *shareholding. This is now JO percent."*[**]

75. Germany applied this 20% threshold to identify foreign direct investment until at toast 2000 (before 1939 it was 25%).[51]

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48 Rfiquvat for Arbitration, U 14JO.

49 H. 175.

$ft J ^ 13GA{0.

Ji National Statistics, "First Release: Foreign cfirect Investment 2QD4* dated 13 December 2005s 5 (RA-24; emphasis added).

SI See Anna M. Fatecm* Statistics *m* Foreign Direct Investment and Multinational Corporations: A Survey[51] (15 May 2000), 17 0n Germany, *afijhe threshold jar shares* to fie *haid in an enterprise tn order for on Investor io be considered as a direct investor h 2Q% (before 193? èl was 25%).")* (RA-25). 5ee *also* QECD, "OECD Benchmark Definition of Foreign Direct Investment?' £3rd ed.* 1996) ^ S3 *{"Enterprises resident tn Geimany required* to *report their atthvwd direct investment assets ore: (a) residents (chiding primes mdt-lfhiais) who* on *the reporting date hold directly or indirectly more thrm 2Q per cent cjf the*

76. Thailand follows the approach taken by fhe International Monetary Fund fTMF"), the Organisation of Economic Cooperation and Development ("OEGD" and the Untied Nations ("UN") in using a 10% cut-off to define foreign direct inyestmont. Respondent cites the IMF jsiudy 'Tareign Direct investment Statistics – How Countries Measure EDI: 2001[51] and the UN 'fWorid Investment Report: 2005"[52].

77. The IMF study advises:

> "*4.2 According to the [OECD]* Benchmark *[Definition] and the* BPM5 *[IMF Balance of Payments Manual, 5th Edition] a* direct investment enterprise *is on incorporated or unincorporated enterprise in which a direct investor that is resident of another economy has 10 percent or more of the ordinary shares or voting power (for on incorporated enterprise) or the equivalent (fbran unincorporated enterprise] The* direct investor *may be an individual, an incorporated or unmeorporated private or public enterprise. a government, or an associated group of individuals or enterprises that has a direct investment enterprise in an economy other than that in which the direct investor resides. The ownership of 10 percent ofordinary shares or voting power is the criterionfor determining the existence of a direct investment reJaiionvhip.*
>
> *43 Although the 10 percent equity ownership is specified in the* Benchmark *and the* BFM5, *some countries have chosen to permit two types of qualifications to that criterion. First, if a direct investor awns less than 10 percent of an enterprise but has an effective voice m management, the transactions between the investor and the enterprise are included in the FDl statistics. Second if the investor owns 10 percent or more of the equity ofthe enterprise hut does not have an effective voice m*

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shares or voting rights ân a nonresident enterffise which has a bafanca sheet total gqinvehti to more fhni DM 1 million (EA-m

51 **International Monetary Fund, 'Toreign Direct Investment Statistics – How Countries Measure FDL 200V' (2003) (RA-27).**

JJ **United Nations "World Investment Report: 2005" £RA-2S). The Report says that foreign direct investment** [297; emphasis added]:

> *11(FD?) is defied os an tnvestm&fi involving* a *longterm relationship* JW *reflecting a lasting interest and control by a resident entity in on* economy (foreign direct imvslvr &r parent enterprise) in an enterprise resident in an economy other than that ctfike foreign direct investor.*
>
> *uAn equity ccnhai stake of 16 per* cejir *or mare of the ordinary fftpres or voting power far an incorporated enterprise, or is eamvaknt lor an unincorporated enterprise, is pormqffv considered as the threshafdfar the control affljstrff.*[a]

> ***management, the Enterprise is excluded frvm ihv FDI statistics. The application of these two qualifications is not recommended by the*** Benchmark ***or by the*** BPM5.''**

It goes ort to canfimi:

> ***"Use of fkc 10 percent ownership rule for identifying RDI; Ninety percent of the 61 countries use the 10 percent ownership ruh as their Basic criterion for identifying direct investment enterprises in at least part of their inward FDI transactions data, and 82 percent use the mb ns the basic criterion for identifying direct investors in their outward FDI transactions data. (See Tables 4.1 and 4.2 and Tables 16 and 17 of Appendix Iforfurther details./'*6***

Indeed, tables to the study confirm that Thailand follows thfe aiittfiaach.[57]

5« Intcntationfll Mooetaiy Fund, "Foreign Direct Investirtfiait Statistics – How Countries Measure FDI: 2G0I* {20G3X 23 (JlA-27; emphasis added).

54 *Id] 2&*

57 *Jd.* S5-90. *SSB also* OECD, "OECD Benchmark Definition nfEorsign Direct Investment" (3rd ed. 1956) 3 (RA-Jd), winch states, *inter alia* (emphasis added):

> *"7. O&CD recommends that a direct Investment enterprise be defined as* fifi *incorporated or unincorporated enterprise in which a foreign investor* owrar *10 per cent or more of the ordinary shares or voting power of* OH *incorporated enterprise or the equivalent ofc& unincorporated enterprise.*
>
> *S.* rJjg *rntmericoi* gamfe/*ina* nf *ownership of 10* par *cent of jprdlnnrv shares or voting stock dstermoies the existence of a direct Investment relationship. Aft qffecttvn voice in the management, as evidenced by on ownership of of hast JO per cent, implies that the direct investor is able to influence or participate in the mamgement of cut enterprise ; it docs not require absolute control by the foreign Investor.*
>
> *P. Although not recommended by the OECDi some countries may still fed it necessary to treat the JO per cent cut-off point in a flexible* manner *to fit the circumstances. In some case, the ownership of 10 per cent of the ordinary shares or voting power may nat lead to the exercise of ary significant influence while,* art *the other hand a direct investor may awn less than 10 per cent but have an effective voice in the management OECD dees not recommend any qualifications to th& JO per cent rule. Consequently, countries that choose not to follow the 10 per cent rale* in *all cus^s should identify where ptinsifrfe the aggregate value of transactions iwtfalling under the JO per cent cut-off rule, satisfy facilitate latermtianal comparability."*

IMF Committee cm Balance of Payments Statistics and OECD Workshop on International Investment Statistics, Direct Investment T&dmical Group (DITEG), "Issues Paper (DJTEG) #20: Definition of ForcEgn Direct Investment (FDT) TEEHIS (November 2004), Annex Jr attached to "Eighteenth Meeting of die IMF Committee Ofl Balance of Payments Statistic Washington DC., June 1 Muiy 1, 2005: Definition ofDirecE Investment Terms," available at <*httpdhnvw.*}itsf.Grg/extemsti/pubs/ftfbap/2005/1%htm> (discussing proposed (re)definitkjn *v£ foreign direct Itwmtmsri enterprise")* (RAo0).

78. Representatives of the Bank of Thailand additionally have confirmed that Thailand follows this approach, in a statement made to the United Nations Conference non Trade and Development ("UNCTAD") in December 2005:

> *"Direct investment refects the lasting interest of a non-resident of an economy in a resident entity. According to the BPM5 JTMF Balance of Payments Manual, 5th Edition], direct investment can he classified into investment in forms of equity capital, other capital and reinvested earnings.*
>
> *L Investment in equity where the direct investor owns 10 percent or more of the ordinary shares or voting power for an incorporated enterprise or the equivalent for an unincorporated enterprise ...."*[5]

79. And enquiries of die Ministry of Foreign Affairs (Departments of Economic Affairs and of Treaties) have demonstrated that Thailand has never granted a certificate of approvai for protection (or its predecessor, a certificate of admission) hi respect of an equity investment of less than 10%.

80. The rationale applied by Thailand in limiting treaty protection to direct investments with reference to a 10% stakeholding can be readily understood; countries do not want investment protection extended to just any foreign entity feat may take a shareholding (however small) in a local company, particularly in circumstances such as fee present, where the stale has no control over the identity of such an investor or the sale of ail or part of its interest

SI. Indeed, this was made clear to the German delegjation on numerous occasions during negotiation of the Treaty. For example, in its letter dated 1S September 2000, fee Thai delegation stressed:

SB Pusadiefc GtemjflimideCj Bank of Thailand, 'Thailand/\ Balance of Payments Foreign Direct investment Statistics/\ published an United Nations Conference on Trade and Development, "Expert Meeting on Capaai/\ Building in the Area of FDI: Data Compilation and Policy Formulation in Developing Countries" dated 12-14 December 2005, 2 (RA-29; eraphssts added); *see also* pp. 5-G concerning Thailand's adherence to this principle.

> *"if h essential to maintain this prior approval principle in order to ensure that the FDIflawing into Thailand wfli be channeled into the most needed sectors and will assist in our efforts to achieve early economic recoveryfm"*[39]

82. To similar effect, the Announcement advised that relevant considerations in making case-by-oase deteimmations of whether to approve an investment for treaty protection include:

> *"the benefits in relation to the nation's safety and security, economic and social development, technology transfer and research for development, public order and good moral, art, culture and tradition, of the country, naiured resource conservation, energy and environment protection, and consumer protectio?i"*[fit]

83. In die present case, Wafer Ban's shareholding does not meet the 10% threshold required to be considered a direct investment Accordingly, it has never been entitled to protection under the 1961 *Treaty* or the BIT.

84. Not surprisingly, then, Claimant glaringly avoids any mention of the approval requirement in its pleading.

85. Waiter Bau pleads only that the "*Concession*" received BOI approval on 16 May 1991.[1]

86. BOI approval of DMT is a red herring. DMT is not the investment at isstlo in this arbitration, nor is its Concession Agreement Walter Ban did not purchase DMT or the concession. Walter Bau purchased shares of DMT. ft is those shares, and those shares alone, that require approval under the treaties.

87. But accepting tor the sake of argument that BOI approval of DMT were relevant to this arbitration (it is not), Walter Bau could not just rest on its assertion that BOI approval was given on 16 May *1991*. Walter Ban would have to prove (1) that it continuously

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39 **Letter Wo. 0504/3533 than Thailand Idimsby of Foreign Affairs to 6K Embassy of the Federal Republic of GennKiy, Bangkok, duted IS September 2000 (R-4).**

«3 **Tbs ArtncfliUecmeBt, Art. 5 {R-Sj.**

«1 *See* **Request for Arbitration, /\51.**

ftAWS HH«5 U2|tf

satisfied the fourteen conditions that the BOI specified in the promotion certificate [*see* R-9V[52] and (ii) that the extension of the tollway was approved for investment promotion.

88. Moreover, even if Walter Bau met its burden of proof on these points, the feet of BOI approval would not mean that the investment was protected under the treaties until the Announcement was issued in October 2003. Only at this point in time did the BOPs certificate of promotion become equivalent to the Ministry of Foreign Affairsf certificate of approval for protection. This is made clear by file Announcement which states:

> *fCfTTke Certificate of Promotion from the Board of Investment ... shall be considered as the Certificate of Anurova! for Protection – C.AP. for the investment Such investment shall be granted protection under the agreement on the promotion and protects of investments between the Government of Kingdom of Thailand and the Government of the country ofthe foreign investors.*
>
> ...
>
> *The announcement shall he effective as of this dated*[**]

So, even if Walter Bau could piggyback on BOI approval of DMT (It cannot), unless DMT received a certificate of admission prior to the Announcement (it did not), there would be treaty protection only from the date of the Announcement

89. Try as it may, Walter Bau cannot escape that its investment required specific approval for treaty protection, and that whether It obtained such approval is case-tfisposilive. The simple truth is drat Walter Ban's investment was not approved. As a result, this arbitration must be dismissed.^

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62 *See* Board of Investment Certificate oFPmnuciticii issued to DMT dated 16 May 199t (R-9). In ttiis regard, while Oldman* asserts that HOF approval was given on 16 May 1991, ii also acknowledges that certain conditions ^*imposed m the time cf BGl* qp^pGVttf" were not implemented until MoAl was entetftd into on *27* April 1995. *See* Request for Arbitration, ^ 59.

« **T33e Announcement, arte. 4 and 5 (R-S).**

54 *See* \ 42 and the footnote thereto.

R. NO JURISDICTION *BATtOm TEMPORIS* UNDER THE Bn

90. Putting aside the approval requirement (art exercise which involves a courageous or foolhardy ignorance of reality), Walter Ban's claims suffer from other fundamental flaws, Among other things, the Tribunal lacks jurisdiction *rations tsmpuris* under the BIT to the extent that the alleged dispute and/or Thailand's alleged breaches occurred before the BIT entered into force. Although the Tribunal would have jurisdiction *mtiam temporis* under the 1961 Treaty {*see* section C below), foal treaty docs not apply for other reasons that are set forth in this memorial.

t. Treaty Obligations Arc Binding Only After Entry Into Force

91. Under general principles of international law, a state is responsible for breach of an international obligation only if the obligation Is binding at the time of the alleged breach.[65]

92. A treaty obligation becomes binding only once the treaty has come into force.[66]

93. This principle of non-retroactive application of treaties is embodied in Article 23 of the Vienna Convention, which states:

> *"Unless a deferent intention appears from the treaty or is otherwise established, its provisions do not bind a patty in relation to any act or fact which took place or any situation which ceased to exist before* the *date of the entry into fores of the treaty with respect to that party."*[67]

£5 *See* Intjcmafional Law Commission, *Draft Articles On Merponsibilfty of States far Intermtfondfy WroRgfd Acts* (2Q01jU Art 13 ⋀ *fajn act of a Stats dees not constitute a breach of an irtfemoficnal obligation unless the Stats Is bound by the obligation in question at the time the act occurs.") (*RAX31). *See also* Case *Concerning the Northern Centeraans (C&neroan v. United Kingdom) (2* December 1963} (1563) iC7 *Itep* 1⋀, 12? (2 December 1963) (separate npmlfjn of Judge FlEzmauiiee) ⋀*An act which did not, in relation to the party complaining qf it, copstUvte a wrong nt the time ft took plans, obviously cannot et post facto besoms one.")* (RA-32).

