

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the matter between

Rafat Ali Rizvi
(Claimant)

and

The Republic of Indonesia
(Respondent)

(ICSID Case No. ARB/11/13)

AWARD ON JURISDICTION

Members of the Tribunal

Dr. Gavan Griffith QC (President)

Judge Joan Donoghue

Professor Muthucumaraswamy Sornarajah

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

Assistant to the President of the Tribunal

Ms. Lucja Nowak

Representing the Claimant

George Burn
Sophie Palmer
Louise Woods
Ioana Petculescu
Dentons

Representing the Respondent

Yoseph Suardi Sabda
Office of the Attorney General
of the Republic of Indonesia

Karen Mills
Iswahjudi A. Karim
Ilman F. Rakhmat
KarimSyah Law Firm

Arthur Marriott, Q.C.
12 Gray's Inn Square
Mahnaz Malik
20 Essex Sreet

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List of abbreviations

BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Republic of Indonesia for the Promotion and Protection of Investments of 1997
BI	Bank Indonesia
BKPM	<i>Badan Koordinasi Penanaman Modal</i> – Indonesia Investment Coordinating Board
FCIL	Indonesia's Foreign Investment Law No. 1 of 1967
PMA	<i>Penanaman Modal Asing</i> - foreign investment company

A. THE PARTIES

1. The Claimant in this arbitration is Mr. Rafat Ali Rizvi, a British citizen.
2. The Claimant's legal representatives are Mr. George Burn, Ms. Louise Woods, Ms. Sophie Palmer, Ms. Ioana Petculescu and Mr. Alexander Slade of Dentons.
3. The Respondent is the Republic of Indonesia.
4. The Respondent's legal representatives are Mr. Yoseph Suardi Sabda of the Office of the Attorney General of the Republic of Indonesia, Ms. Karen Mills, Mr. Iswahjudi A. Karim and Mr. Ilman F. Rakhmat of KarimSyah Law Firm, Jakarta, Indonesia and Mr. Arthur Marriott, Q.C. of 12 Gray's Inn Square, London, UK, and Ms. Mahnaz Malik of 20 Essex Street.

B. PROCEDURAL HISTORY

5. On 5 April 2011 the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received a Request for Arbitration (the "**Request**"), dated the same, from Mr. Rafat Ali Rizvi ("**Claimant**"), a British national, against the Republic of Indonesia ("**Respondent**"). On 6 April 2011, the Centre, in accordance with Rules 4 and 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**Institution Rules**"), acknowledged receipt of the Request and transmitted a copy to the Republic of Indonesia.
6. The dispute is brought under the 1997 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Republic of Indonesia for the Promotion and Protection of Investments (the "**BIT**").
7. On 19 May 2011, the Secretary-General of ICSID, registered the Request and notified the Parties, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "**Convention**") and in accordance with Institution Rules 6(1)(a) and 7(a). The case was registered as ICSID Case No. ARB/11/13. In the same letter the Secretary-General invited the Parties to communicate any agreements reached regarding the number of arbitrators and the method for their appointment, and to constitute an arbitral tribunal as soon as possible.

8. Following the Claimant's proposal on 15 April 2011 for the constitution of the tribunal, on 19 May 2011 Respondent was invited to make its observations on the proposal within 20 days of the receipt of the letter.
9. In a letter dated 7 June 2011, Respondent proposed that the tribunal be constituted as per Article 37(2)(b) of the Convention: that it consist of three arbitrators, with each party appointing an arbitrator, and the third, the President of the Tribunal, to be appointed by agreement of the Parties.
10. On 24 June 2011, the Claimant accepted the method of appointment of the arbitrators as proposed by the Respondent.
11. On 2 August 2011, the Claimant appointed Judge Joan Donoghue, a national of the United States, as arbitrator and suggested a candidate for the position of President of the Tribunal. On 3 August 2011, the Respondent appointed Professor Muthucumaraswamy Sornarajah, a national of Australia, and informed the Centre that the Parties were cooperating to agree upon the President of the Tribunal.
12. On 20 September 2011, the Claimant informed the Centre that the Parties had reached an agreement on the appointment of Dr. Gavan Griffith, QC, a national of Australia, as the President of the Tribunal.
13. On 21 September 2011, the Respondent confirmed the agreement to appoint Dr. Griffith. On the same day, having received Dr. Griffith's acceptance, ICSID's Secretary-General notified the Parties that the Tribunal was deemed to be constituted under Rule 6 of the ICSID Arbitration Rules (the "**Rules**"). The Tribunal is thus composed by (i) Judge J. Donoghue (appointed by the Claimant), (ii) Professor M. Sornarajah (appointed by the Respondent) and (iii) Dr. Gavan Griffith (appointed by agreement of the Parties). The Centre also informed the Parties and the Tribunal that Ms. Anneliese Fleckenstein, ICSID, would serve as the Secretary to the Tribunal.
14. On 18 October 2011, the Respondent filed Preliminary Objections pursuant to Rule 41(5) of the ICSID Arbitration Rules (the "**Application**"). In its application, the Respondent made a separate application for security for costs.
15. On 25 October 2011, pursuant to ICSID Arbitration Rule 13(1), the Tribunal held the first session by telephone conference without the presence of the parties.

16. On 27 October 2011, the Tribunal established a schedule for the Parties' submissions on Respondent's Objections under Rule 41(5). The Tribunal further informed the parties that it had held a first session in accordance with ICSID Arbitration Rule 13(1). On the same day the Tribunal informed the Parties that the Respondent's application for security for costs was held over for directions at the hearing of the Respondent's application under Rule 41(5), and would not be addressed until after the disposition of that latter application.
17. On 30 November 2011, the Claimant filed his Response to Respondent's Preliminary Objections ("**C 41(5) Response**").
18. On 9 January 2012, the Respondent filed its Rebuttal ("**R Rebuttal**") to the Claimant's Response and the Claimant filed his Rebuttal ("**C Rebuttal**") on 30 January 2012.
19. On 20 and 21 February 2012, a hearing on Respondent's Preliminary Objections was held in Auckland, New Zealand ("**Auckland Hearing**"). During the hearing the Respondent stated that if the Tribunal found against the Respondent on its Rule 41(5) application, the Respondent intended to file objections to the jurisdiction of the Tribunal under Rule 41(1) of the ICSID Arbitration Rules.
20. On 4 April 2012, the Tribunal issued a Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules. In its Decision, the Tribunal rejected the Respondent's objections and reserved all other issues to a further order, decision or award, including the question of costs and the Respondent's application for security for costs. This Decision as well as all other decisions and orders made by the Tribunal form an integral part of the Award.
21. On 13 April 2012, with the Parties' agreement, Ms. Lucja Nowak was appointed as assistant to the President of the Tribunal.
22. On 18 April 2012, the Respondent reiterated its intention of filing objections to the Tribunal's jurisdiction under Rule 41(1) of the ICSID Arbitration Rules and requested the bifurcation of the proceeding pursuant to Arbitration Rule 41(3).
23. On 8 May 2012, after hearing the Parties, the Tribunal issued a Decision on the Respondent's Application for the Security for Costs, dismissing the Respondent's application.