66 STr Robert Jennings and Sir Arthur Wilts, "Opperehan⋀s International Law" (?tb etL, 39£2) 5 612 (Sir Robert Jemmgs & Sir Arthur Watte eda⋀ 9th fid, 1996) (Hfl *treaty onfy become# binding upon the contracting states when it ha# came into fared') (*RA-33).

4T Vienna Convention⋀ Art 28 (RA-2).

94. Thus, there fe a presumption that a state is not responsible for any art, feet or situation which ceased to exist before the date of entry into force of the treaty for that state.[da]

95. As Article 23 of foe Vienna Convention expressly states, such presumption exists unless a different interpretation clearly appeals from the treaty or is otherwise established. In this regard, commentary by the International Law Commission affirms feat:

> *Ka treaty is vot to be regarded as intended to have retroactive effects tmlcss such an intention is expressed in the treaty or is clearly to be implied from its* ferms.[H@9]

96. The International Court of Justice ('TCP') applied the non-retroactivity rule in fee *Amhatielos Cose.*[jn] The Court rejected fee Greet Government's contention that it was entitled to present a daim for acts that had occurred in 1922 atid 1923 under a treaty feat had entered into force in 1926, stating:

> ^Tb *accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall came into force immediately upon ratification Such a conclusion might have been rebutted if there had been cmy special clause or any special object necessitating retroactive interpretation There is no suck clause or object*

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[68] Sir Robert JeftnbtfS and Sir Arthur Watts, "Oppcarheam's btemsb&naJ Law[71] (5Kh ed., *1992)* § G2fl *tJTke genial rvte is that o treaty does not bind a party with retroactive effect is in relation to* tfrcp *oct or fact wMch ftro/\ place or any situation which ceased to exist before the dale of the entry into force of the treaty for that partyf)* {RA-33). *See also* International Law Commission, *Draft Articles on Responsibility of States for Jjrternationalfy Wrongful Acts* {2001), Ait. 13 *(" fqjn act qfa Sttiie does not constitute a breach of an international obligation unless the State is bound by the obligation in question* of *the time the act occurs.*") (RA-31).

[GS] International Law Commission, Final Draft Articles on the Law of Treaties, Commented to Article *21* (same as Article 2B), reprinted b 2 Sir Arthur Watts, "The International Law Crannussicin I949-I99JT *(1999) hf:9* {RA-34; emphasis added). *See also Efettrottfca Sicuia S.pA. (United States* v. *Italy)* (1939} *ICJ Rep* 15, 42 (an important principle *al* customaiy International 3sw should not *iLbe held to have been tacitly dispensed with in the absence of any wards making dear an iitferiiwti* to *do so')* (RA-35L

[70] *AmbaHelos Case (Greece* v. *United Kingdom) (Judgment on Preliminary Objection)* [1 July 1952) *ICJ Rep* 2S (RA-36).

in ihe present case. It is therefore impossible to hold that my of its provisions must be deemed to have been in force earlier."[71]

97. Therefore, according to the principle of noivreiroaciivity, absent an unambiguous indication *to* the contrary, Thailand's Treaty obligation *in* Article 10 to arbitrate *a [djisputes concerning investments* became binding only upon entry into force of foe BIT on 20 October 2004.[72] Therefore, the BIT must have been in force when the alleged dispute arogs.[73]

98. Similarly, and absent an unambiguous indication to the contrary, the BTT must abo have been in force when the alleged breaches arose.[74]

99. Unless each of these conditions is met, the Tribunal lacks jurisdiction *ratiom temporix*.

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71 *Id.* The Court also stated that tbs feet that aa eadier treaty cartlaired substantive provisions shnifer to substantive provisions in the treaty in force was not a basis for giving retroactive effect to the Cnsfliy in force: *id*

73 *See Impregiia S.p.A.* v. *Islamic Republic uf Pakistan, (Decision on Jurisdiction)* (22 April 3005) ICSID Case No. ARB/03/3 U 3.10, available at <bt //tlafew.uyicxd> {"*[IJt is to be noted that Article 1(1) of the RTF does not give the substantive provisions of the IYeaiy any retrospective effect.* FAMS, *the normal principle stated* in *Article 28 of the Vienna Convention on the Law of Trades applies, and the provisions ofthe BIT: '... do not bind the forty in relation to any act offsets which took place or any situation which ceased to exist before the date of entry into farce of ihe Treaty.'*}* (RA-37, *citing SGS Svcieie G£n&rrie de SurvetlfoncB S.A. v. Republic of the Fhilippipes, (Decision qf the Tribunal an Objections to Jurisdiction}* (29 January 2004) ICSID Case Ho. ARBfl)2/Gp available at <vyyvw.wridbank.org|icsi&> 166 and 167 (RA-3B).

73 *See* Christoph H. Sehreucr; "The ICSID CemYcndoir A Commentary" (2001) 211 (in order for a bilateral investment treaty to provide a basis for junsdretinn, Et must be in farce at the relevant Eifflft) (RA-39); BIT, Art. 10(1) {WB1); *2* Gppenhafriris International Laws Treaties, § G2G at 124? (£tr Robert joinings & Sir Arthur Watts eds, *9th* e«h 1996) *("The general rule is that a treaty does not bind a party with retroactive effect, ie 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 for that party!*)* (RA-33, emphasis added).

74 *Sag* Schreuer, *id., citing Trad&x Hellas S.A.* v. *Republic of Albania (Decision on Jurisdiction)* (24 December *1996}* ICSID ARSm2 reprinted in (JS99) 14 *ICSID Rev.-FHJ* 161, 173-130 (the Tribunal found feat there was no jurisdiction on the basis of the E3T betWEen Albania sod Greece because both the aliened expropriation and fefc Ropiest for Arbitration occurred before itg entry Into force) (RA-40); MWev *International Ltd v. United States of America (Award)* (11 October 20Q2) ICSID Case Ho. ARB(AFy99/2 7t3 (the HAFTA Tribunal stated: *^eversts cr conduct prior to the entry into force of on obligation for the respondent Stale may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to pom: fo conduct of the Stale after that* pbfe *which is itself a hreaohJy)* (RA-41; emphasis adefed).

100. In the following Sections, Respondent shows that the BIT does not apply retroactively to disputes and/or breaches arising prior to entry into force. Accordingly, there is no jurisdiction *ratiane temporis* because foe alleged dispute arose prior to that dine. Respondent further demonstrates that, even if foe alleged dispute had arisen before foe Treaty entered into force, the Tribunal would not have jurisdiction over foe alleged breaches (with limited exceptions) because they too arose prior to foe Treaty's entry into force.

2. Temporal Scope of Application Under Article 8 of the BH: No Retroactive Application to disputes or Breaches Arising Before the BIT's Entry Into Force

101. In respect of foe scope of foe Treaty's application, Thailand and Germany agreed in Article S of the BIT that

> *"[tftris Treaty shall also apply to approved investments made prior to its entry into force by investors of either Contracting Forty in the territory of the other Contracting Party consistent with the latter's laws and regulations,"*[15]

102. Pursuant to Article 31 of the Vienna Convention, Article S of foe BIT must be interpreted *"in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of Us object and purpose."*

103. According to its ordinary meaning, Article 8 of foe BIT does not deviate from the general rule of noil-retroactivity codified in Article 28 of foe Vienna Convention. It merely states that the Treaty applies to investments – not disputes, not breaches – made prior to 2& October 2004, foe date of its entry into force. It does not state that the BIT shall apply to any act or conduct or event which took place prior to Ibis time.

7i WB1 (eropha&s added).

104. On its face, Article S accordingly provides only that approved investments made prior to the BlT?a entry into force shall benefit from the Treaty's protections in the same way as investments made alter its entry info force, *is*. with respect to acta or conduct or events or situations occurring after entry info force.

105. If the state parties had intended the Treaty to apply to past conduct or disputes, then they would have stated so explicitly.[75]

106. Continuous use of the future tense through repeated reference to what the state parties MshdTf do connotes that the parties agreed to he bound by the obligations – i.n, to conform their conduct – in the future.[77] Because the obligations undertaken in the Treaty are drafted in a forward-looking way and because the normal rule in international law is that treaties do not apply retroactively, it stands to reason that the state parties to the BIT

Tfi *See, e.g., Agreement Between the United States of Anfsricct anil Albania ‹rn th& Sett!?mSnt of Certain Outstanding Claims,* done in Tirana (ID March 1995) 1261L TIAS, Aft 1 *{"The dethm settkd ptersutttf* Jo *this agreement are: (a) the claims of United Stales nationals (including nah&al and Juridical persons) against Albania arising from any natiOnaltation, expropriation,* fpffcrantfojTv *and other taking of or measures affecting property of nationals of the United States prior ta the date of this agreement; and (b) the claims of nationals ofAlbania (including matured njidjuridical persons) against the United States prior t# the this of this azreeweniP)* (BA-42; emphasis added); United Hattons Stcunty Council ResoEution 687 (1991); *UR*. Dm £/ftESyG&7 {3 April 1991} 1 16, available at <*btipj!*www.linog.cVurtdJrcaoludo/res0687.pdf> [*"Reaffirms that Iran, without prejudice to the debts and uhRgatityns of Iraq arising prior to 2 August 199*‖, *which will be addressed through the normal mechanisms, ds liable under imornationoi law for any direst loss, damage, Rn:haling sTivirornientid damage md the depletion of natural resources, or Injury to foreign Governments, nationals and corporations,* AS *a result tf Iraq's unlawful invasion and occupation of Kuwait)* and ‖f IS ("Decider *also to create a Jhnd to pay compensation far claims drat fall within paragraph 16 above amd to establish a Commission that writ administer ihefund* ") (RA-43; emphasis added).

77 For exanpICp tha BIT provides *hAk" [e]xvh Contracting Party shall in its territory promote as Jar as possible investments by investors of the other Contracting Party and adntU such investments in accordance with its laws and regulations"* (Art 2{l')) *f [n]either CvtUractfng Party shall subject fttvestmenis in its territory owned or controlled by investors of the other Commoting Party to treatment lessfavourable than it accords to investments qf its awn investors or lo investments if Investors of any third Slate"* (Art 3(1)); *"[fnvestmenls by westers of either Cortfmcirrtg Party shaft enjoy fill protection and security in the territory of the other Contracting Partf* " (Art. 4(1)) (WB1; etflphasis added).

would have expressly staled any intention that the BIT apply retroactively to past breaches and disputes.[78] They did not.

107. Support for the view that the BIT does not apply retroactively, even in respect of **approved** Investments existing at the time of its entry into force, is found in decisions of various International tribunals feat foccd wife provisions worded similarly to Article 8, held that treaty protection did not extend to breaches or disputes occurring before the treaty in question came info force.

108. In *SGS* v. *Philippines*, for example, the ICSID Tribunal interpreting the meaning of Article II of the Switeerland-philippines BIT (which provided that the treaty applies to investments *"made in accordance with its laws and regulations ... whether prior to or qfor the entry into force qf the Agresmenf')* concluded that:

> *"Article U does not, however, etw the substantive provisions of the BIT any retrospective effect. The normal principle stated in Article 28 of the [Vienna Convention] applies: the previsions of the BJT 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 f"*[79]

109. Similarly, the ICSJD Tribunal in *Salim* v. *Jordan* found that treaty obligations did not have any retrospective effect by virtue of fee treaty's definition of ***"investment*** as

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1* *See Tradex Hellas SA. K Republic of Albania (Decision on Jurisdiction)* **(24 December 1996)** JCS3D ARB/94/2 reprinted in {1999} 14 *ICSID Rev.-FILJ* 161, I79–IBG (considering Article ft of tbe Albania-Greece **BIT (1991J, wbicfc iststes that** Gftj& **BLT applies to mrvestmenis made prior to its entjy into farce, the** TrtbunaJ **stated:** Hlif ***seems clear that the Contracting Parties had the intention to only submit to TCSE> jurisdiction regarding oflvged expropriation end requests for arbitration occurring ip*** ffe ***nditre, even if thsy concerned investment* made earlier."*** **(RAAO; emphasis edded)** *Teonteas Mudioamb'fen-tafas Teemed 3.A. v. The Untied Mexican Stotts (Award)* **(29 May 2003} 1C3JD Case Wo. ARB(AF}/0G/2 H 64** *["Although the Agreement applies to investments existing its of the date of Us entry into farce—which suggests me a logical conclusion that the situations siBTwndi?ig inpesitnettfs existing at the time da net escape its prevlstozs ~, the way the provisions an which the Claimant reties are drafted suggests that application thereof isjbrward-IaaJdng.*)** (FA-44).

77 *SGS Saciete Generate dc Surveillance SA.* **v.** *Ropiffljc of the Philippines, (Decision of the Tribunal an Objections ta Jurisdiction)* **(29 January 2004) KSID Case Wb. ARB/D2/G 166, avaflabic at <wwWpTWtiridbank-£IF fr33id> (RA-3B).**

including "*QfQ* kind of property invested before or after the entry info force of this* ***Agreement.***[riSO]

UO. NAFTA tribunals have also held that jurisdiction did not extend to acts or omissions that occurred before the treaty's entry into farce, notwithstanding a provision in NAFTA which states that "risrs *Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired hemqft&rfo*[1]

111. For the foregoing reasons, no intention appears from the Treaty or is otherwise established that – contrary to foe general rule codified in Article 28 of the Vienna Convention (or indeed, as a matter of simple common sense) – foe state parties to foe BIT intended it to apply retroactively to disputes or breaches.