24. On 18 May 2012, the Claimant filed observations on the request to address the objections to jurisdiction as a preliminary question. On 28 May 2012, the Respondent filed a reply, and on 8 June 2012, the Claimant filed a rejoinder.
25. On 22 June 2012, the Tribunal issued a Decision on Bifurcation under Rule 41(3) of the ICSID Arbitration Rules (the “**Decision on Bifurcation**”). The Tribunal decided to hear the objections to jurisdiction as a preliminary question and, as a result, suspended the proceeding on the merits.
26. As established by the Tribunal on 28 June and 3 July 2012, the Respondent filed Objections to Jurisdiction Pursuant to Rule 41(1) on 30 August 2012 (“**Objections**”). On 1 November, 2012, the Claimant filed his Response to Respondent’s Rule 41(1) Application (“**Response**”). On 22 November 2012, the Respondent filed a Reply to Claimant’s Response to the Respondent’s Objections to Jurisdiction (“**Reply**”). On 13 December 2012, the Claimant filed his Rejoinder to Respondent’s Rule 41(5) Application (“**C Rejoinder**”). On 18 December 2012 the Claimant filed Addendum to Claimant’s Rejoinder to Respondent’s Rule 41(1) Application (“**C Rejoinder Addendum**”).
27. In a letter of 19 December 2012 the Respondent requested the Tribunal to call upon the Claimant to disclose the full corporate records of Chinkara/FAGH (see para. 37) showing all share ownership and management, the amount of paid in capital invested by Chinkara/FAGH shareholders as well as any trust arrangement, official and unofficial, regarding the shareholding. The Respondent argued that the documents are necessary since existence of the Claimant’s stated investment must be proven as a first condition of bringing any claim under the BIT.
28. In a letter of 21 December 2012 the Claimant responded to the Respondent’s request noting that the Decision on Bifurcation was clear that for the purpose of the issue that was the subject of the bifurcated proceeding, i.e. the question whether the Claimant’s investment was protected given BIT Article 2(1), it was to be assumed that Claimant did make an investment. Any evidence of the Claimant’s interest in Bank Century was therefore outside the scope of the Tribunal’s enquiry at this stage.
29. In a letter of 28 December 2012 the Tribunal rejected the Respondent’s request for document production and asked the Claimant to update the description of its alleged

investment presented in the Request to take into account facts that had emerged in the proceedings before the Tribunal.

30. In a letter of 14 January 2013 the Claimant presented an updated description of his stated investment. The Respondent replied to this letter on 15 January 2013 maintaining its position that it is imperative to investigate the precise nature of the Claimant's investment at the present stage of the proceedings. The Respondent noted that the Decision on Bifurcation incorporated the issue whether the Claimant made an investment in Indonesia into the bifurcated issue. The Claimant responded on the same day, reiterating his position.
31. In a letter of 17 January 2013 the Tribunal informed the parties that it understands the issues for determination in this phase of the proceeding to be whether the investment as stated by the Claimant was 'granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.' The Tribunal explained that if the Respondent's objection to jurisdiction does not succeed at this stage the question of proof of an investment and the implications of investment through a company incorporated in a third State will be analysed at the merits stage.
32. On 22 through 24 January 2013, a hearing on the Respondent's Objections to Jurisdiction was held in Singapore ("**Hearing**"). Present at the Hearing were, for the Tribunal, Dr. Gavan Griffith QC, President; Judge Joan Donoghue; Professor Muthucumaraswamy Sornarajah; Ms. Anneliese Fleckenstein, Secretary of the Tribunal; and Ms. Lucja Nowak, Assistant to the President. Claimant was represented by Mr. George Burn and Ms. Louise Woods - Dentons. Respondent was represented by Ms. Karen Mills, Mr. Iswahjudi Karim, Mr. Ilman Rakhmat, Mr. Priyanka Tobing and Ms. Aulia Nora from KarimSyah Law Firm; Ms. Mahnaz Malik, from 20 Essex Street; Mr. Yoseph Suardi Sabda, Ms. Cahyaning Nuraith, Ms. B. Maria Erna and Ms. Carolita Novinia Yuanita from the Office of Attorney General of the Republic of Indonesia; Mr. Mohamad Oemar, Secretary of the Vice President of the Republic of Indonesia; Mr. Farid Harianto, Special Staff of the Vice President of the Republic of Indonesia; Mr. Didik Hariyanto from the Ministry of Finance of the Republic of Indonesia; Mr. Indra Rosandry from the Ministry of Foreign Affairs of the Republic of Indonesia; Mr. Riyatno - Investment Coordinating Board of the Republic of Indonesia.

C. THE SCOPE OF THE TRIBUNAL'S ENQUIRY

33. Pursuant to the Decision on Bifurcation, the Tribunal's enquiry at this stage is limited to "a question of law, that is, the meaning of BIT Article 2(1), with particular attention to the meaning of the phrase "*granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it*". This question of law is distinct from the merits of the Claimant's case. In addition, any evidence regarding the question whether the Claimant complied with provisions of Indonesian law in respect to admission of his investment is distinct from the evidence relating to the merits of the Claimant's claims."¹
34. The Tribunal strictly limited its inquiry at this stage of the proceedings, underscoring that it "will not entertain any legal argument, nor consider any evidence, that relates to any other matter."²
35. Accordingly, the Tribunal will first consider the interpretation of the phrase "granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it" and then will consider whether Claimant's investment was, in fact, "granted admission."

D. THE RELEVANT ALLEGED FACTS

36. Due to the limited scope of the Tribunal's enquiry at this stage the issue of whether the Claimant made an investment in the territory of the Republic of Indonesia is outside the scope of this decision. The Tribunal refers to the facts pleaded by the Parties only to the extent relevant for the purposes of the Objections. The Tribunal refers in particular to its summary of the Claimant's written case in its Decision of 4 April 2012. These references do not constitute a finding of fact by the Tribunal.
37. The Claimant has invested in Indonesia through a company incorporated in the Bahamas, Chinkara Capital Limited, ("**Chinkara**"), subsequently renamed First Gulf Asia Holdings Limited ("**FGAH**"). Together with Mr. Hesham al-Warraq ("**Mr. al-Warraq**"), Claimant was a co-owner of Chinkara.

¹ Decision on Bifurcation, para. 26

² Decision on Bifurcation, para. 28

38. In the course of proceedings before the Tribunal, it became clear that the Claimant had transferred legal ownership of his shares in Chinkara prior to the date of the events that, in the Claimant's view, gave rise to violations of the BIT. The Claimant maintains that he retained equitable ownership of an investment in the territory of Indonesia despite this transfer. This gives rise to a considerable number of legal and factual issues that would have to be addressed in order for the Claimant to prevail in this case.³ However, these issues are outside the scope of the Tribunal's enquiry at this stage.
39. From early 2000 Chinkara began to acquire shares in three Indonesian banks: PT Bank Pikko, Tbk ("**Pikko**") (acquired 65% of shareholding), PT Danpac, Tbk ("**Danpac**") (55%) and PT Bank CIC, Tbk ("**CIC**") (19.8%) ("**Pre-Merger Banks**"). These banks merged at the end of 2004 to form PT Bank Century, Tbk ("**Bank Century**").
40. The Claimant contends that, in addition to the financial commitment represented by his shareholding in the Pre-Merger Banks and subsequently Bank Century, his investment included certain other loans and financing arrangements.⁴ These arrangements took place after the date on which, according to the Claimant, his investment was "granted admission" and thus the Tribunal need not address them further at this stage of the proceedings.

E. RELEVANT LEGAL PROVISIONS

a) The Customary International Law of Treaty Interpretation

41. Indonesia is not a party to the Vienna Convention on the Law of Treaties (VCLT). Nonetheless, the Parties agree that Articles 31 and 32 of the VCLT reflect customary international law.⁵ The Tribunal applies those provisions in these proceedings:

"Article 31

³ Claimant did not provide the Tribunal with precise information about the percentage of shares he held in Chinkara and, indirectly, in Bank Century. (Tr., Day 2, 45:9-46:16; Day 2, 77:10-78:16). Claimant stated that the transfer of shareholding from him to Mr. al-Warraaq was based on an unwritten agreement. According to Respondent, Indonesian law does not recognise trust arrangements. (see e.g. Objections, para. 16-18).

⁴ Request, paras 19-20.

⁵ Response, para. 10; Reply, para. 21.

General rule of interpretation

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**
3. *There shall be taken into account, together with the context:
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.**
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) *leaves the meaning ambiguous or obscure; or*
- (b) *leads to a result which is manifestly absurd or unreasonable.”*

b) **The BIT**

42. BIT Article 2(1) provides as follows:

“Scope of the Agreement

(1) This Agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.”

43. BIT Article 1(1)(a) provides as follows:

“Definitions

For the purposes of this Agreement:

(a) ‘investment’ means every kind of asset and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;*
- (ii) shares, stock and debentures of companies wherever incorporated or interests in the property of such companies;*
- (iii) claims to money or to any performance under contract having a financial value;*
- (iv) intellectual property or goodwill;*
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;”*

44. BIT Article 4(1) provides as follows:

“Most-favoured-nation provision

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of nationals or companies of any third State.”

c) **Relevant Provisions of Indonesian Law**

Indonesia's Foreign Investment Law No. 1 of 1967 (the "FCIL")

45. Articles 1 and 2 provide as follows:

“Article 1

Investment in this Law denotes only direct investment of foreign capital made in accordance with or based upon the provision of this Law for the purpose of carrying on the enterprise in Indonesia, with the understanding that the owner of the capital directly bears the risk of the investment.”

Article 2

Foreign investment in this Law means:

- a) foreign exchange that does not form a part of the foreign exchange resources of Indonesia, and which with the approval of the Government is utilized to finance an enterprise in Indonesia.*
- b) equipment for an enterprise, including rights to technological development and materials imported into Indonesia, provided the said equipment is not financed from Indonesian foreign exchange resources.*
- c) that part of the profits which in accordance with this Law is permitted to be transferred, but instead is utilized to finance an enterprise in Indonesia.”*

46. FCIL Article 5 provides as follows:

“(1) The government shall determine the fields of activity open to foreign investment, according to an order of priority, and shall decide upon the conditions to be met by the investor of foreign capital in each such field.

(2) The order of priority shall be determined whenever the Government prepares medium and long-terms [sic] development plans, taking into consideration developments in the economy and technology.”

47. FCIL Article 28(1) provides as follows:

“Provisions of this Law shall be implemented by coordinating among the Government agencies concerned in order to ensure harmonization of Government policies regarding foreign capital.”

48. The above provisions were in force at the time when the BIT was concluded and during the period when the Claimant alleges that his investment was “granted admission” (2000-2004).
49. In addition, the Cabinet Presidium Decree No. 104/EK/KEP/1967 spelled out the admission procedure for foreign capital in more detail. In the same year, by another decree (Cabinet Presidium Decree No. 17/EK/KEP/1/1967), the Government set up Capital Investment Advisory Board (“BPPMA”), replaced in 1968 by Capital Investment Technical Committee (“PPPM”). In 1973, Decrees of the President of Indonesia Nos. 20 and 21, replaced the PPPM with Indonesia Investment Coordinating Board (the “BKPM” – *Badan Koordinasi Penanaman Modal*) and introduced a general procedure for admission of foreign investment into Indonesia. Under BPPMA and PPPM, applications for admission were directed to an appropriate Ministry and to BPPMA/PPPM and, finally, to the President of Indonesia; approval of each of these institutions was required. Under the Decrees of 1973 the BKPM makes recommendations and foreign capital investment approvals are granted by the President of Indonesia. Since 1998 the BKPM has the authority to approve investments up to a certain threshold (USD 100 million).⁶

Indonesia law related to banking

50. The banking sector was regulated on the basis of Law No. 14 of 1967 concerning Banking Principles. That law was revoked by Law No. 7 of 1992, subsequently amended by Law No. 10 of 1998. Foreign investment in the banking sector was allowed under Law No. 14 of 1967 but was limited to foreign banks investing in the form of a joint venture or a branch office.⁷ Indonesia allowed foreign investment in the banking sector by way of purchase of bank shares in the 1990s.⁸ On the basis of

⁶ Hiswara Expert Statement, paras. 24-30; Opinion of Tan Sri Cecil Abraham, paras. 68-71 (Exhibit R26), Professor Sirait Expert Report, paras. 15, 22-23 (Exhibit R28); Affidavit of Gregory Churchill, paras. 13-16 (Exhibit R31)

⁷ Hiswara Expert Statement, para. 46; Professor Sirait Expert Report, paras. 26, 42-44.

⁸ Claimant appears to argue that purchase by foreigners of banks shares in Indonesia has been allowed since 1992. (Tr. Day 1, 65:5-11) However, the legislation referred to by the Parties is the Act of the Republic of

that legislation 1) foreign citizens and/or foreign legal entities could establish an Indonesian commercial bank in a joint venture with an Indonesian citizen and/or Indonesian legal entity pursuant to requirements stipulated by Bank Indonesia and 2) foreign citizens and foreign legal entities could purchase shares in commercial banks in Indonesia, either directly or through the Indonesian stock exchange, subject to implementing regulation issued by the Government of Indonesia.⁹

51. There is no disagreement between the Parties on the points of Indonesian law summarized above.

F. INTERPRETATION OF BIT ARTICLE 2(1)

52. The Parties disagree about the interpretation of the phrase “*granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it*” which delimits the scope of UK investments in Indonesia that are protected by the BIT:

- (1) Respondent argues that that phrase refers only to direct investments that were granted admission in a process administered by the BKPM and in a special legal form of foreign investment company (“PMA” – *penanaman modal asing*). In Respondent’s view, only investments admitted through the BKPM process are entitled to the protection of the BIT. In addition, the Respondent argues that only “direct” investments fall within the scope of the BIT, relying on a requirement in BIT Article 2(1) that the investment be ‘by’ UK nationals as well as on the reference to “direct” investments in FCIL Article 1.
- (2) The Claimant offers two possible interpretations of BIT Article 2(1). His primary interpretation is that an investment is “granted admission in accordance with” the FCIL if it has been made in a way that does not contradict the FCIL.
- (3) Claimant’s secondary interpretation places emphasis on FCIL Article 5, which states Indonesia’s right to determine the fields of activity open to foreign

Indonesia No. 7 of 1992 Concerning Banking as Amended by Act No. 10 of 1998 (Exhibit CIL 10). The precise effective date is without significance in these proceedings.

⁹ Articles 22 and 26 of the Act of the Republic of Indonesia Number 7 of 1992 Concerning Banking as Amended by Act Number 19 of 1998 (Exhibit CIL10); Response, para. 117; Rejoinder, para. 61 (ref to Hiswara Expert Statement, paras. 17 and 53).

investment and the conditions to be met by the foreign investor in each such field. He maintains that this provision gives Indonesia the flexibility to assign the process of admission of foreign investments to agencies other than the BKPM and that, for the banking sector, the conditions of admission are set by Bank Indonesia.

(4) The Claimant considers that the reference to “direct” investments in FCIL Article 1 cannot change the scope of the term “investment” as defined in BIT Article 1. As defined in BIT Article 1, “investment” is not limited to “direct” investment.

53. The Tribunal begins by examining the Claimant’s primary interpretation, i.e. that the requirement that an investment be granted admission in accordance with the FCIL means only that the investment must be admitted in a manner that does not contradict the FCIL.

G. DOES “GRANTED ADMISSION IN ACCORDANCE WITH” FCIL REQUIRE ONLY THAT AN INVESTMENT BE LAWFULLY MADE?

a) Claimant’s arguments

54. The Claimant argues that an investment “granted admission in accordance with” the FCIL is an investment that has been lawfully made in Indonesia.

55. The Claimant argues that the meaning of the phrase “in accordance with” merely requires that the admission is not inconsistent with or not contradictory to the FCIL. He derives this interpretation from the ordinary meaning of the phrase “in accordance with”, arguing that it means that something “accords with”, is “consistent with” or “agrees with” something.¹⁰ Applying this ordinary meaning to BIT Article 2(1) the Claimant argues that an investment that has been “granted admission in accordance with” the FCIL is an investment that is consistent with or does not contradict the FCIL.¹¹

56. The Claimant interprets BIT Article 2(1) as introducing a standard of admission by reference to national law, but not setting any particular procedure representing the

¹⁰ Response, para. 42; See also: Auckland Hearing Tr. Day 2, 194:27-31.