112. Nevertheless, if the Tribunal were to find that Article 3 is in any way unclear as to whether the BIT applies retroactively to disputes or breaches, Respondent submits that the Tribunal must still find that the BIT does not so apply. This is because foe general principle of treaty interpretation is font, where the meaning of a provision is unclear, the meaning which is ies4 onerous to the state assuming an obligation is to be preferred *(fin dubio mithiA*[7]*)*[?1]

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30 *Salint Costmfiari S.p.A. atjd Ifalsfrade S.p.A.* v. *The Hashemite Kingdom of Jordan, (Decision on Jurisdiction)* (29 November 2004) ICSID Case No. AR&T02/H ⋀ *66, 177* (RA-45).

33 *Sec* Notes to North American Free Trade AgFeament, amiable at <http://wv\ ⋀]ce.oasrorg/tiade/nsfte/nates.asp>-3 note 39 (" *Article 1101 { fnv&xtment - Scope and Coverage) : this Chapter covers Investments existing on the date of entry into force of this Agreement as well os investments made or mqalr&d ihefta/far*) {RA-46); Marvin Kay Feldman Kcrpa* v. *United Mexican States, (Interim Decision on Preliminary Jurisdictional Issues)* (6 December 2000) ICSID Caw No-ARB(AFy99/I % 62 £*Glven that NAFTA came into fores on January /, 1994, no obligations adopted mder NAFTA existed and ike TtUmnnFs jurisdiction does aot ⋀xtsnd before that dote. NAFTA Itself did ?iot purport to hove any retroactive effect. According# this Tribunal may no deal with acts or otids&'on* that occurred before January 1, 1994.n} {RA-47); Mondev International Lid yr United Stales of America,* ICSID Case No. ARBfAF ⋀?⋀, Amrd, II October 2Q024 68 ⋀A-4I).

Sir Robert Jennings and Sir Arthur Watts, "Oppenhctro's InternaEantiJ Law" (9th cd., 1992) 5 633 {RA-33X

113. Applying the principle *in dubio mitius*, the Id's predecessor, the Permanent Court of International Justice ("PCIJ"), has held that "*if the wording of a treaty provision is riot clear, in choosing between severed admissible interpretations, the one which involves the jrtinimum ofobligations for the Parties should be adopted;*"[83]

114. Here, the meaning of Article 8 which is less onerous to the state *is* that the BIT does not apply retroactively to disputes or breaches.[84]

115. Such interpretation is less onerous to the state ibr the additional reason that if the BFT did not apply, investors would have no recourse to arbitration for disputes or breaches occurring prior to the BITs entry into force. (As explained in Section C, although such disputes or breaches could be covered under the 1961 Treaty, that treaty does not provide for any investor-state dispute resolution.)

116. Accordingly, the nan-retroactive interpretation of Article 8 must be preferred.

a. No Jurisdiction Because the Dispute Arose Prior to the Trealysa Entry Into Force

117. The ICT has defined a dispute as *Ka disagreement on a point of law or fact, a conflict of legal views or interests between parties."*[85]

118. According to Claimant's own words:

> *"The dispute arises from the matters described in ike summary offacts. ... Walter Ban has raised the dimute with the Respondent, both directlyjtself and through the German Government, since at least October 2001.11*[86]

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83 *The Frontier* ***Between*** *Iraq* ***and*** *Turfey* ***(Advisory Qpfitfoit)*** **[1925) PCIJ SerF B, No. 12, 25 (RA-4&).**

84 While it is true that such disputes or breaches Wtsutd still be subject to obiigjfftiBng undertaken by SIB state in the *961 Treaty, fre s&tB's obligations uDdcrtho 19G1 Treaty are teas onerous than its obHgsfiona under th* BIT in at least one mafcrtal respect: underlie *1961* Treaty, an investor cannot compel arbhnatEon.

85 COSE *Concerning Entf Timor (Portugal* T *Austrattqf (Jtidgtitertf)* (1995) *1CJ R&p* 39, *99* [RA-49).

86 ficqucst for Arbitration, \% 29-30 (emphasis added).

119. Walter Rsu itself thus pleads that it seeks to arbitrate a dispute that arose no later than October 2001.

120. Pursuant to the principle of **nDH-retroactmtyP** because the Request for Arbitration alleges a dispute that arose **prior** to the BfPs **entry** into force, there is no jurisdiction *rations temporis*.

121. Support for Respondent's interpretation of (he BIT comes &om views expressed by Peruvian delegates concerning the scope cf the bilateral investment treaty between the United Kingdom and Peru, which defines the term "*investmenf*" as including "*all invesitnents whether made before or after the date cf entry into force of this* ***Agreement***":[54]

> "[A] BIT applies to investments made after it goes into effect, and in some cases to investments made before it went into effect provided the dispute in question arises after the treaty has entered into force Therefore, if a treaty gees into effect July 7, 1993, and a subsequent dispute arises between an investor and the government involving an investment made prior to the effective treaty date, the conflict resolution clause will apply to the dispute."[55]

122. Respondent's interpretation is also affirmed by a recent case before (be ICJ in which the Court determined that it did not have jurisdiction over a continuing dispute that had arisen before the effective date of Yugoslavia's consent to jurisdiction.

123. In *Yugoslavia v. Belgium*, Yugoslavia sought to litigate claims based on a bombing campaign by NATO that began on 24 March 1999 and that was ***"conducted***

IJ **jdgmajtffcflf *between the Gcrtprmnz Tit of the United Kingdom of Grsai Brfiatn* miff *Northern Ireland* tW *the G^mrmnt of (he Rzpubfta of Pent jhr thz Promotion and Protection qf Invetfmzrtf S*, dons in London (4** October 1993), Article 1(a) (RA-50).

it Enrique Miguel Chaves Bardaies, "Tho Secernent of Disputes Under the United KmgdonvFeni Bilateral Investment Treaty" at <http://VtVAV.servilex.cQtft.p&arhEtraje/colabaradonesAEscrt JiW>, s. ***23.6*** (RA-51; emphasis added).

continuously" over a period extending beyond 25 April 1999.[89] Yugoslavia's declaration accepting compulsory jurisdiction of the Court contained a limitation *ratiom tempnrii* precluding any retrospective jurisdiction of the Court to disputes arising prior to 25 April 1999, the date ii signed the declaratm.[90] In rejecting jurisdiction, the Court held that the dispute concerning the legality of the bombings, "*taken as a whole*," had arisen well before 25 April 1999, and found that the bombings had continued and that the "*dispute concerning them has persisted sines that dots £J not such as to otter the date on which the dispute arose.*"[91]

124. The ICSID Tribunal in *Liicchetti u. Pent* adopted similar reasoning in finding that it did not have jurisdiction under a treaty between Peru and Chile because the parties' dispute had arisen prior to the treaty's entry into force.[92] It was common ground between the parties that, prior to the treaty's entry into force, a dispute had arisen in which "*each side held conflicting* views *regarding their respective rights and obligations*," but the parties disagreed as to whether the dispute had continued or a new dispute had arisen.[93] Finding that the subject matter of the present dispute was foe same as that of the earlier dispute (the municipality's repeated efforts to compel claimants to comply with the rules and regulations applicable to foe construction of their factory), the *Lucchetti* Tribunal

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89 *Case Cotiming Legality of Use of Force (Yugoslavia uL Belgium) (Request for ihs JTuFcathn Of Prtyyf$iQ?Tci Measur&x)* (2 June 1999] *ICJ Rep* 124 /\ 28 (RA-52).

90 *Id*, /\ 26 {RA-52).

91 *Id*, ¶¶ 23-29 (*RASZ*).

92 *Empresas Luccheitf, S.A. and Lucchertt PeruY &A* m *Republic of Pent fAw&rd)* (7 Fcbmaiy 2005) ICSID Case No. ARB/G3/4 ¶¶ 53, *59* (RA-53).

93 *Idt* 149-50 (RA-53).

determined feat there was only one continuing dispute which had "*crystallized*" prior to the treaty's entry Mo force/[94] Accordingly, it denied jurisdiction.

125. Here, too, jurisdiction must he denied. Walter Ban seeks to arbitrate a continuing dispute concerning Thailand's obligations to its investment,[95] a dispute that arose, according to Claimant's own words, by *Kat hast October 2001.*[51pfi]

b. In Any Event, No Jurisdiction for Breaches Arising Before 20 October *2004*

126. As discussed in Section Ul.B.1 above, in ords' for the Tribunal to find jurisdiction *rations ternporis*, Claimant must establish feat both the dispute and the alleged breaches occurred while the BIT was in force. This is because Thailand's obligation to arbitrate disputes Is separate and distinct from its substantive obligations to afford investors fee protections set forth in the Treaty,[57]

127. Thus, even if the Tribunal were to find feat it has jurisdiction *rations temporis* over fee dispute, there is, in any event; no jurisdiction *rations temporis* over any alleged breaches that occurred before 20 October 2004, the date upon which the BIT entered Into force.

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94 jft, 153 (RA-53).

95 Claimant consistently refers to *"Ww dispute"* (in singular form) in lie Request for Arbitration. *See,* ftg; ⋀ 2 CTtf⋀ *d&pttfs arises directly* tfsrf *of Wdter* jStaf *'i priteftofeH/ in a toflwqy concession lx Bangkok ... and concerns breaches by the Responded of nblig&fi&ns it owed under the Treaty to Walter Baa* os *an Investor"*).

5* *See* Request fnF Arbitration, ⋀ 30.

77 *See* Christoph H. Sdireucrj "Tbe ICSID Convention: A Cwnmecrfary" (2001) 21 I (in order for a bilateral investment treaty to provide a basis foe jurisdiction, it must be in force at the relevant time) (RA-39), *effing Tradex Hellas SA.* w. *Republic of Atiania (Decision* av *JarisdictlQTj)* (24 December 1996) ICSID A&B/94# reprint In (1999) 14 *1C3ID Rttyr-FIU* SSI, 17S-1BG (the Tribunal found that there was iro jmiadi ctton on the basis of the BIT between Albania gnd Greece because both the alleged expropriation aod the Request for Arbitration occurred before Its enlry into force) (RA-40); Sir Robert Jennings Hid Sir Arthur Watts, wOppeuh⋀itsTa fotematfonai Law" (9th e&L, 1992)]] 620 (Sir Robert Jennings & Sir Arthur Wfttts eds., 9th Cdl 1996) *(fThs general rule fs fhri a treaty does not 4iratf a party* wfiA *retroactive %ffecf, l& Irt relation to any act or feet which took place or any situation which ceased to exist before the date of the entry intoforce of the treaty for that party."}* (RA-33; emphasis added).

128. Just as it is necessary to isolate when the cause of action accrued in die contest of establishing whether an action has been brought within a limitation period, Claimant must be able—in order to establish jurisdiction *rations temporis*— to isolate when the conduct alleged to have breached an obligation occurred.

129. Walter Ban contends that the alleged acts and emissions summarized in ⅄ 13QA of the Request for Arbitration constitute, *"both cwrmlativsfy and each individually,"* breaches of the Respondent's Treaty obligations and that Respondent "*continuously*' breached its **obligations.**[38]

130. If the alleged acts and omissions in ⅄ BGA are taken *amdivldmUy?*,* it is apparent on the iace of Claimant's pleading that the Tribunal cannot have jurisdiction *raticne temporis* over at least the following alleged acts and omissions, since, by Waiter Bau's admission, they occurred before 20 October 2004—

- Alleged Act/Qmissioii; causing delay to the opening of the Tollway and to the charging of tolls.[99]

  Allegedly Occurred: May 1993 to July 1996.[1W]

- Alleged Act/Omission: tailing adequately or at all to respond to DMT's requests to adjust the toll rates in light of changes in the economic situation; failing to enter into negotiations with DMT to remedy negative effects set out in paragraph 25.2 of the Concession Agreement.[to:]

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91 *$eg* **Request for Arbitration, ¶ 130.**

99 **/d, ▮▮3QAfr).**

ICO *fdt %* 14.1 f *'completion* arwf ***cpemngeftix ToHway were detayedfrom May 1993 to July 1996*).***

3D1 ***£, 1 !30A(b).**

Allegedly Occurred: September 1999;[tE] September 2GGl;[im] October 2002.[HM]

Alleged ActfOmis&iom exploiting DMT*$ difficulties to procure or effect amendments to the original conditions of the Concession by virtue of MoA2 and the Share Purchase Agreement[1]^

Allegedly Occurred: 29 November 1996 (MoA2); 2997 (Share Purchase Agreement).[106]

Alleged Act/Omission: felling to arrange the Soft Loan; free floating the Baht.[3fl7]

Allegedly Occurred: June 1997 (Soft Loan); 2 July 1997 (currency free floating).[m]

Alleged Breach: failing to observe Thailand's own internal systems regarding the admmistratietn of private concessions.[I09]

Allegedly Occurred: beginning of 1999 and at every 6 month interval thereafter.[1]^

10Z *Id*, 1 100 (*0TI *16 September 1999 DMT requested ike DoH to enter Into negotiationt to remedy the effects on its financial position under Article 25 of the Concession Agreement and Article 15 qf MoA 2/1926* irt *connection with Appendix FT}.*

ina *Jd*± ⋀ I05 C*7re *September 2#01 these negotiations [concerning rut Assessment of Financial Damages Report/ suddenly ceased before they could come to arty ooncbtfiofr")*.

rW *Mi* % lOrf *("In an effort to rsrbts negotiations with the DoB, DMT submitted an update of its original Assessment of* FtnancUri *Damages Report on 31 October* 2tf0Z'').