¹¹ Response, para. 42; Rejoinder, para. 64; Tr Day 2, 22:10-13 (investment must accord with, not contradict the FCIL); Tr. Day 3, 132:24-133:4 and 6-12 (is consistent with, agrees with but does not contradict the FCIL).

admissions process.¹² According to this interpretation, the intention of BIT Article 2(1) is simply to ensure that foreign investments in Indonesia comply with local laws, which include, in certain circumstances, a requirement to gain admission.¹³ If there are no procedures under Indonesian law which the foreign investor must follow for gaining admission, the investor must be seen as having complied with the FCIL if his investment is legally made.¹⁴

b) Respondent's arguments

57. Of particular relevance to Claimant's principal interpretation of BIT Article 2(1) is the Respondent's argument that BIT Article 2(1) represents the State's ability to restrict a scope of a treaty to certain types of investments and investors. In particular, the Respondent points out that Article 2(1) limits the scope of the BIT with great specificity and clarity, making a reference to a specific law: Foreign Capital Investment Law No. 1 of 1967.¹⁵ Thus, in the Respondent's view, the Claimant must establish not only that his investment was granted admission to the territory of Indonesia, but also that any such admission was in accordance with the FCIL.
58. The Respondent notes that limitations of the scope of application of investment treaties are recognised and accepted in practice.¹⁶
59. The Respondent refers to the *Desert Line v. Yemen*¹⁷ tribunal's comment on different techniques of limiting the scope of a treaty in terms of what investments are granted protection under the treaty. The tribunal observed that the treaty practice ranged from no requirement of *ex ante* identification of investors that might in the future rely on the treaty to an exercise of qualitative control of investments that are promoted and protected under the treaty. Respondent also points out that the *Desert Line* tribunal, as

¹² Tr. Day 3, 133:6-12; 134:13-15

¹³ C Rebuttal, para. 80.

¹⁴ C Rebuttal, para. 64.

¹⁵ Objections, paras. 3-5; Tr. Day 1, 112:18-19.

¹⁶ Tr. Day 1, 114:17-117:13.

¹⁷ *Desert Line Projects LLC v. The Republic of Yemen*, Award of 29 January 2008, ICSID Case No. ARB/05/17 (hereafter as "*Desert Line*").

well as the UNCTAD report on scope and definition of investment treaties¹⁸, expressly refer to BIT Article 2(1) as an example of specificity, located at the qualitative control end of the spectrum.¹⁹

60. The Respondent argues that the limitation of the scope of the BIT in Article 2(1) is made with “great specificity and clarity” because it requires that the investment be granted admission in accordance with a specifically defined piece of domestic legislation which points to a specific admission procedure. To meet this requirement and fall within the scope of the BIT it is not sufficient to show that the Claimant’s investment was lawful.²⁰
61. The Respondent refers to the *Gruslin*²¹ award to support its argument that even if the Claimant can show that he was granted some approval under domestic law this does not mean that this approval is an approval required by the BIT and that the requirements do not have to be explicitly stated in the BIT itself but may follow from the context and domestic law.²² To support this argument the Respondent also relies on *Yaung Chi Oo*²³ where the tribunal found that the treaty in question required the investor to obtain a special approval for the purpose of the agreement. The specific requirements concerning this approval process also were not set out in the agreement itself.²⁴
62. The Respondent argues that in the *Desert Line* dispute the language of the treaty was ‘much looser’ than in the BIT and did not refer to any specific legislation or approval. The Respondent pointed out that the *Desert Line* tribunal noted that the respondent in that case did not show what the terms ‘accepted’ and ‘certificate’ mean. It was not clear whether these terms had any specific meaning in the domestic law of the host State. Based on the broad language of the treaty the *Desert Line* tribunal found that it

¹⁸ UNCTAD “Scope and Definition” UNCTAD Series on Issues in International Investment Agreements II, 2011, p. 45.

¹⁹ *Desert Line*, paras. 108 and 109; Objections, paras. 3, 59.

²⁰ Objections, para. 5-7, 12, 46-50.

²¹ *Philippe Gruslin v. Malaysia*, Award of 27 November 2000, ICSID Case No. ARB/99/3 (hereafter as ‘*Gruslin*’).

²² Objections, para. 58; Tr. Day 1, 175:14-176:25.

²³ *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, Award of 31 March 2003, ASEAN I.D. Case No. ARB/01/1. (hereafter as “*Yaung Chi Oo*”)

²⁴ Objections, para. 58; Tr. Day 1, 177:1-178:2.

could be interpreted in a way that allowed for investment acceptance in another way than by issuing of a certificate. The Respondent pointed out that *Desert Line* award should be distinguished as the treaty relevant for that dispute referred to ‘acceptance’. This term is much broader than the requirement of being ‘granted admission’ enshrined in the BIT. The Respondent pointed out that in the treaty in question in *Desert Line* the requirement of ‘acceptance’ was not specifically linked to domestic laws and regulations, and that fact allowed for its broader interpretation. As a result, the *Desert Line* tribunal was comfortable finding that a personal involvement of a very high level State official who signed contracts between the investor and the State (of which there were seven), constituted acceptance required by the treaty.²⁵

63. The Respondent distinguishes the above decisions from the circumstances of the present dispute, where the BIT refers to a specific admission regime. The Respondent observes that acceptance of the Claimant’s primary interpretation would mean that there would have been no reason to include the limits of the BIT’s scope in its Article 2(1).²⁶

c) Tribunal’s analysis

64. The International Court of Justice states the obvious in its Libya/Chad reasons:

“[i]nterpretation must be based above all upon the text of the treaty”²⁷

As reflected in the general rule of interpretation of VCLT Article 31, here the function of the Tribunal is to discern the meaning of the agreement that the contracting States reached in the BIT. The BIT must be read in good faith, upon consideration of the ordinary meaning of the disputed phrases in their context and in light of the object and purpose of the treaty.

65. Applying this approach, the Tribunal begins by examining the text of BIT Article 2(1). In the Tribunal’s view, the Claimant has not made a convincing case that the ordinary meaning of “in accordance with” is “not in contradiction with.” This interpretation overlooks the fact that the complete phrase is “granted admission in

²⁵ Tr. Day 1, 178:3-182:1.

²⁶ Supplement to the Affidavit of Gregory Churchill, paras. 7-8 (Exhibit R39).

²⁷ *Territorial Dispute (Libya/Chad)*, Judgement, I.C.J. Reports 1994, p. 22, para. 41.

accordance with.” In its plain and ordinary meaning, Article 2(1) explicitly contemplates an admission procedure, culminating in a grant or denial of admission. It is insufficient for an investor to demonstrate simply that an investment was commenced without contradicting the FCIL, given this explicit requirement. In addition, BIT Article 2(1) refers not to Indonesian law in general but to a particular piece of legislation, namely the FCIL, or any law that amends or replaces it.²⁸

66. It follows that to pass the threshold of being “granted admission in accordance with” the FCIL it is not enough that an investment made in Indonesia is generally lawful or that it was established without contradicting the FCIL. The investment is required to be “granted admission in accordance with” a particular piece of legislation, namely the FCIL.
67. The practice of limiting the scope of a treaty by way of so called ‘legality provisions’, i.e. provisions setting out conditions of compliance with domestic law, is an important and common part of investment treaty practice. This treaty practice is exemplified by a variety of thresholds set for foreign investments. Each such ‘legality provision’ in an investment treaty is required to be approached on its own terms.
68. It is clear to the Tribunal that the requirement of BIT Article 2(1) of being ‘granted admission in accordance with’ the FCIL goes beyond a requirement of general compliance with (or non-breach of) national law as a condition of BIT protection.

Here the Tribunal agrees with the Respondent that BIT Article 2(1) is quite specific. It refers to a particular provision of national law, rather than making a general reference to national law. In this respect, BIT Article 2(1) is more specific than the provision considered by the Tribunal in *Desert Line*,²⁹ which defined ‘investment’ as “*every kind of assets owned and invested by an investor of one Contracting Party, in the territory of other Contracting Party, as an investment according to its laws and regulations, and for which an investment certificate is issued.*”³⁰ BIT Article 2(1) also refers to “admission,” rather than to an approval process that applies both to foreign and local investments.

²⁸ The Tribunal notes here that the FCIL was amended in 1970 and in 2007 and that there is no dispute that those amendments constitute a legislation that “amends or replaces” the FCIL.

²⁹ Yemen - Oman investment treaty.

³⁰ *Desert Line*, para. 92 (emphasis added).

69. The treaty at issue in *Gruslin*, cited by each Party, is substantially different from the circumstances before this Tribunal. That treaty³¹ defined ‘investment’ in Malaysia as an asset “*invested in a project classified as an ‘approved project’ by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practices, based thereon*”. This provision was clarified between the Contracting States in subsequent *notes verbale*. Malaysia explained that if a project undertaken in Malaysia does not require approval from the relevant designated Ministries the provision referring to ‘approved project’ and ‘appropriate ministry’ is not applicable.³² The Tribunal does not benefit from such clarification in the present case. On the contrary, the Respondent vigorously opposed the Claimant’s interpretation of BIT Article 2(1).
70. For these reasons, the Tribunal rejects the interpretation of the phrase “admitted in accordance with” the FCIL that the Claimant described as his primary interpretation.
71. The Claimant’s secondary interpretation accepts that an investment falls within the scope of the BIT only if has been “granted admission.” There are two key differences between the Respondent’s interpretation and the Claimant’s secondary interpretation. First, the Respondent here argues that in its secondary interpretation admission “in accordance with” the FCIL refers only to investments admitted by the BKPM. By contrast, the Claimant invokes FCIL Article 5, which provides that the Government of Indonesia shall determine the fields to be open to foreign investment and the conditions to be met by foreign investors in each such field. In the Claimant’s view, Indonesia has done exactly this by assigning to Bank Indonesia the authority to decide on the conditions to be met by foreign investors in the banking sector. Secondly, the Respondent maintains that the Claimant’s investment is not a “direct” investment and thus falls outside of the scope of the BIT. This argument is made on two levels. First, Respondent maintains that the BIT does not apply to investments structured through third States which are not party to the BIT, i.e. the Claimant’s stated investment. Second, the Respondent maintains that FCIL Article 1 refers to “direct” investments and any investment that is not a “direct” investment, i.e. the Claimant’s stated investment, falls outside of the FCIL and outside the scope of the BIT. The Claimant

³¹ Malaysia – Belgo-Luxembourg investment treaty and *Note Verbale* of the Malaysian Government, Article I(3)(e)(i) (*Gruslin*, para. 9.2).

³² *Gruslin*, paras. 23.1-23.2.

disagrees with both of these assertions regarding “direct” investment and thus considers that the fact that his stated investment was made through Chinkara does not place it outside the scope of the BIT.

72. The Tribunal turns to address each of these differences.

H. CONTENTION THAT ONLY THE BKPM-ADMINISTERED PROCESS CONSTITUTES A PROCESS OF BEING “GRANTED ADMISSION IN ACCORDANCE WITH” FCIL

73. It is common ground between the Parties that the Claimant’s stated investment in Indonesia was not made through the BKPM-administered process. However, the Parties disagree whether BKPM is the only body authorized to administer a process of admission of foreign investment in accordance with the FCIL.

a) Respondent’s arguments

74. Respondent argues that investments “granted admission in accordance with” the FCIL are only those admitted by the BKPM (Indonesia Investment Coordinating Board). Indirect investments are not administered by the BKPM, nor are investments in the banking sector. The BKPM is the sole regulatory authority recognised to administer the FCIL.³³

75. The FCIL requires investment via special legal form, namely via a foreign investment company (**PMA** - *penanaman modal asing*), Banks in Indonesia cannot be PMA companies.³⁴ Respondent’s expert, Professor Sirait observes that the definition of investment in FCIL Article 1 is limited to investments that are used to run companies in Indonesia, whereby shareholders bear direct management responsibility and risk of the investment. The FCIL’s definition of investment does not cover holding shares in a publicly listed company.³⁵

76. The Respondent argues that the requirement of BIT Article 2(1) in its ordinary meaning requires that an investment is “granted admission in accordance with” FCIL

³³ Objections, paras. 47-49.

³⁴ Objections, para. 49; Professor Sirait Expert Report, para. 14, 20, 30, 34, 43, 48 (Exhibit R28).

³⁵ Professor Sirait Expert Report, para. 47 (Exhibit R28).

and is met only when an investment is made under the FCIL and its implementing regulations and obtains the approval of the BKPM to set up a PMA company.³⁶ The PMA company is the sole vehicle for investing in Indonesia in accordance with the FCIL. This company is entitled to various benefits, including, if that company is from a State with which Indonesia signed an investment treaty, BIT protection, which may include access to ICSID arbitration.³⁷

77. The Respondent points out that the reason why the FCIL does not refer to the BKPM is that the BKPM did not exist at the time the FCIL entered into force. It has been established on the basis of regulations implementing the FCIL.³⁸
78. The Respondent argues that the BIT Contracting States' understanding that a reference to the FCIL is also a reference to the BKPM is confirmed by the internal correspondence of the UK BIT negotiators, which expressly refers to the BKPM. It is contended that this reference in the *travaux* shows that it was clear to the British negotiators that the BKPM, not any other institution, was *to vet foreign investment applications* and grant approvals under BIT Article 2(1).³⁹
79. Here the Respondent's primary argument is that the FCIL and the banking sector constitute separate regulatory regimes that do not overlap and are administered separately by non-related institutions. As a result, foreign investments in the banking sector cannot constitute foreign investments that are "granted admission in accordance with" the FCIL as they are exclusively channelled through a separate regulatory system.⁴⁰
80. The Respondent's expert witness Professor Sirait explained that under Indonesian law there are several regimes for foreign investment. However, only one covers investments made in accordance with the FCIL: it concerns PMA companies and is supervised by the BKPM. The other investment regimes are under supervision of: 1) the Ministry of Finance, covering e.g. insurance; 2) the Regulatory Body of Oil and

³⁶ Objections, para. 49; Tr. Day 3, 115:9-17; Professor Sirait Expert Report, paras. 14, 15, 20, 34, 43, 48 (Exhibit R28).

³⁷ Tr. Day 3, 115:9-16; 116:17-117:4.

³⁸ Professor Sirait Expert Report, paras. 15, 34, 43, 48 (Exhibit R28).

³⁹ In the internal correspondence shows that the understanding of the British negotiators was that by virtue of the reference to FCIL in BIT Article 2(1) "[t]he Indonesian Investment Co-Ordinating Board would surely vet each application". (Objections, para. 50) See also: Tr. Day 1, 102:13-15; Tr. Day 3, 122:17-123:9.

⁴⁰ Objections, para. 48.

Gas, covering upstream oil and gas and 3) the Bank Indonesia, covering banking.⁴¹ For those specific fields of activity there are different regulatory regimes. These are separate from the FCIL and thus, even if an investment is entirely in accordance with these differing regulatory regimes, it cannot be considered to be “granted admission in accordance with” the FCIL.⁴²

81. Historically, foreign investment in the banking sector was always subject to a separate regulatory regime. The two regimes existed separately at the time the BIT was negotiated (both the FCIL and the banking law were enacted in 1967). Foreign investment in banking was allowed at that time: foreign banks could obtain operating licenses from the Minister of Finance upon recommendation of Bank Indonesia. Thus, there could have been no doubts or confusion in the minds of the negotiators that a reference to the FCIL excludes the banking sector.⁴³
82. The Respondent argues that the FCIL covers only the areas of economy that are assigned to the coordination by the BKPM and Ministries assigned specific duties under applicable law. The Respondent argues that the regulations concerning the BKPM make it clear that foreign investment into Indonesia may be in a form other than capital investment foreseen by the FCIL and such investment is then handled by other departments, on the basis of separate laws and regulations.⁴⁴ A decree of 1977 that sets out the application procedure under the FCIL requires an investor who plans to establish a business enterprise under the FCIL framework to submit an application to the BKPM.⁴⁵
83. The Respondent relies in its argumentation on the structure of the FCIL and its implementation. Pursuant to FCIL Article 28(1) implementation of the FCIL was to occur by coordination among the Government agencies concerned in order to ensure

⁴¹ Objections, para. 63, ref. to Professor Sirait Expert Report, para. 18 (Exhibit R28).