MB *td*› J l30A(b).

EM Jef, ⋀ 6 (tfw pariles entered into MoA2 on 29 November 1996, and the Share Purchase Agreement in 19P7).

107 *Idr* \ UOAfb).

t08 *Id*, U 14.2 {*"The Respondent JaBed to arrange [the Kofi Loanf immediately putting DMT wider renewed pressure from its banks and, by Jims 199?, forcing U to enter into arm's length commercial loans ... on 2 July 1997, the Respondent decided to float the Baht free of other major currencies .J'}*

IN *Id*,%65.

1t0 IdT Iff 101-107. Walter Ban alleges that under the Act *on* Letting Private Pcracits Participate in or Undertake AfitiYitiea of SEate, the Director General of t\OH was required **to report at least every $lx months to the mf*ifster-in-charge** [Id., ⋀ 102). Respondent acknrwiEdgca that, as pleaded, eetfmn reports weuEd have been doe after the BFFs entry into Etfcs. Respondent addresses tiie issue of reports occurring after this time Jn ⋀ 149-150.

- Alleged Acf/Omission: blocking or otherwise delaying the toll Increases granted to DMT' and its investors.[111]

  Allegedly Occurred: 2 December 1988; 16 June 1999; Id June 2004.1'[12]

- Alleged Breach: approving and implementing road schemes in competition with the Tollway.[313]

  Allegedly Occurred: 1998."*

131. As most of tile "*individual*' acts and omissions which Walter Ban alleges are temporally barred under (he BIT,[113] the question becomes whether there is nevertheless jurisdiction over this conduct because, as Claimant asserts, the Respondent "*coitinuousif'* breached such obligations, or the alleged acts and omissions "cHBJHZafrve ⋀ constitute breaches of Respondents Treaty obligations.[116] As discussed below, there is not.

(A) Continuing Breach

132. The **concept** of continuing breach is set forth in Article 140) of the Intoraational Law Commission's Articles on State Responsibility, which states that:

> "*The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act*

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m *id.* ¶ l30A(d).

ia *I&*, 7 39 (toll increase upon completion of the DOK Ujtonie was postponed until 2 December 1953); If 93 {iha Northern Extension opening should have xeifulted in toll increases on 16 June 1999); HI E7* 97 (automatic toll iccrcaa= should have been implemented on 1G June 2004).

ns *Id*, 1 !30A(c).

m *Id*, Tf 32 ⋀ ***By the later pert qf Ij98, ... the*** ifs ponrfenf ***impfemctUed road schemes ⋀ In partt&ifar, ft decided to convert the main carriageways of the VRR step by step into an attractive alternative totljree expressway, thus creating it into dired &jmpeitinn for the Tolhvoy... J*)** (emphasis added).

U5 In addition to the acts and omissions set forth lit If 130, the Tribunal *prhmjhcie* does not havejuriediedon over the "*individual*" &ct suid omission of "*moving* nr *directing or approving the move of ail scheduled air traffic from Don Muang airport to OK* JIAW *Savornabhunu International Airport*" since Walter Pan did *mK* plead when the decision to move air traffic to the new airport yfas allegedly made &ttd tbits cannot establish that this mourns! after the BIT entered into force. *See id* , ⋀ 93, 330A(e).

its *Seeid.* ⋀ 130, 130A.

> *continues and remains not in conformity with the international obligation.*[vU7]

133. Commentary to file Articles on State Responsibility provides the following examples of continuing wrongful acts:

> *"the maintenance in effect of legislative provisions Incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its* ***consent***[›iJiS]

134. Claimant will presumably argue that the Tribunal could have jurisdiction (in theory) if Gaimant established that there was conduct capable of breaching obligations that continued after the BlT's entry into force (even though, of course, the Claimant could not seek compensation in respect of the earlier conduct).

135. But Claimant's mere assertion that there is continuing breach here does not make it so.

13fi. First, the conduct at issue in the present case cannot be characterized as continuing. As demonstrated by the dates ascribed by the Request for Arbitration to the alleged acts and emissions outlined hf /\ 130, Claimant's Request for Arbitration makes it clear that such acts and omissions constitute discrete, isolated events, not ongoing, enduring ones as exemplified in the Commentary to the Articles on State Responsibility.

137. For example, regarding Respondent's alleged breach of its treaty obligations by causing delay io the opening of the Tollway and to the charging of tolls, Claimant readily admits that the Tollway has been open and that tolls have been charged since July 199G.[139] As

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in RA-31.

112 Jamas Crawlcrd, "Ths International Levr Coraixusskm^s Artidcs on Stats Responsibility; Introduction, Test and CornjyJBntnris3[u] (2DB2) 136 (ccimrneritnjy (3) to Artkle 14) (11A-54; emphasis added).

119 *See* Request for Arbitration, % 41.

such, Respondents allegedly wrongful conduct happened well before the EITs entry into force.

13S. As another example, in respect of Respondent's alleged breach of its treaty obligations by approving and implementing road schemes in connection with Hie TollwaVj Respondent's so-called wrongful conduct occurred when Respondent approved and implemented the road schema. Claimant pleads that Respondent *"implemented"* (note past tense) road schemes in 1998.[120] Again, this is well before the BIT's entry into force.

139. At best, Claimant pleads that Respondent's alleged acts and omissions had continuing effects on the value of its shares in DMT after the Treaty entered into force. Tellingly, Claimant says:

> *"As a result of these acts and failures of the Respondent, as well as the economic crisis triggered by the Respondent's free floating of the Baht against world currencies, DMT's financial position continuously and rapidly declined"*[121]
>
> * * *
>
> *"The cumulative effect of all these measures on Walter Bau's investment has been devastating."*[122]

140. Assuming that Claimant could prove that wrongful conduct prior to the BIT* enPy info force continued to effect the value of its investment after the BIT's entry into fotos* that would not establish jurisdiction on the basis of continuing breach because the wrongful conduct itself was completed before entry into force.

141. As the *Monday* Tribunal observed, *"there is a distinction between an act of a cantiming character and an act already completed, which continues to cause loss or damage."*[123]

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120 *Id*, f S2.

lu *Id*, ¶U3.

is /*, 113.

142. Tills principle is codified in Article 14(1) of the Articles *on* State Responsibility: *[t]he breach of on htfcrmtianal obligation by on* art *of a State not having* a *continuing character occurs at the m&meftf when the act ispe?fbnn&d, even if its effects continue,*

143. **Commentary to Article 14 explains:**

> *"An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by emptier acts of torture or the economic effects of the expropriation of property continue even though the torture Has ceased or title to the property has passed.*

144. Claimant has die burden here to establish that the alleged acts and omissions occurred at the relevant time. Claimant dearly has not met that burden in its Request for Arbitration.

145. Second Claimant does not point to conduct of die state after entry into force, which, in and of itself, is a breach.

146. In this regard, while the NAFTA Tribunal in *Monday* v. *U.SA.* ibund that *"events or conduct prior to the entry into force of an obligation Jbr the responded State may he relevant in determining whether the State has subsequently commuted a breach of the obligation* It emphasized that *"it must still be &osrihls to noinp to conduct of the State*

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137 *Mondev friermtionai Ltd. ?. United States of America (Aworcfi* **(11 October 2002) ICSID Caw No.** *ARSfAFy99l2* **5£ (RA-4l; emphasis added).**

*U** **RA-31 (emphasis added).**

125 **Jaincs CrBwffrd, 'Tbs International Law CMitmJssion'a Artielea on State Responsibility: Introduction, *Test* and Commentaries[11] (2002) 136 (commcntaiy (fi) to Arbeit- 14] (RA-54).** *See also,* **International Law Commission, Commentary EHI Article IS of the Draft Articles on State Responsibility ProvisionaOy Adopted *by* tbs Commission on First Reading (1996) 21a ayailabEe at** chttp://tciUaw.cam.ac.uk/projects/stflrtE_document_coHection.php#4> *{''[AJ 'continuingr act qf the State jtntsi not be confused with 'an instantaneous act producing continuing effects,' Jbr scatftpfa an act of confiscation. hi case, the act of the Stats as such suds as soon as the caifiscatiort has taken place, eyen if its consequences cue Lasting. In the fott&r event the existence of a breach of* cm *tntErntstiamJ obligation wilt be established solely on the basis of an obligation which ww tn force for the State at the ttpie when the instantaneous ad occurred and the conclusion reached cannot* fie *altered by the fact that the effects qfthe act continue qfter an obligation* to *refrain from such an act has entered into force!')* (RA-55).

after dial dale which is itself a breach»[126] The Tribunal pointed out that OTIC must look at not only die feds but also *iCthz obligation said to have been breached*»[127]

147. *JR* Paragraph 128 of the Request for Arbitration, Claimant lists fee Treaty provisions that Respondent has allegedly breached. Then, fe Paragraph 130A, Claimant summarizes Respondent's alleged wrongful ads and omissions and declares (with so explanation} which of the Treaty provisions each net and omission supposedly breached. Thus, Claimant says what Respondent allegedly did, and concludes that Respondent violated the Treaty. Claimant foils, howevers to explain how Respondents acts and omissions violated fee Treaty.

148. Assertion cannot replace argument In ¶¶ 171-1S0, Respondent explains that Claimant has a burden in respect of jurisdiction *raticne material* to pariicujarize its claims, and Respondent feows why Claimant's allegations are not *pruwfaoi*/\ capable of triggering Respondents treaty obligations. Claimant's failure to particularly the legal basis for its claims, however, *h* also fetal in respect of jurisdiction *rutione temporis*. Absent a showing that Respondents alleged conduct is capable of triggering Respondent's treaty obligations, Claimant cannot establish either the duration of fee alleged breaches (i.a, whether there was continuing breach) or that any breaching conduct took place after fee BTTs entry into force.

149. The only acts and omissions that Claimant pleads took place ufer fee Treaty's entry into force are as follows:

13S *Mcndzv International Ltd.* v. *United States tif America (Award}* {11 October 2002) ICSID Case Ko. AKl!(AF)/99/2 /\ 70 (RA–41; snrphfcsis added). *See ak& Tectticas MedioamMentdies Teemed S.A.* ɪ. *The United Mexican States (Award)* (29 May 2003) ICSID Case Ho. ARB(AP)/0O/2 % 66 {fbJlowing Arfbrarfsv) (&A–44).

53? *MandevidP* ¶58 [RA-41; emphsria added).

* Alleged Act/Onusstou: Imposing or otherwise effecting a reduction of the toils.[124]

  Allegedly Occurred: December 20G4.[129]

* Alleged Act/Omission: Disregarding Walter Ban's interests as a minority shareholder in DMT.[130]

  Allegedly Occurred: December 2GQ4 and following,[131]

* Alleged Breach: Failing to observe 'fliailand's own internal systems regarding the administration of private concessions.[133]

  Allegedly Occurred: Every sis: months.[133]

150. As discussed hi Section M.D below, Claimant has made no effort to particularize the Treaty obligations supposedly breached by these alleged acts and omissions. S is for Claimant to establish that, by *'Cunprising or otherwise effecting a reduction of the tollsf "disregarding of Whiter Han's interests as a minority shareholder,"* and *"failure to observe its own internal systems regarding the administration of private concessions",* Respondent could have foiled to comply wlfh the treaty obligations specified in the

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CM Request for Arbltrahotij /\ 130A(d).

iw /dCp.TJ 14-1Q (*fin December 2004, the Respondent pressured DMT fagaiwtthe objections of Walter Ban and DMTTs othor foreign shareholders) into accepting a supposedly three-month 'trial' of reduced toll fens, aguinsl a promise of compensation.*").

130 *Id.*, ¶ 130A(f).

in *Sea idz* /\ 117 *CBMTsozt Intel* Jj *report to th& Respondent ort SO November 2Q#4"*)i f 119 {*trJust two weeh qftcr receiving Intel's report, the Respondent forced through a unilateral reduction of the t&Hs.. jyT* 1120 ("Jjftsf *reduction was made with total disregard to the interests and to the detriment of DMT and in breach of the Respondent's treaty obligation to Waiter Bolt. I7ie Respondent used its position as director and shareholder of DMT and also Its influence on the nonfbreign board members and shareholders ofDMT to obtain DMTTs consent to this measure against the strong objections of Walter Baa and the other foreign shareholders and without the prior consent qfBMT's Imders.*[35]). *See oho id*, ¶¶ 124-25.

131 *Id.*, ¶ 65.

333 ***See* footnote 111.**

Request *for* Arbitration (at ¶¶ I30A(d) and (f), respectively).[134] Because Claimant has failed to do so, there is no jurisdiction *raiione* temperte on the basis of continuing breach.

(B) Ounuiative Breach

151. In describing Respondent's alleged acts and omissions as "*cumulatively*" constituting breaches of Respondent's Treaty obligations, Respondent understands Claimant to posit that Respondent breached Treaty obligations through a composite act, *i.s.*, a series of actions and omissions that are wrongful in aggregate.

152. This concept is described in Article 15 of tile International Law Commission's Articles on State Responsibility, which stales:

> *"(I) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs When the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*
>
> *(2) in such a case, the breach extends over the entire period* storting *with the first of the actions* or *omissions of the series and lasts for as long as these actions or emissions are repeated and remain not in corformity with the international obligation."*[135]

153. Claimant might well argue that jurisdiction *rotione tetnporis* could exist if Respondent's alleged conduct cumulatively amounted to a breach of its Treaty obligations, and such conduct occurred, in part, after entry into force.

154. However, not just any series of acts and omissions can, in aggregate, give rise to the breach of an International obligation. To amount to a breach of an international obligation, there must be an accumulation of identical or analogous breaches which are

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H* *See* discussion of *Mender* (KA-41), ¶ 146.

us intemadonal Law Ccmmission, *Draft Articles on Responsibility cfStales far Internationally V/rongfiit Acts* (2001 HRA-31).

suftickrrtiy numerous and interconnected to constitute a systematic policy or practice, as in the case of genocide and crimes against humanity.[136]

155. On the face of foe Request for Arbitration, that is not the case here. It is for Claimant to establish otherwise. Because Claimant has foiled to do so, there ss no jurisdiction *rations temporis* on the basis of cumulative breach.

C. NO JURISDICTION OVER CLAIMS UNDER THE 1961 TREATY

156. In apparent recognition of the tack of temporal jurisdiction over its alleged claims under the BIT, Walter Ban asserts that Respondent's alleged conduct breached the 1961 Treaty. This assertion is unavailing, because the 1961 Treaty does not provide for investor-state arbitration.

1. No InvestordState Arbitration Under the 1961 Treaty

157. The 1961 Treaty was terminated upon entry Into force of the BIT.[137] And even prior to this event, no inveator had the right to bring suit.

158. Indeed, cot all investment treaties provide recourse to investors for breach of treaty obligations, and this possibility of recourse was in fact foe exception in the early days of these treaties. For example, neither the Gertnany-Paldstoii BIT (1959) nca· foe Ecuador-Switzeriand BIT (1971) provide for investor-state arbitration.[138] The state parties to each of those treaties instead negotiated that any disputes concerning their interpretation or application would be resolved only at a state-to-staie level. (This is perhaps not surprising given that each of these treaties, including the 1961 Treaty, was signed before

136 *See* James Crawford, "The InfEmadDcaE Law Commssaon /\ Articles on State Responsibility: Introdiretinn, Text and Commentaries" (2002) 135 (commentary (3) to Article 14) (RA-54).

137 **Bir, Ail. UfWBl).**

138 *Pakistan and Federal Republic of Germ&iy Treaty jar the Promotion and Protection of Ittvesiraenti (with Protocol and exchange /\f nats/\r* done *m* Bonn (25 November 1959), Art. U (RA-56); *Accord entre la Cotf&d&ation Suisse ct h Rspublique de VEquateur rdatff à la protection ct d /\encouragement dts if7ve£ifssemcnls±* done *m* Berne (2 May 1968), Art. 7 (RA-57).

the creation of ICSID in 1966.139 Today, advance consents by governments to ICSID arbitration can be found in more than 900 investment treaties)[1«]

159. The only state consent to arbitrate in the entire 1961 Treaty is contained in Article 11, pursuant to which the state parties agreed that "*fdjisputzs concerning the interpretation or application* of foe 1961 Treaty could ho submitted to an arbitral tribunal upon the request of either state party.

160. Heedless to say, Walter Bau is not a state party; nor does it seek to arbitrate a dispute concerning interpretation or application of the 1961 Treaty. Ho consent to arbitrate Walter Ban's claims under the 1961 Treaty tan thus be found therein.

161. And yet, the Claimant would have you believe that this fundamental right – absent from the 1961 Treaty – was somehow crested, without express provision, in the BIT.

2. Article 10 of the BIT Does Not Apply to Claims Based on the 1961 Treaty

162. Claimant appears to contend that Article 10 of the BIT contains state consent to arbitrate claims arising under foe 1961 Treaty.[141] In other words, Claimant contends that the Tribunal should override foe unambiguous intent of foe state parties not to provide for **ínv^fon-state arbitration in foe 1961 Treaty.**

163. Pursuant to Article 31 of the Vienna Convention, Article 10 of foe BIT must be interpreted "*in accordance with the ordinary meaning to he given to the terms of the treaty in their context and in the light of its object and purpose!*«[142]

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139 Ttse Wor[:]d Bank Group, rntemafiona] Centre for SeHieoicnt of investment Disputes, "Abturt TCISD", a ivaikbie at <tvttp-*Jtvrvnx*:v:ofIdbank.orgficsid/about/aboutht m> (RA-58).

W *Id*

[4[**Request for Arbitration, ^ 20** ***tfRespQndent's enment io ihs submission of ths dispute referred to in this Request to the Centre fs contained In Artich W qf the Treaty!**),**

1« **RA-2.**

164. Interpreted according to its ordinary meaning, the consent to arbitrate expressed in Article 10 does not encompass claims arising under toe 1961 Treaty. Article 10 contains no reference to the 1961 Treaty. Instead, Article 10 refers to *"[djisputes concerning investments"* and *"investments"* is a defined term hi the Treaty. The use of this defined term in Article 10 signifies that the state parties intended that the scope of Article 10's application would be confined to claims in connection with fee BIT.

165. In any event, it stands to reason that, if the signatories had intended that an investor could arbitrate disputes both arising under a separate treaty and in respect of which the investor would otherwise have no right to arbitration, they would have done so in the clearest possible terms.

166. Respondent's interpretation of Article 10 is consistent with die object and purpose of the Treaty. In entering into the BIT, the slate parties intended to replace the obligations undertaken in the 1961 Treaty with new ones. It would be contrary to the object and purpose of the BIT if ua Waiter Ban suggests, its dispute resolution provision could be invoked by an invertor to compel toe arbitration of claims based on treaty obligations that the BTT had replaced.

167. Bven If the Tribunal were to find that the meaning of Article 10 is ambiguous as to whether it envelops claims based on toe 1961 Treaty, toe Tribunal must apply the *in dishio mitins* principle, which specifies that, if the meaning of a provision is unclear, the meaning which is less onerous to toe state assuming an obligation is to be preferred.[143] The less onerous meaning of Article 10 is that it does not apply to disputes arising under separate treaties.

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[143] SIT **Robert Jennings anii Sir** Arthur **Watts,** "OppraheWa EntenjatJonaj **Law"** (9th ed,, 1992) § 633 (RA-33).

168. Applied in the particular contest of claims arising under the 1961 Treaty, it is apparent that this interpretation of Article 10 is less onerous to the state because it means that investors are not given a right to arbitrate that they otherwise would *not* have.

169. Accordingly, the interpretation of Article 10 that limits the right of investors to compel arbitration to disputes that are related to the BIT must be preferred.

170. This interpretation is moie reasonable in light of the meaningful difference between the dispute resolution provisions in the two treaties. Without question, the state's dispute resolution obligations are more onerous under the SHY hi such circumstances, if the state parties had intended in the BIT to take on more obligatitms tor claims based on the 1961 Treaty than would otherwise exist under (hat treaty, then they would have said so expressly. They did not, and the Tribunal should accordingly find that It has no jurisdiction over claims based on the 1961 Treaty.

». NO *PX/M4 FACIE* BREACH

171. As summarized in the tabic on page 9 of this memorial, Walter Bau alleges feat the Respondent has violated obligations tinder fee BIT and the 1961 Treaty to guarantee:

> "*fair and equitable treatment; not to impair the management,* atfe, *enjoyment or disposal of the Investment by arbitrary or discriminatory measures; JUU and most protection and security; compliance with the treaties as regards the standard Jar expropriation and measures tantamount to expropriation of investments; observance of other obligations the Respondent has assumed with regard to the investment; and national and Mosi-Favoured-Nation-TreatmentP*[144]

172. The Tribunal must be satisfied that the claims and facts presented are at least capable of establishing a breach of the treaties.[145]

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144 **Request &r Arbitration, ⋀ 130.**

145 ***See Ethyl Carp*** **v.** ***Government of Canada*** **(*Award on Jurisdiction)*** (34 June 1998] NAFTA/**tl**⋀CTTRAL Arbitration ⋀ Gja reprinted in (1999) 3S *ILM* 7QB **(finding** that the **cldmant's** allegations were **sufficient** to

173. *As* the tribunal in *UFS v. Canada* stated:

> *"{The Tribunal] must condud a* prima facie *analysis of the NAFTA obligations, which UFS seeks to invoke, and determine whether the facts alleged are* capable of constituting a violation *of these obligations."*[146]

174. Following the ruling of the ICJ in the *Oil Platforms* case, the ICSID Tribunal in *SGS* v. *Philippines* held In its decision on jurisdiction that, when assessing whether a tribunal has jurisdiction *rations materiae* in respect of a dispute alleged to he arising under a treaty, the tribunal *"must ascertain whether the violations of the [treaty] pleaded by [Claimant] door do not jail within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction* **rations tnaleriae** *to entertain"* **pursuant to the treaty's dispute resohiticai provisions.**[147]

175. **The Tribunal said:** *"Is is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test forjurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on.*[145]

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wjratlfftyj **prima ficie** *ike requirements of Article 1116 tv esiabilth she jitrlsrfjciion if this* TWfiuadt*) (8A-59).

144 *Utrded Rarcel Service qfAmerica Inc* v. *Government qf Canaria (Award an Jurisdiction)* (22 November 2002) NAJFTA Chaffer 11 Arbitration, available at <http://vavw.dfait-niffid ^ cartnaiiac/dQcwiKatsif JurJsdJc^onMSO Award 22NoYti2.pdi> ¶ 33 (HA-60) (unitaldci2&d original empha ^^ underline emphasis added). *See oho Pan American Energy LLCt and BP Argentina Exploration Co* v. *Argentine Republic awl BP America Production Co., et ai* u *Argentine Republic (Decision art Preliminary Objections)* (27 My 2006) ICSID Cuae >tos. ARBA53/13 and ARB/04/8 ^ Jl *("[T]he question is* [sic] *here whether the Cfaiiaanls' chritrts, if well founded a matter to he examined at the fallowing stage, may denote violations of the BIT and therefore fdl within the Centre's jitfisrictton and this Tribunal's Competence inzder the relevant provisions qftli& BIT and Article 25 qf the ICSID CoT&enfiGflJ*)* (RA-61).

147 *SGS Satiate GinSrafe de Surveillance SA* v. *Republic of the Philippines, (Decision qf the Tribunal an Objections to Jurisdiction}* (29 January 2004} ICSID Cast No. AJ3B/D216 1 26, available at <www.wot3dbar^or^/tcsid> (RA-3S, *quoting* Gsre *Cancet,ifng Oil Platforms (Islamic Republic of Iran* v. *United Slates)* (1996) *ICJ Rep* 803 B10 (RA-62), and *ailing Cose Concerning Legality of Use qf Farce (Yugoslavia* vr *Belgium) (Request for the Indication of Provisional Measures)* (2 June 1999) *ICJ Rep* 124 ^ 137 {RA-52J).

HH *SGS* v. *PhilippinesJd* ^ 137 (RA-38).

176. The *Salim* Tribunal's decision on jurisdiction supports tie *SGS-Philippines* Tribunal's conclusion that, in order to assess whether claims fall within the terms of a treaty, it is not sufficient for a claimant merely to say so. The *SalM* Tribunal held that it did not have jurisdiction over treaty claims where, "*after having prtsentpd the contractual claim in detail, the Claimant[] [cited] the articles of the JUT which, in [its] opinion, had been violated without giving any further explanation.*"[53][149]

177. As in *Salim*, the Claimant here Jails far short of the standard for jurisdiction *radons mottriat*. (It must also be recalled that Claimant had a second opportunity to remedy tills when invited by the Tribunal to clarify its claims.)

17S. First, although Claimant rattles off in its pleading various treaty provisions that Respondent has allegedly violated,[130] in Paragraph 130Å of the Request Sir Arbitration – in which Walter Bau links Respondent's alleged acts and omissions to the specific treaty obligations supposedly breached – Claimant neglects to particularize all of its claims. Specifically, Claimant fails to aver any factual basis whatsoever &r claiming violation of Rjespaodcrct's obligations under Articles 3{1) and £2) of file BIT not to treat Claimant's investment less favorably than investments of Thailand's own nationals or companies or investments of nationals or companies of any third state. As Claimant's pleading is

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HP *Safini Costndtori S.pjL and Italslrade Ep/\~ VI The Hashemite Kingdom of Jordan, (Decision* AH *Jurisdiction)* (29 November 20G4j ICSID Case No. ARMEZ/13 /\ 161 (BA-45). *See trfsa Ambafizlos Case (Greens* v. *United Kingdom) (Judgment on the Obligation to Arbitrate)* (19 May 1953) *SCI Step* 10, 1& ("Ifte *Court must determine* ^ *whether the arguments advanced by the Hefenlc [sic] Government in respect of the treaty provisions on which the Ambotielos claim is said to be based are of a suffkientfy plausible character to warrant a conchtsion that the claim is based on the TyeatyP}* (RA-63); *Case Concerning Legality of* tftff of *Force (Yugoslavia* v. *Belgium) (Request jbr the Indication* of *Provisional bfeairtrex} (2* June 1999) *ICJ Rep* 124 Tf 3S) (win *order to determine* even *primafacie, whether* a *dispute within the mmming of Article IX* of *the Genocide Convention ext&M the Court cannot limit itself to noting that one* of *the Parties maintains that the Convention applies, while the other denies It;* ^ *[It] must ascertain whether the breaches* of *the CoTrvenfton alleged by Yugoslavia* HFS *capable offaffing within the provisions of that instrument and whether, as a consequence the dispute is one which the Court kps jurisdiction* raltcuie material *to entertain pursuant to Article DC)* (RA-52).

15H *See* **Request for Arbitraifcmj 323-29**.

deficient in this respect, there is no jurisdiction *rations materiaa* over claims based on Arfcies 3(1) and (2) of the BIT.