⁴² Professor Sirait Expert Report, paras. 16-17 (Exhibit R28).

⁴³ Opinion of Tan Sri Cecil Abraham, paras. 67-70 (Exhibit R26). Respondent’s expert witness, Mr. Gregory Churchill, reaches the same conclusion, that foreign investments under the FCIL and in the banking sector in Indonesia constitute separate regimes. (Affidavit of Gregory Churchill, Exhibit R31).

⁴⁴ Article 10 Sections 1-9 of the Decree of the President of the Republic of Indonesia No. 53 of 1977 concerning the Investment Coordinating Board (the BKPM) of 3 October 1977 (Exhibit R-GC 07). Affidavit of Gregory Churchill, para. 14 (Exhibit R31).

⁴⁵ Decree of the President of the Republic of Indonesia No. 54 of 1997 Concerning Principles of Capital Investment Procedures of 3 October 1977, Article 2, Sec. 1-2 (Affidavit of Gregory Churchill, para. 15 (Exhibit R31))

harmonization of Government policies regarding foreign capital. Elucidation of FCIL Article 28 points out that the execution of the FCIL involves several departments and thus it is necessary to have a simple coordination body which may take a form of a council consisting of the Ministers concerned. FCIL Article 28(1) thus served as a ground for establishing the BKPM. The BKPM was established by Presidential Decree No. 20 of 1973 as a governmental institution authorised to manage investment issues in Indonesia in all business sectors in which authority has been delegated to it by Government Ministries. Those delegations were made over time, and to date 15 Ministries have delegated at least partial authority to the BKPM. Thus, investment in each sector that has been delegated to the BKPM falls within the scope of the FCIL and a foreign investment in that sector granted admission by the BKPM is an investment “granted admission in accordance with” the FCIL. One of the Ministries that delegated (at least some of) its powers to the BKPM was the Ministry of Finance. Professor Sirait observed that the BKPM did not have any delegation from Bank Indonesia. Thus, foreign investment in the banking sector cannot be an investment “granted admission in accordance with” the FCIL as the banking sector is a special regulatory regime that had not been delegated to the BKPM. Such delegation, in the opinion of Professor Sirait, was not possible, as Bank Indonesia is not a government institution but a central bank and the coordination under FCIL Article 28(1) is possible only among government institutions.⁴⁶

84. The banking regulations for foreign investments⁴⁷ make no reference to the FCIL and applications for approval of foreign investments under those regulations were from the very beginning handled by decision-makers and under procedures different from those established for the FCIL.⁴⁸
85. The rules for foreign investment in banking differ from the rules for foreign capital investments. First, banking regulations allow for branch operations, whereas investment laws do not. Secondly, to be approved, investments under the FCIL must show economic viability and clear benefit to Indonesian economy. Foreign investment in banking is assessed on different criteria: reciprocity, market size of the foreign

⁴⁶ Professor Sirait Expert Report, paras. 21-28, 31 and 35 (Exhibit R28).

⁴⁷ Law No. 12 of 1967 on Cooperatives and Law No. 14 of 1967 on Banking.

⁴⁸ Affidavit of Gregory Churchill, para. 17 (Exhibit R31).

bank and careful vetting and testing of the persons who are proposed as directors of the bank.⁴⁹

86. Moreover, interpretation of BIT Article 2(1) as excluding from the scope of the BIT foreign investment in important sectors of economy, such as banking, is in accordance with Indonesian policy.⁵⁰ The FCIL was enacted as a screening law for any direct investments in Indonesia for the purposes of development of the Indonesian economy. This intention was clear from the economic situation in Indonesia at the time of the FCIL's enactment: Indonesia was suffering from disastrous economic policies of the past and needed foreign capital. It set up a screening system to channel foreign investment to the areas of economy where it was most needed. At the time the BIT was being negotiated the foreign investment in certain sectors of Indonesian economy which had not been granted admission in accordance with the FCIL was being phased out. According to Respondent's expert, Mr Churchill, it was certainly an understanding of Indonesian signatories to the BIT that the reference to the FCIL excluded investments that have been made under previous rules and was being actively discouraged by Indonesia at that time.⁵¹

87. Respondent's expert, Mr Churchill, observes that the banking sector regulation is separate from the FCIL regime. This is shown by a reference in the Government Regulation No. 3 of 1968 to the FCIL provisions concerning nationalisations and compensation of foreign investments:

“The provisions regarding nationalisation and compensation as regulated in [FCIL] also apply to Foreign Banks.”

88. Mr Churchill observes that, had the banking sector been part of the FCIL regime, such reference would have been redundant as the sector would have been protected directly by the provisions of the FCIL.⁵² In response to the Claimant's argument that interpretation of the FCIL cannot exclude banking or other important economic sectors from BIT's protection, the Respondent argues that such exclusion was

⁴⁹ Affidavit of Gregory Churchill, paras. 20-21 (Exhibit R31).

⁵⁰ Objections, para. 55.

⁵¹ Affidavit of Gregory Churchill, para. 11 (Exhibit R31); Tr. Day 1, 96:14-22.

⁵² Supplement to the Affidavit of Gregory Churchill, para. 14 (Exhibit R39).

precisely the position as a matter of Indonesian law and policy, decided within the discretion left to Indonesia pursuant to BIT Article 2(1).⁵³

89. With regard to BIT Article 5, which is seen by the Claimant as the ‘bridge’ between the FCIL and the banking sector regulation (see para. 98), Respondent makes the following two arguments:

- (1) FCIL Article 5 provides for Indonesia’s discretion to determine the fields of foreign investment and conditions to be met by foreign investors in each such field. This discretion is excluded in the fields listed (non-exhaustively) in FCIL Articles 6(1) and 7. The Respondent argues that banking is absent from this list of activities closed to foreign investment because it had always been a separate regulatory regime. The FCIL, in other words, does not regulate *all* sectors of Indonesia’s economy, but only *most*.⁵⁴
- (2) FCIL Article 5 was a basis for delegations of specific fields of economy under the supervision of the BKPM. Those delegations were made on the basis of specific letters issued by a relevant ministry at the instruction of the government. To date, there are 15 such fields, which do not include banking. Together with some other areas of economy, like oil and gas, the regulatory areas that have not been delegated to the BKPM constitute separate regimes and are not covered by the FCIL. Banking was initially under the supervision of the Ministry of Finance and Bank Indonesia and now is completely under the supervision of Bank Indonesia, which is Indonesia’s central bank. That regime is based on different legal provisions and is based on a different theory than the FCIL.⁵⁵

90. The Respondent’s expert, Mr. Churchill, agreed that the FCIL does not provide for any specific procedures for admission of foreign investment and FCIL Article 5 is a general provision and any specific conditions or procedures are determined by implementing regulations.⁵⁶

⁵³ Objections, para. 55.

⁵⁴ Opinion of Tan Sri Cecil Abraham, paras. 66-68 (Exhibit R26).

⁵⁵ Tr. Day 1, 97:6-98:23.

⁵⁶ Supplement to the Affidavit of Gregory Churchill para. 9 (Exhibit R39); Notes of Meeting Between Mr. Gregory Churchill and Mr. Iiril Hiswara at Melt Dine and Wine, BRI Central Park on Friday 18 January 2012, para. 6(a), submitted during the Hearing.