179. Second, as concerns Walter Batris other claims, Claimant does nothing more than describe Respondent's alleged acts and omissions and cite tlie treaty provisions that It alleges Respondent violated.[131] In abort, Waiter Ban alleges legal conclusions that Respondent breached the treaties without saying how Respondent breached them. The Tribunal need only look to Paragraphs 12 BrI 3GA of the Request for Arbitration, in which Claimant specifies Its treaty claims, to confirm that this is the case. Claimant's Mure to particularize the legal basis for its claims constitutes a lack of jurisdiction *ration# materiae*.

180. Third, the facts pleaded by the Claimant, if prov&i to be true, arc not capable of triggering Respondent's obligations under the treaties.

1. No Expropriation

1S1. Although Claimant vaguely alleges that Respondent expropriated its investment through acts and omissions that devalued DMT, as a matter of law, any such acts and omissions would not constitute expropriation unless Walter Bau was substantially deprived of the economic value, use or enjoyment of its investment

182. Walter Ban's complaints of deprivation center around an assertion that as a result of the Respondent's alleged acts and omissions, the anticipated return on Walter Ban's investment has declined.[132] With mare than fifteen years left in the life of the

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IS1 *Id.*, ¶¶ 128-130A.

152 *Seeld*, ¶ 12.

Concession, Walter Bau cannot seriously contend that It has been substantially deprived of the economic value, use or enjoyment of its investment[133]

183. Since it is dear on the foce of the Request for Arbitration that Walter Ban has not suffered a substantial erosion of the value of its shareholding in DMT, Walter Ban cannot make a case for expropriation.

2. Claimant Insufficiently Pleads Contractual Breaches

184. To the extent that, despite Walter Bau's failure to particularize the legal basis for its claims, Respondent can discern from the Request for Arbitration any rational cohnectian between the alleged acts and omissions and Walter Bail's claims, it appears that the alleged treaty breaches stem almost entirely foom DOH's alleged performance or non-perfbmatficc under the Concession Agreement (as amended by MoAI and MoA2) between DOH and DMT.

185. In foci, Claimant effectively concedes in its Request for Arbitration that alleged contractual breaches are the essence of its complaint For example, Claimant characterizes attempts to seek redress for Respondents alleged wrongful conduct as a contractual matter, and even characterizes attempts to negotiate settkuusnt as being contract – not treaty – based:

> *"UDMT has persistently sought fo negotiate with the Respondent Jbr remediation of its situation as ft is entitled to do under the Caneession AgretitneHt. Starting from 2001, Walter Sou sought in parallel and m goodfdfth to seek a commercial solution with the Respondent ..."*[154]

186. Claimant describes Respondent's alleged wrongful conduct, first and foremost, in terms of breach of contract:

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153 *Id.*, ¶ 63(b)(iii).

154 /d. /\ 14.9 (emphasis added).

> **As will be seen from Section D below, the Respondent has persistently breached its obligations to DMT under the Concession Agreement and other contracts ...*[Hi33]

187. Claimant contends that every one of Thailand's alleged breaches (summarized in f 13GA of the Request for Arbitration) amounts to a failure by Thailand "*to jtdjil obligations it has entered into under the Concession Agreement*."[156]

188. Yet, while Walter Ban *attempts* to hang its treaty claims upon breaches of contractual obligations, it curiously foils to plead focte sufficient to establish such breaches. In particular, Claimant does not aver how each of Respondent's alleged acts and omissions breached a specific team of foe Concession Agreement. Claimant has not even produced signed copies of the Concession Agreement (WB8), MoAl (WB1G) or MQA2 (WB16). *Primajocie,* then, Claimant has not pled claims and foots capable of establishing breach of the 1961 Treaty or BIT (Respondent refers to the 1961 Treaty purely to demonstrate that Claimant's case foils on any analysis of jurisdiction).

3. Mere Breach of Contract Does Not Constitute Treaty Breach

189. Even if Waiter Ban had properly pleaded the elements of a cause of action for breach of contract, there would still be no jurisdiction. Claimant cannot state a cause of action under the treaties by merely recasting breach of contract claims as treaty violations. It is well-established in investor-state jurisprudence that whether there has been a treaty breach and whether there has been a breach of contract are different questions.[1iT]

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155 *Id* (emphasts added).

15* *See Id* 31J 13GA. JXftiiilj (bXHD/feDOii), (dXlHl (e)(tn), COM (emphasis added).

JST *See Compankf de Aguos del Aca^qulfc HA and Vhsjtdl Universal ^ Argentine Republic (Decision* cm *Anmdmefit)* (3 My 2002) 1CSED Cage No. AP3/97/3%?6 *(f [w]hetfser there has been a breach qf the Bff and whether there has been tt breach qf contract ate different questions Each qf thesz claims wiil be determined by reference to its onrn proper or applicable Itzw—hi the case qf the BlTt by tntefRotitmal l&w; in the case qf the Concession Contract, by the proper law of the contract^) {RA-6/\}; Solftri Costi titton i S.p.A. and ftdistrade H.p.A. v. The Hashemite Kingdom qf Jordan, {Decision an Jurisdiction)* {29 Novearfjer

190. The Tribunal does fiat have jurisdiction over purely contractual claims ;which do not amount to a treaty violation.[158] In ihe words of the Aisnulmenrt Committee in *Vivendi* v. *Argentina*:

> *'LA treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary? to the relevant treaty standard.*"*^

191. Accordingly, in order to satisfy the Tribunal 1ha± Claimant's allegations are the sort of allegations capable of triggering Respondents treaty obligations, Walter Ban must establish that the treaties specifically protect investors against contractual breaches by the state, and that Waiter Bail is entitled to any such protection under the treaties.

192. In this regard, Claimant only pleads that Respondent had a duty to observe obligations "*stemming from the Concession Agreement*" in accordance mth Article 7(2) of the BIT and Article 7 of the 1961 Treaty.[1«]

193. The question thus arises whether Walter Ban can elevate alleged contract claims to the level of treaty claims by **vartuE** of Article 7(2) of the BIT and Article 7 of the 1961 Treaty, *Is*. whether each of these jtfovJsions is tantamount to a so-called Umbrella" clause that places contracts under the protection of the Treaty.

5004) ICSID Case No. *ARMIQIfII* V 154 (*"[N]ot any breach qf an tnvoatment contract could be regarded as a breach of & BIT'*) (RA-45); *SGS Sodete Generate de Surveillance S.A. v. Islamic Republic efPakistan (Decision on Objections to Jurisdiction)* (6 August 2DW) ICSID Case No. AJ&B/Q1/13 % 1G7 (a violation of a contract entered into by a state with sit investor of another state, is not, by fadf, a violation of international kw) (RA-G5).

!» ***See Pan American Energy LLQ and BP Argentina Exploration Co. v. Argentine Republic andBP America Production Co., e& at. v. Argentina Republic (Decision on Preliminary Objections}*** **(27 luty 2006) ICSID Case NG5. AKB/G3/13 and ARB/04/8 V 91 ("Tjfie *Tribunal _ has onlyJurisdiction aver treaty claim [sicj, and cannot entertain purely contractual claims which do not amount to a viofaiitm of ihe BIT.")** (RA-61).

1» ***Campania de Agtfas del Aconqmja 3A and Vfventft Unp^rsal v. Argentine Republic {Decision on Annulment)*** **(3 July 2002} ICSID Case No. ARBA>7£ 1113 (RA-54).**

1»5 *See* Bequest for Arbftiratlcin,* VI J 2S(&X 129(d).

a. No Umbrella Clause

194. Article 7(2) of the BIT provides, in relevant part, that "*[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.*"[161] Similarly, Article 7 of the 1961 Treaty specifies, in relevant part, that "*[e]ach 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.*"[162] As there is no substantive difference between these provisions (and because under any view the 1961 Treaty does not apply), Respondent henceforth discusses only Article 7(2) of the BIT.

195. As mentioned above (*see* ¶102), pursuant to Article 31 of the Vienna Convention, Article 7(2) of the BIT must be interpreted "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[17]

196. Interpreted according to its ordinary meaning, in context and in the light of its object and purpose, it is apparent that Article 7(2) of the BIT does not elevate contractual breaches to treaty breaches.

197. First, Article 7(2) does not refer to "*contracts*" or "*contractual obligations*".

198. Second, Article 7(2) is separated from the substantive obligations undertaken by the state Parties in Articles 2 to 5 of the BIT, concerning admission, protection and treatment of investments, national and most-favoured-nation treatment, protection and compensation, and free transfer. These substantive obligations are grouped together and marked-off by Article 6 (entitled "*Subrogation*"). The separation of Article 7(2) from those obligations

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161 *VBL*

162 WB2.

indicates that it w not meant to give rise to a substantive obligation like those set out in Articles 2 to 5 of the BFT.

199. The reasoning of the ICSID Tribunal in *SGS-Pakistan*, which was confronted with a very simitar structure and sequence of provisions in flic SwIss-PaJdsten BIT, is apposite:

> *"[gJWen the above structure and sequence of the rest of the Treaty, we consider thatt had Switzerland and Pakistan friended Article 11 to embody a substantive "first order" standard obligation, they would logically hove placed Article 11 among the substantive "first order" obligations set out in Articles 3 to 7. The separation of Article 11 fiom those obligations by the subrogation article and the two dispute settlement provisions (Articles 9 and 10), indicates to our mind that Article 11 was* not *meant to project a substantive obligation like those set out in Articles 3 to 7, let alone one that could, when read as SGS asks tis to read it, supersede and render largely redundant the substantive obligations providedfor in Articles 3 to 77* w

200. For the foregoing reasons, Article 7(2) of the BIT cannot be construed 35 an "umbrella" clause that elevates contractual breaches to the level of treaty violations.

201. This interpretation of Article 7(2) follows from the provision's plain and ordinary meaning. If, however, the Tribunal considers that the provision is undiearj the Tribunal must also reach this interpretation of Article 7(2), in accordance with the *in duhto minus* principle of treaty interpretation.[1*4]

4. If Article 7(2} Were a*i Umbrella Clause, It Would Only Encompass Obligations With Regard *to* the Investment

202. In the event that the Tribunal finds that Article 7(2) Is an umbrella clause, the Tribunal would still lack jurisdiction over Walter *Baniys* asserted breaches because Article 7(2)

[1*3] *SGS SocisCe Generate ds SiirvefUance S.A* v. *Islamic Republic of Pakistan (De&lsfon on Objections to Jurisdiction}* (6 August 2003) EC3ID Caae No. AKB/Q1/13 % J70 (RAH55). *See also Joy Mining Machinery Limited* v. *Ar&b Republic of Egypt (Daoisbn on Jurfocfleibn) (6* August 3004) ICSID Case Ha. ARB/03/11 /\ SI (expressing doubt as to whether fli* so-called umbrella clause could elevate contractual breaches to treaty breaches, even if there was state interference with the contract, given that the clause was not inserted very prominency in the treaty) (RA-661.

[&] *Sss* ¶¶ **112-113 above**

applies only to obligations that Thailand assumed "*with regard to [the] hjvesfmentfff* i.e., with regard to Walter Ban's shares in DMT. Stated simply, Walter Ban cannot overtook feat it is not a party to the contracts it complains have been breached.

203. Because Arttote 7(2) expressly applies only to obligations assumed "*with regard to [the] imestmentfff* toe Tribunal must determine the scope of Article 7(2) with reference to the definition of "*investment*" in Article 1 of the BIT. In defining "*investment,*" Article 1 distinguishes between "*shares of companies* and *"business concessions tinder public law*" as different types of investment.

204. Walter Ban's investment within the meaning of the Treaty was toe purchase of shares in toe company DMT, not the purchase of a business concession.[1^] To toe extent that Article 7(2) is an umbrella clause (it is not), it follows from (he plain wording of Article 7(3) feat Claimant can invoke the clause only to respect of obligations assumed with regard to its shares, such as obligations assumed under a shareholder agreement (although erven here, other fundamental barriers to a treaty claim apply).

205. But as shown in Section 33LD.2, Walter Ban apparently contends that the **alleged** breaches in the Request for Arbitration constitute breaches of the Concession Agreement (or MoAl or MoA2) between DOH and DMT. Walter Ban tons complains about alleged breaches of contractual obligations assumed wife regard to DMT, not contractual obligations assumed with regard to Walter Ban's shares.

206. Apparently, toon, Walter Ban wants toe Tribunal not only to find that Article 7(2) of the BIT confers jurisdiction over contractual claims (it does not), but also that it protects

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1G5 ***SeeytlShll***.

strangers ID contractual obligations undcrfcakeri by the state from any breach of those obligations.

207. It is unreasonable to assume tbat Thailand would open itself up to contract-based claims by non-parties to those contracts.