91. The Respondent disagrees with the Claimant's reliance on decisions in *Desert Line* and *H&H Enterprises*⁵⁷ in support of his argument that certain conduct of the host State lead to a waiver or estoppel with regard to admission requirements in the relevant investment treaties. Respondent argues that neither *Desert Line* nor *H&H Enterprises* involve a question of estoppel or waiver and that the finding that certain factual conduct (such as engagement of high level State authorities, contractual commitments or meetings) was based on a broad wording of both relevant treaties, which did not make a reference to a specific regime of approval for foreign investments.⁵⁸
92. In relation to the *H&H Enterprises* decision the Respondent points out that that dispute was also based on a treaty with a broader wording, requiring that the investment be accepted in accordance with prevailing legislation of the host State. The Respondent pointed out that the tribunal's comments on the waiver of specific procedure were made *arguendo*, in an *obiter* observation. The actual finding was based on the broad text of the treaty, which included no reference to a specific legal regime, which allowed the tribunal to find that the existence of permits, contractual commitments as well as dealings on a very high level satisfied the requirement of investment's acceptance.⁵⁹

b) Claimant's Arguments

93. It is accepted that the Claimant's investment in Indonesia was not granted admission by the BKPM. However, the Claimant argues that the process administered by the BKPM is not the only process pursuant to which an investment can be "granted admission in accordance with" the FCIL.
94. Calling attention to the wording of other investment treaties⁶⁰, the Claimant argues that BIT Article 2(1) does not refer to any specific bodies, specific admission

⁵⁷ *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, The Tribunal's Decision on Respondent's Objections to Jurisdiction of 5 June 2012, ICSID Case No. ARB/09/15 (hereafter as "*H&H Enterprises*").

⁵⁸ Tr. Day 1, 181:3-182:2, 183:5-19.

⁵⁹ Tr. Day 1, 182:2-183:19.

⁶⁰ Investment treaties between: Malaysia, Belgium and Luxembourg; Singapore and Pakistan; Netherlands and The Philippines; Thailand and the UK; Indonesia and Vietnam; Indonesia and Denmark as well as the ASEAN Agreement and the COMESA Investment Agreement (Tr. Day 2, 23:20-26:20).

procedures, approved or registered projects or investments but merely refers to “admission in accordance with” the FCIL. BIT Article 2(1) therefore leaves open the architecture of the admission process.⁶¹ The Claimant argues that there are four admission regimes for foreign investment in Indonesia. They include, but are not confined to the BKPM-administered procedure.⁶²

95. The Claimant points out that the FCIL refers neither to the BKPM nor to any particular admissions procedure. Such procedures are set out only in secondary legislation. There is nothing in the FCIL that limits such secondary legislation to legislation describing the BKPM admission process.⁶³
96. The Claimant argues that, although the BKPM was the only institution authorised to admit foreign investment into Indonesia at the time the BIT has been negotiated, it was preceded by other institutions and it did not remain the only institution exercising such a function, as the system evolved over time and new bodies were vested with such functions.⁶⁴ The Claimant answers the Respondent’s reliance on the internal correspondence of the UK negotiators that refers to the BKPM (see para. 78) by arguing that, although at that time the BKPM was the only body to administer the FCIL, the wording of BIT Article 2(1) is sufficiently flexible to allow things to develop over time. Indeed, things developed over time and other bodies acquired competence to process foreign investments.⁶⁵
97. The Claimant emphasizes that FCIL Article 5 authorises the Government to specify the fields of activity opened to foreign investment and to specify conditions and requirements that must be met by those foreign investments.⁶⁶
98. As a result, the Claimant argues, the FCIL serves as an ‘umbrella’ legislation for *all* foreign investment into Indonesia. In particular, FCIL Article 5 foresees an open-ended range of possibilities as to conditions of admission and therefore constitutes a ‘bridge’ through which Indonesia may allow foreign investments not only under the

⁶¹ Tr. Day 2, 26:23-27:6.

⁶² Tr. Day 2, 27:25-28:18.

⁶³ Response, para. 124; Tr. Day 1, 64:3-8.

⁶⁴ Response, para. 113; Tr. Day 2, 10:15-21; 57:25-58:2.

⁶⁵ Tr. Day 3, 161:5-13.

⁶⁶ Response, para. 122; Tr. Day 1, 64:19-23; Tr. Day 3, 133:21-134:2 (answering Judge Donoghue’s questions); Tr. Day 3, 133:13-134:1; Tr. Day 3, 144:19-25; 133:15-20.

authority of the BKPM but also in such specific sectors in which a foreign investment must meet specific conditions. For the Claimant FCIL Article 5 allows the Indonesian Government to determine the fields of activity open to foreign investment and covers also those sectors of Indonesian economy that were opened to foreign investment after the FCIL's entry into force, such as the banking sector. Investments admitted in accordance with the standard of admission and procedures set out by Indonesia pursuant to FCIL Article 5 are "granted admission in accordance with" the FCIL. The legislation allowing for foreign investment in Indonesian banks should thus be considered in light of FCIL Article 5. The Claimant's interpretation of the FCIL as an 'umbrella' legislation governing all foreign investment in Indonesia is confirmed by the clearer wording of the 2007 amendment to the FCIL (which replaced the original act), Article 12 of which states that "*Any business fields or types are open to investment activity, except for those declared as being closed and open with certain conditions.*" The list of excluded sectors does not include banking. The Claimant emphasizes that a negative list promulgated under the FCIL (as amended in 2007) refers to the banking sector as open but subject to a license requirement.⁶⁷

99. Because of the diversity and specificity of particular sectors of Indonesian economy the admission process and the requirements of admission may differ from sector to sector and may include different administrative bodies authorised to admit foreign investment as best qualified for assessing whether a foreign investment fulfils the criteria. The Claimant argues that those special regimes, which include banking, contrary to the position of the Respondent's expert Professor Sirait, fall within the scope of the FCIL.⁶⁸
100. Foreign investment in the banking sector was allowed by the banking law from 1967 but was restricted to foreign banks establishing branches or joint ventures.⁶⁹ The Claimant argues that foreign investment in the banking sector was allowed gradually, subject to conditions, which include specific approval process, justified by the specific

⁶⁷ Response, paras. 84 and 86; Hiswara Expert Statement of 1 November 2012, para. 95; Tr. Day 2, 35:10-12; 37:1-38:25.

⁶⁸ Response, para. 84. Tr. Day 3, 145:3-14. This argument was sketched by the Claimant in his submissions under Article 41(5) Application. However, due to a different evidentiary threshold it had not been developed at the previous stage of proceedings. (See Auckland Hearing Tr. Day 2, 189:7-10; 190:10-18 and 23-25; 191:7-14).

⁶⁹ Response, para. 116.

needs of the banking sector, supervised by Bank Indonesia.⁷⁰ Use of specialised bodies, other than the BKPM, is explained by the specific needs of the banking sector.

101. The Claimant argues that the banking sector was never excluded from the scope of the FCIL. The 2007 amendment to the FCIL expressly defines capital investment as ‘all investment, whether by foreign or domestic investors’. Similarly, the BKPM in its official presentation does not make any such distinction.⁷¹
102. Relying on the *H&H Enterprises* decision the Claimant argues that, in practice, investment tribunals avoid pedantic analysis of bureaucratic requirements, preferring instead to focus on the substantive approval under relevant domestic laws. As long as the authorities granting such approval hold regulatory powers similar to those held by officials normally entrusted with admission of foreign investments, arbitrators afford investment protection under a relevant investment treaty.⁷²
103. The Claimant further argues that, in the circumstances here, his investment was admitted by organs that sit higher in the State hierarchy than the BKPM and pursuant to approval procedure that is more thorough and complex than that required before the BKPM. Bank Indonesia, being a central bank, is a higher organ than the BKPM. Its legal basis is the Indonesian Constitution and it is independent and free from governmental interference, except for matters expressly prescribed. In contrast, the BKPM is a non-departmental government institution set up by a decree. Its function is to support the President of Indonesia and it is directly responsible before the President. Regulatory approval of foreign investments is subject to more stringent conditions than those applied by the BKPM. Anyone purchasing shares in Indonesian banks must fulfil certain stringent criteria: he must not be blacklisted by Bank Indonesia and must have high standards of integrity, which cover character and morals, compliance with laws and regulations and commitment to the development of a healthy banking system and fitness as a shareholder of a bank. Moreover, every potential and/or existing controlling shareholder is required to pass a ‘fit and proper’ test, performed by Bank Indonesia to ensure that such controlling shareholder has the

⁷⁰ Response, para. 118.