208. Tli® recent decision of the ICSID Tribunal in *Azurix* v. *Argentina* accords with this view. In that case, the Tribunal rejected the claimant's argument that it could submit claims for breach of a concession agreement under Article Il(2)(c) of the US-Argcntina BIT (stating that ^*[ejach party shall obxeme any obligation it may have entered into with regard so Investments*"}. It did so because the claimant was noE a party to the agreement. In finding that there was no ^*obligation with regard to an investment,*" tire Tribunal **reasoned as follows**

> *"None of the allegations made by the Claimant refer to breaches of the Province in relation to Axurix itself The obligations undertaken by the Province in the Concession Agreement were undertaken in favor of ABA not Azitrix. As the Respondent itself has asserted, Argentina is not party to the Concession Agreement, and ABA is not party to these proceedings. Therefore, the underlymE premise of Article JI(2c) of the BIT — that a party to the BIT has entered into an obligation with regard to an investment — is inexistent. Neither the Respondent nor the Province, as a political subdivision of the Respondent has entered into a contractual relationship with Amrix itself."*[165]

209. **The Tribunal stated further:**

> *"While Aztirix may submit a claim under the BIT for breaches by Argentina, there is no vrideriakmg to be honored by Argentina to Azurix other than the obligations under the BITm Even if for argument's sake, it wmdd be possible under Article II(2)(c) to hold Argentina responsible for the allsged breaches of the Concession Agreement by the Province, it was ABA andnotAsurix which was the party to this Agreement."*[167]

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3 Mi *Aλurix Cvrpm* **v.** *Argeiftire RepnbHe (Award)* **(14 July 2006} ICSID CkaeNo. ARBλl/12 ¶ 52 {RA-67).**

1ST *Id , % 3U (Riλ67).*

210. Hers, too, Claimant is not party to flic Concession Agreement allegedly breached. Accordingly, jurisdiction over any claims under Article 7(2) based on alleged bleaches of the Concession Agreement should be denied.

5. If Article 7(2) Were an Umbrella Clause, Claimant Would Still Have to Plead Contractual Breaches Beyond Mere Commercial Acts

211. Even if Article 7(2) were to elevate contractual claims to treaty claims (which is denied), and even if Walter Ban were entitled to sedt redress tor breach of contractual obligations owed to DMT (which is also denied), the Tribunal would still not have jurisdiction over Respondent's alleged contractual breaches to the extent that the alleged breaches are a consequence of the stale acting merely as a contracting party, as opposed to as sovereign authority.[ES9]

212. This view has been adopted by various international tribunals in determining whether claimant's breach of contract claims could constitute treaty claims.

213. For example, while the ICSID Tribunal in *Joy Machinery Limited* v. *Arab Republic of Egypt* noted that a discussion of the alleged "umbrella" danse was not necessary for the outcome of the case, it conducted, in principle, that such a clause could not have flic eflfeot of transforming alt contract disputes into treaty disputes "*unless of course there*

14* *See* Stephen M. Schwebel, "*iQn* Whether the Breach by a State of a Contract vrfth an Alien is a Breach of International Law" reprinted in "Justice in tetematiortat Law: Selected Writings of Stephen ML SchwebEp (1994) 425, A31 ("*[T]here is more than doctrinal authority in support of the conclusion that white mere freock* fry *a State of a contract with an alien (whose proper law is not International law)* is *not a* wnifltiora *of international Jaw, a 'nm-ccmmerctal' act of a Sate contrary to such a contract may he*"} (RA-65); *Restatement (Third) of Foreign delations Law of the United States* (1987) § 7L2 (note 5) ("... *interiHttUfnal law* is *not Implicated if a stale repudiates or breaches a commercial contract with a foreign national for* <u>*commercial reasons*</u> *as a private contractor mighty e.gr due to inability of the state to pay or othenvhe perform or because ike performance has became uneconomical* ..." (RA-69; emphasis added).

would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection»1®

214. The Tribunal clarified: A *basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of same form of State Interference with the operation of the contract involved*«170

215. This view was also taken by the ICSID Tribunals in *Salmi v. Jordan* and *Impreglio S.paL* v. *Islamic Republic of Pakistan*. The *Impreglio* Tribunal quoted the *Salmi* Tribunal with approval as follows:

> *"[i)n order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which art ordinary* contracting party could adopt. Only the State in the exercise of its sovereign authority ('puissance pubUquef and not as a contracting party, may breach the obligations assumed under the BTT.'tin*

216. hi the present cases many of the alleged acts or omissions that make up Walter Barr's claims concern conduct which, on hs face, was merely commercial in character.

217. For example, any other contracting party could have stood in Respondent's place and delayed the opening of the Tollway by failing to procure land needed for flyovers and ramps,[172] or rejected requests by DMT to negotiate under the contract. And certainly any other contracting party could have disregarded Walter Ban's interests as a minority

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I4S *Joy Mixing Machinery Limited* VI *Arab Republic of Egypt (Decision cm Jurisdiction}* (6 August 2004) ICSID Case Ho. ARBA13/11 ! 81 (RA-G6). Notably, the *Jvy Mining* Tribunal did not accept dint the so-called umbrella clause could elevate carflractual breaches to treaty breaches, even if there was state interference with the contract *See ld.*, ! SI (observing that the clause was not fnMftsd *very* pronmiEfltfy in the treaty).

170 **&Lt % 12 (RA-6/\).**

171 ***Impreglio S.p.A. v. Momic Rspvblic of PaHsta/\ {Decision ax Jurixdftribn)* (22 April 2005) ICSID Case No. AftE tf>3/3 U 260, available at <http://ltaJaw.uYlc.es> (RA-37); *SaItt CostrutlariB pmA. and ItaLstrada S.pA. v. The Ef&sh&nite Kingdom of Jordan, (Deetston an Jvrisdkitimi)* (29 November 2004) {CS1D Cttse No. AEB/02/I3 1154 (RA-45).**

VH ***See* Request for Arbitration, ! I30A(a).**

shareholder in DMT *Ltfbjv its conduct as shareholder and though the organ of DMT.*[173]

218. It is for Claimant to establish that the facts upon which it relies, if proven, could be capable of triggering Respondent's treaty obligations. Insofar as the Request for Arbitration fails to allege that Respondent committed the alleged wrongful conduct in its capacity as sovereign, the Tribunal lacks jurisdiction *rations materiae* over at least the following alleged acts and omissions:

* acts and omissions causing delay to the opening of the Toilway;[174]
* failing adequately nr at all to respond to DMT's requests to adjust the toll rates to light of changes in the economic situation (in accordance with paragraph 25.2 of the Concession Agreement);[175]
* foiling to enter into negotiations with DMT to remedy negative effects set out in paragraph 25.2 of die Concession Agreement;[176]
* exp biting DMT*s difficulties to procure or effect amendments to the original conditicfrtf of the Concession by virtue of MoA2 and the Share Purchase Agreement;[177]
* failing to arrange the Soft Loan;[171]
* imposing or otherwise effecting a reduction of foe tolls;[179] and

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173 Sffl *Id*, 113GA(f)-

374 *Id*., ¶ 130A(a).

375 *Idx* 1fnOA(b>

Ui *Id*. nnOA(b)-

377 *Id*, tnOA!b).

m frf P]]30A(b).

179 *Id* /\ !30A{d).

disregarding Waiter Bmfs interests as a minority shareholder in DMT.[iso]

6. If Article 7(2) Were An Umbrella Cause (And Somehow Permitted Claimant to Contplain of Breaches of the Concession Agreement), Claimant Could Not Disregard Other Agreements or Waivers by DMT

219. If, despite the above, the Tribunal finds that Waiter Ban is entitled to seek redress under Article 7(2) of the BIT for contractual obligations owed by DQH to DMT, Walter Bau should be bound by the effect of amendments to the Concession Agreement and other relevant agreements entered into by DMT.

220. Claimant pleads, *inter* ALIOE, that alleged acts and omissions causing delay to the opening of the Toilway and die charging of tolls, which allegedly occurred between May 1993 and July 1996, constituted a breach of obligations that Thailand assumed under the Concession Agreement.[iSti]

221. Claimant also pleads that *"[bjy its terms, MoA 2 settled all claims arising under the Concession Agreement before die date of MoA 2*[iiffi]

222. If Claimant can seek redress under Article 7(2) for the DGH's alleged violations of the Concession Agreement, it should not be permitted to seek redress tor any alleged violations

(a) arising prior to 29 November 1996, the effective date of MoA2, because MoA2 expressly settled any violations of the Concession Agreement pre-dating the MoA2;[m] or

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tan *Id.*, ¶ 13GACO.

[8t *Idr* 1 13QASa)(Iri), /\ I4J *{fcampf&iion and opening of th& Tolfway* uw* *dgfay&djrom May 1993 io July 199m.*

[H *Id.*, ¶ 64(a).

IU *Id.*

(b) based cm "*moving or directing or approving the move of all scheduled air traffic from Don Miiong airport to the new Suvarmbbum International Airport and the consequent downgrading of Don Mvang airport,*" because in MoAZ, DMT expressly wived the right to bring any claims related to the change in use of the Don Mnang Airport.[134]

223. In addition, Walter Ban should not he permitted to assert any claims that its investment was expropriated by Respondent, because, in 199S, DMT expressjy waived its rights to any guarantee and protection that the "*State [would] riot nationalize the activity of the promoted person.*"[135]

TV. THESE PROCEEDINGS SHOULD BE BtFURCATED

224. Article 21{4) of the UMCITRAL Rules states, in part, that "*fi]n general, the arbitral tribunal should nde on a plea concerning itsjurisdiction as a preliminary question!*"[136]

225. Efficiency, *te^* the cost in time and money to the parties and the practicality of bifurcation, is the primary factor in determining whe&Er a tribunal should nde on jurisdictional objections as a preliminary matter.[137]

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134 *Size* MoA2, Art. 142{Mrty *change in the use of the Bangkok Airport ... shad not be regnr&d as an act in competition fo ihe concession highway according to Clause 25.2 (d) of the Existing Toflway Concession Agreement or on act cf the Government which causes Vehicle loss") {*WHltf. *See also* DMT's Assessment of Firiatuctat Damages Suffered by The Company and Requested Remedies fer Restoring Its Financial Position in Accordance wilh Clause 25.3 of the Taltway Concession Agreement, daEcd 31 May 2000 (acknowledging tiiat DMT agreed not to use as reasons for compensation claims under the Concession Agreement "*the relocation of flight operations front Don Mining Airport to the new airport of NongNguHnoC*)

IB *See* Letter from DMT to fho SecjeEsry General of the Board of Investment dated 25 February *199% "The Company hereby conjoins the* wafver *of the rights particularly io the extent of Sections 43-46 if the Investment Promotion Act RR 2520 [1977].")* {R-lO}; *Investment Promotion Act B.E 2520* (as amended) 5.43 *("The State shall nat nationalise the activity of the promotedpersonf)* (RA-70).

1G5 RA-1.

lET *See* David D. **Caron**, Lee M. Capfenp Matfi PeHompUE, The UKdTRAL Arbitration Rutes: A **Commentary**[71] {2006) 450-51 [efficiency is the primary feeler in determining whether a tribunal ahouidrufe on pteas concerning jurisdiction **aa** a **prdrminary** matter) (RA-71); *Glamis Gold* v. *United States of America {Procedural Order No. 3* 31 May 2005) UKCriRAL/NAFTA Chapter 11 Arbitration 11 {"*In examining*

326. The rationale of this rule lies in a respondent's right to see that it is not unnecessarily dragged into an international arbitration; it also demonstrates that consent is the basis for jurisdiction.[1]

227. Thus, although the Tribunal has the power to join jurisdictional objections to the merits of a dispute:

> *"It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively. On the other hand, some jurisdictional questions are so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form."*

228. That is not the case here.

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the drafting history of Article 21(4) of the UNICTRAL [sic] Jb fzsT the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary com f/rffon of a Jurisdictional objection T*H5 to ensure efficiency iff tbs proceedings.")* (RA-72); *Ohaffari yr Mamie Republic of Iran (Grtfer dated 2 February 1998))* (Case No. 963), Case No. 96S, Dissenting Opinion of Judge KhaHElau (signed 10 February 19S3), reprinted in (1988-1) 18 *tron-DS CTR* 79 *(fjTJhe Tribunal has demonstrated that by following a general rule in international provesdings—namely the necessity of separating preliminary objections from the merits—if serves ike parties front making an imncceuary Waste of energy, tints and expense.*") (RA-73); *Starred Housing Carp. y. Islamic Republic of Iran, (Interlocutor Award No. ITl 32-24-1)* (19 December 1983), *reprinted in* (1934-1II) 7 *IrmtlS CTR* 119, +44 at +55 (stating that issue of standing must be considered as a prelhninary Issue ia accotdaoce with Artiste 21(4), "*so as ia tab a decision as to its lack of jurisdiction before burdening the Pivties with any further trouble and zrp&nse*") (RA-74); *Untied Parcel Service ofAmvrica Inc. v. Government of Canaria (Award on Jurisdiction)* (22 November 2002) NAFTA Chapter 31 Arbitration available at <hBp:/Avww.dfaifc-maeci.gc.ca/tnanac/documeuts/JurlsdictionAvwd22NoyO2.pdf> 1 31 {"*This power [undtr Article 21(4)] both supports Jhs efficient and effective administration if the mbitral process and reflects the fad that parties, notably State parties, to arbitration processes are subject tojurisdiction only to the extent they hare consstttedR*} (RA-0).

IBS *See Ghaffijri vr Islamic Republic of Iran (Order dated 2 February 1998))* (Case No. 963), Cast No. 968, Dissenting Opinion of Judge KhflHKan (signed 10 February 19%& reprinted in (198S-1) 18 *fron-US CTR* 79 (JRA-73), quoting V.S. Maui, "International Adjudication: Procedural Aspects" (1580) 123-24 *If [Although] me party has a right to have its claim recognised by a competent tribunal, the other party has cm tqaaf right to see that it is not tomecesxorify dragged into an intmidtiottctl litigation before a tribunal before which shs claim is either nan-receivable or otherwise barred. Moreover, preliminary diction procedure demonstrates that the basis of international jurisdiction is the sovereign consent qfStates}*") (*RA-75*).

irt Christoph H. Sflhreuer, "The ICSID Convention: A Commentary" (2001) 545 (considering Article 41 of Ehe ICSID Convent \tfitch provides, in relevant part, that with respect to a question on jurisdiction, a Tribunal "*shall determine whether to deaf with it os a preliminary question or to join it to the merits of the dispute.*") (RA-3&).

229. First, Respondent has submitted virtually no additional evidence to substantiate its jurisdictional challenge, relying Instead on the plainly obvious deficiencies in Claimants **pleading.**

230. Second, Respondent's jurisdictional objections are not dependent on testimony or other evidence that can only be obtained through a full hearing of the merits; rather, they can be resolved largely on the face of the Request for Arbitration and according to legal argument by the parties.

231. Third a preliminary ruling by the TVibuml on Respondent's jurisdictional objections (ihr example, *on* the approval requirement) would be case-dispositive.

232. Bifurcation is warranted in these circumstances.[199]

V. CLAIMANT SHOULD BEAR THE COSTS *OF* THESE PROCEEDINGS

233. Thailand requests that the Tribunal order Claimant to bear all costs of arbitration.

234. Article 9(5) of the BIT generally provides that each party shall bear *athe cnxt of its cwn member and of* frj *representatives in ike arbitration proceedings; the cost of the* ***chairmens and the remaining casts shall b& borne in equal parts [by the parties] f howoveTj the ^arbitral tribzmal may make a deferent regulation concerning costs."***[191]

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199 *Sen* Schreuer, *if* 547 *{"The need for a joinder to tfis merits is apparent where the answer* to Ms *jwrisdfcttanaf questions depend* on *testimony and other evidence that cm only bo obtained through a jail hearing qf the* ema") (RA-39); *id* at 345 (treatment of Juriedietional issues as prclfrnEnajy questions is standard procedure In ICSID practice). *See also, e.g., Methanex Carp.* v. *United States of America, (Partial Award on Jurisdiction) (7* August 2002) NAFTA Chapter 11 Arbitration 160 {cnftfcludinjj tha£ fee *"exceptional procedure"* of joining jurisdictional issues to die merits may be appropriate under Ankle 21(4) *'Svhere jitrisdlctlornd issues are intertwined with (he merits, it may be impossible or impractical tc decide the former withoul also hearing argumerit and evidence an the Jolted*") (RA-76; emphasis added); *Ethyl Carp* ∗ *Government of Csisada (Award On Jurisdiction}* (24 intoc 1993) NAFTAAJNCITRAL Arbitration 1 54, reprinted in (1999) 38 *JLM 70Z* (dctcnrjnkg certain jurisdictional objections as a prcftroiuaiy question, "IK *adherence ia Article 21(4)"}* (RA-59).

m Article 10(2) of the BH\ which pertains to the settlement of disputes between a Contracting Party and an Investor, specifies that Article 9(5) of the HIT, which pertains to the setlkancnt of disputes between Jfre Coatitieting Parties, shall be appiiod *muiaiis mutandis* (WB1).

FAFUS uncos t (zK}

235. fn agreeing to arbitrate their dispute under tie UNdTRAL Rules, the parties agreed to a different allocation of costs than that according to the general principle in Article 9(5) of the BIT. Pursuant to Article 40 of the TJNCJTRAL Rules, Sic default allocation of the ***"casts of arbifratinn"*** is that they shall bo home by the unsuccessful party.[152]

236. The "*costs of arbitration* are defined in Article 3B of the UNCITRAL Rules as including: (a) flic fees of each arbitrator; (b) the travel and other expenses incurred by the arbitrators; (c) the costs of expert advice and of other assistance required by the Tribunal; (d) the travel and other expenses of witnesses, provided such expenses are approved by the Tribunal; (e) the reasonable costs for legal representation and assistance of the successful pariy; and (f) any fees and expenses of the appointing authority.[193] The Tribunal is obliged to fix the costs of arbitration in its award.

237. Thailand has incurred considerable expense defending itself against unmeritoriotts clalm3 brought by a bankrupt company desperate for cash.[m] In accordance with Article 40 of the UNCfTRAL Rules, Thailand respectfully requests that the Tribunal issue an award requiring Claimant to compensate Thailand for all costs of arbitration.

T52 **Article 40 of theTIWCITRAL Rules provides, irt n/\evaetpart:**

> ***{!} Except os provided in paragraph 2, th& costs of arbitrate shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs befipeen the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.***
>
> ***(2) With repeat to the costs of legal representation and assistance referred to in article M paragraph (e), ths arbitral tribunal, taking into account the circumstances of the cttsey shall be free to determine which party shall tsar such costs or may apportion such costs between ths parties fit determines that apportionment is reasonable."***

Article 33{$) Ffiftors fl> the ***"costs fur legal representation and assistance qf the successful party if such costs were claimed during the arbitral proceedtngs, and only to the extent that the arbitral tribunal determines that the amount of such costs h reasonable"*** **(RA-1; empfrasSs added).**

137 ***Id*** **Arikde 3S (RA-1).**

1M ***See*** Respondent's Application Jfrr Security (or Costa dated 30 Jime 2fl06, /\ 34-29.

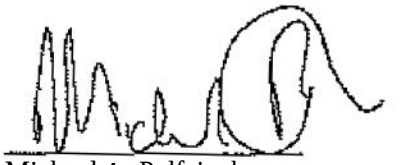
238. Claimant reserves the right to make submissions quantifying the costs of arbitration at a later stage of these proceedings.

VL CONCLUSION

239. For all the reasons set forth above, the Tribunal should resolve Thailand's jurisdictional objections as a preliminary issue, Walter Ban's claims should be dismissed in their entirety and Walter Ban should bear all costs of arbitration.

Respectfully submitted on 2 *October* 2006

WHITE & *CASE* LLP



Michael A. Polfcingbome
Leon loanrtou

Cowisetfor Respondent
The Kingdom of Thailand

EsHjHrrflfo.	PESQRfPTTQU	LOCATION (PARAGRAPH(S))
Exiiibit R-7	Representative Certificates of Admission dated between 27 October 1972 aod 20 February *1991* issued by the Thailand Ministry ofForeign Affairs	RMoJ (62)
Exhibit K-&	Announcement of the Committee on the Approval for the Protection of Investment between Thailand and Other Countries No. MFA 0704/1/2003 Concerning Foreign Investment Protection under the Agreements on the Promotion and Protection of Investments between the Government of the Kingdom of Thailand and Foreign Governments dated 22 October B.E. 2546 {Buddhist calendar equivalent far 2003) (the ^AnnourtCttmfcnf)	KMoJ (O, 66, 82, 8S)
Exhibit R-9	Board of Investment Certificate of Promotion issued to DMT dated 16 May 1991	RMoJ {*7)
I&hibjtKrlD	Letter from DMT to the Secretory General of the Board of Investment dated 25 February 1993	KMoJ (223)

m *M* AFTER OF AN ARBITRATION
UNDER THE LENCiTRAL ARBITRATION RULES

BETWEEN:

WALTER BAU AKTIENGESELLSCHAFT (in liquidation)

Claimant

- and -

THE KINGDOM OP THAILAND

Respondent

LIST OF RESPONDENT'S LEGAL AUTHORITIES
(AS *AT 2* OCTOBER 2006)

AirmOAlTY	DESCRIPTtCgf	LOCATION fl*ARAGSAPHfell
Authority RA-1	UNCTTRAL Arbitration Rules (1976)	RMoJO. 27, 236)
Authority RA-2	*Vienna Convention on the Law QfTrecitiest* douo at Vienna (23 May 1969} UNTS VoL 1155, 331	RMoJ (22, 33)
Authority RA-3	*Emilio Austin Maffezlm* v. *Kingdom of Spain (Decision on Jurisdiction)* {25 January 2000) ICSID Case No. ARB/97/7 reprinted in (2001) L6 *ICSID Rev^FIU* 21.2	RMoJ {22)
Authority RA-4	*Grand River Enterprises She Notions, Ltd et aL* v. *United States of America (Decision on Objections to Jurisdiction)* (20 July 2906) NAFTA/UNCITRAL Arbitration (excerpt)	RMbJ (22)
Authority RA-5	*Colder y. United Kingdom* (21 February 1975) ECHR SCTH A* NOT 13	RMQJ (23)
Authority RA-6	*Case Concerning KasikiWSedudu Island (Botswana* v- *Namibia)* 1999 ICJ (Judgment of 13 December 1999) reprinted hi 39 JZM 310 (2000) (excerpt)	RMoJ (23)
Authority RA-7	Da Arechaga, "International Iaiy in the Past Third of a Century" (197S) 159 *Recueit des Cours* I (excerpt)	RMoJ (23)

AUTHORITY	PESOtITTIflK	LOCATION ftARAC5t£rafsYl
Authority RA-3	Afraco.Asjtf Corporuftcfi v. *Indonesia (Award* ora *Jurisdiction)* (25 September 19S3) ICSID CSSENOH ARB/SI/1 reprinted in (1934) 23 iLM 351	**RMoJ (35)**
Authority RA-9	JSjffiier ACTari *Corp.* v. *Bank Markazi* jirnn (ytyarrfJ/o. *46-57-2)* (25 May 1933) 2 JftjR-I/S *CTK* 334	RMoJ (23)
Authority RA-lfl	*LiU Tour* vr *The Government of the Islamic Republic of Iran (Award No. 415-483-2)* (1 March 1939) available from Vfotlaw	RMoJ (23)
Authority KA-11	*Crediicofp International* friz, v. *Iran Carton Co, {AwardNo. 443-965-2)* (12 October 1989) available from Wesdaw	RMoJ (2S)
Authority RA-12	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. Untied Stales of America) (Jurisdiction and Admissibility)* (1934) *1CJ Rep* 4 (excerpt)	RMoJ (2S)
Authority RA-13	*Southern Pacific Properties (Middle East) Ltd (SPP(ME)) v. Arab Republic of Egypt (Decision on Jurisdiction)* (14 April 19fifi) ICSID Case No. ARB/E4/3 reprinted in (1995) 3 *ICSIDRepm*	RMoJ (29)
Authority RA-14	*Afihaly International' Corp.* v. *Democratic Socialist Republic of Sri Lanka (Award)* (*5 March 2002) ICSID Cose No. ARB/00/2 reprinted in (2002) 17 *ICSID Rev^FIU* 142	RMoJ (29)
Authority RA-15	Black's JLaw Dictionary (3th ed. 2004) (cjioerpt)	RMoJ (31)
Authority RA-16	Jeswdd W. Salacuse, "BIT by BIT: The Grotvth of Bilateral Investment Treaties orad Their Impact on Foreign Investment in Developing Countries" (1990) 24 *The International Lawyer* 655	RMoJ (39)
Authority RA-17	Ibrahim RL Shihata, HfRjeceni Trends Relating to Entry of Foreign Direct Investment" (1994) 9 *ICSID Rey.-FILJ* 47	RMoJ (39)
Authority RA-1S	United Nations Conference on Trade and Development, *International Investment Agreements: Key Issues, Volume I* (September 2004) (excerpt)	RMoJ (39)
Authority RA-19	*Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments,* done in Abuja (11 December 1990)	RMoJ (40)

AUTHORITY	DESCRIPTION	LOCATION foARAGRAFHfS
Authority RA-20	*Agreement between the G&vermnent ofSweden and the Government of Malaysia Concerning (he Mutual Protection ofInvestments*, done in Kuala Lumpur (3 March 1979)	RMoJ (41)
Authority RA-2t	*Philippe Grudin* v. *Malaysin (Award}* (27 November 2000) 5 *ICSID Reports* 483	RMoJ (42)
Authority RA-22	German to English translation of excerpt from Germany's website for it* Foreign Trade and InvestmentPrumotioii **Scheme ⋀ttp⋀agapcntaLde***	RMoJ *(67)*
Authority RA-23	**BloombergrCom, Financial Glossary <http⋀www.hloomberg.coTiiyniYe5t//gI▷£sary/hfglosfJitm>**	RMoJ (71)
Authority RA-24	National Statistics, 'Tirst Release: Foreign direct investment 2004" dated 13 December 2005	RMoJ (74)
Authority RA-25	Anna M. Fal⋀oni* "Statistics on Foreign Direct Investment and Multinational Corporations: A Survey" (15 May 2000)	**RMDJ (75)**
Authority RA-26	OECD, wOECP Benchmark Definition of Foreign Direct Investment" (3rd ed., 1996)	RMoJ (75, 77)
Authority RA-27	International Monetary Fund, 'ToreignDfrect Investment Statistics – How Countries Measure FDI: 2001" (2003) (excerpt)	RMoJ (76, 77)
Authority RA-2S	United Nations •"World Investment Report: 2005" (excerpt)	RMoJ (76)
Authority RA-29	Pusadee Ganjarexndee⋀ Bank oFTbailand* "Thailand's Balance of Payments Foreign Direct Investment Statistics", published in United Nations Conference on TVade and Development 'rExpert Meeting on Capacity Building in the Area of FDI: Data Compilation and Policy Fonuda&m tn Developing Countries" dated 12-14 December 2005	RMoJ (7S)
Authority RA-30	IMF Committee on Balance of Payments Statistics and OECD Workshop on International Investment Statistics, Direct Investment Technical Group (DITEG), ^Issues Paper (DTTBG) #20: Definition of Foreign Direct Investment (FDI) Terms" (November 2004), Annex I, attached to "Eighteenth Meeting of the IMF Committee on Balance of Payments Statistic⋀ Washington D.C.* June 27–JuEy 1* 2005: Definition of Direct Investment Terms," available at <tittp://wwyv.i⋀org/axternai⋀aubsfflbop/2005/1S.htm> (excerpt)	RMoJ (77)

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