⁷¹ Response, para. 83.

⁷² Response, para. 73.

appropriate integrity and accountability.⁷³ Moreover the Claimant contends that he always was treated by the Respondent as a shareholder (see also paras. 165-170).

104. Here it is contended that approvals of foreign investment in procedures other than the BKPM, including procedures before Bank Indonesia, are made ‘in accordance with’ the FCIL.⁷⁴
105. In addition to the legal arguments stated above, the Claimant argues that, even if BIT Article 2(1) can be read to impose the specific requirement of BKPM approval, the facts in his case demonstrate that Respondent has either waived those requirements or is estopped from raising them. The Claimant relies here on reasoning found in decisions in *Desert Line*, *Fraport*⁷⁵ and *H&H Enterprises* to support this argument. Claimant points to the finding by the tribunal in *Desert Line* that the host State was estopped from claiming that claimant had not obtained a required certificate since there was “overwhelming evidence of lengthy dealings between the parties at the highest level” which demonstrated that the authorities were fully aware of claimant’s investment and therefore approved it. The Claimant argues that his situation in Indonesia was analogous because of constant regulatory supervision and regular discussions and meetings between the Claimant and Indonesian authorities.⁷⁶ The Claimant also calls attention to an observation made by the tribunal in *Fraport*, cited with approval in *Desert Line*, to the effect that a government should be estopped from raising violations of law as a defence to jurisdiction if it has knowingly overlooked those violations.⁷⁷
106. The Claimant invokes *H&H Enterprises* to support his argument that if an investment treaty refers to a specific piece of host State’s domestic legislation that contains a specific procedure for acceptance of foreign investments, the host State can be found to have accepted the investment and to have waived the specific requirements if the investment is approved by another State authority, where the authority designated by the specific legislation is not of superior hierarchy than the State authority that *de*

⁷³ Response, paras. 73-81.

⁷⁴ Tr. Day 3, 137:17-18.

⁷⁵ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, Award of 27 July 2007, ICSID Case No. ARB/03/25 (hereafter as “*Fraport*”).

⁷⁶ Response, para. 59.

⁷⁷ *Fraport*, para. 346; Response, paras. 60-61.

facto accepted the investment.⁷⁸ The Claimant argues that, even if there was an approval requirement that goes beyond a mere compliance with Indonesian law, his investment was approved by Bank Indonesia and Capital Market and Financial Institution Supervisory Board. Bank Indonesia is a higher organ than BKPM and, unlike the latter, is independent from governmental interference. The approval procedure to which the Claimant’s investment was submitted was ‘very thorough and complex’. The Claimant argues that his position is analogous to that of the claimant in *H&H Enterprises* and thus it should also be afforded BIT protection.⁷⁹

107. The Tribunal’s analysis and conclusions on this point are made in Section J(a) below.

I. CONTENTION THAT ONLY DIRECT INVESTMENTS FALL WITHIN THE SCOPE OF BIT ARTICLE 2(1)

a) Respondent’s arguments

108. The Respondent presents two arguments to support its position that only “direct” investments fall within the scope of the BIT. First, Respondent interprets the BIT to apply only to “direct” investments.⁸⁰ Second, the Respondent relies on the limitation to “direct” investments in FCIL Article 1.

109. The Respondent refers to specific terms in the BIT to support its argument. It points to BIT Article 2(1) which requires that the investment is made “*by* nationals or companies of the United Kingdom”, rather than investments ‘of’ such nationals or companies. The preposition ‘by’, according to the Respondent, “denotes a direct and close nexus between the noun and the other word in the sentence”. This, the Respondent argues, signifies that a requirement that an investment ‘by’ a UK national or company is an investment made ‘directly’, ‘owned by’ that national or company. The Respondent relies here on *Standard Chartered v. Tanzania*⁸¹ arguing that the word ‘by’ implies an active role of an investor in its investment.⁸²

⁷⁸ Response, para. 72, *H&H Enterprises*, para. 54.

⁷⁹ Response, paras. 73-81.

⁸⁰ Tr. Day 3, 48:2-16.

⁸¹ *Standard Chartered Bank v. United Republic of Tanzania*, Award of 2 November 2012, ICSID Case No. ARB/10/12.

⁸² Objections, paras. 10, 33-34; R Reply, para. 33; Tr. Day 1, 130:21-133:17.

110. Respondent further argues that the phrase “wherever incorporated” in BIT Article 1(a)(ii) also implies that “a UK citizen can make a direct investment in Indonesia (as an individual) through a company established in Indonesia or through a company established in the United Kingdom, i.e. the investment must be made by a UK national or a UK company.” As the Claimant’s stated investment was made through a territory of a third country (Bahamas) it is not eligible for protection under the BIT.⁸³
111. The Respondent argues that the requirement that an investment must be made ‘by’ a UK national or company as well as the phrase ‘wherever incorporated’ refer to a ‘company’, which is a defined treaty term that also must be taken into account in interpreting BIT Articles 1(a)(ii) and 2(1). BIT Article 1(d) defines ‘company’, as an entity “incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended” and “incorporated in the territory of the Republic of Indonesia” or “constituted in accordance with its legislation”. Thus, Respondent contends that this definition of a company excludes companies incorporated in the Bahamas.⁸⁴
112. The Respondent also relies on the structure of the BIT provisions: with BIT Article 2(1) as a ‘gateway’ to the BIT. It is entitled “Scope of the Agreement” and it limits its scope only to those ‘investments’ that fulfil the criteria set in Article 2(1).⁸⁵ Conversely, it contends that BIT Article 1 is not an operative treaty provision and, although it needs to be taken into account when interpreting BIT Article 2(1), it cannot determine the scope of the BIT.⁸⁶ BIT Article 1, as a general provision, cannot override the very specific provision of BIT Article 2(1).⁸⁷
113. The Respondent further argues that FCIL Article 1 defines investments as direct investments. Because BIT Article 2(1) refers to admission in accordance with the FCIL, only direct investments fall within the scope of BIT Article 2(1). The Respondent also points to the Elucidation of Article 2 in the 2007 version of the FCIL which states that “*Investment in all sectors in the territory of the state of the Republic*

⁸³ R Reply, paras. 37, 39

⁸⁴ Tr. Day 1, 16:2-20; Tr. Day 3, 81:18-82:6, 89:1-91:2; 187:9-13; 190:5-9.

⁸⁵ Objections, para. 6; Reply, para. 23.

⁸⁶ Reply, para. 25.

⁸⁷ Supplement to the Affidavit of Gregory Churchill, para. 7 (Exhibit R39).

*of Indonesia means direct investments, not including indirect or portfolio investments.”*⁸⁸

114. The Respondent explains the meaning of ‘direct investment’ in FCIL Article 1 as investments not made through an intermediary.⁸⁹ The Respondent observes that the FCIL does not contain a definition of its term ‘direct investment’ but the meaning of the phrase can be inferred from FCIL Article 1 as a whole and from the Elucidation of that Article attached to the FCIL. The Respondent argues that the key element of a direct investment is that the investor “bears the risk of utilisation”, which is a reference to the structure of the investment in the admission process before the BKPM. In that process a potential investor is obliged to offer conditions of its investment: how much capital it will invest, on what terms, how many people it will employ, what equipment it will buy, what land it will rent, what will be its operating expenses, etc. That offer, if accepted, is then signed by the Indonesian Government and forms a contractual relationship between the investor and the Government.⁹⁰ Thus, the Respondent suggests, those who sign such a contract with the Indonesian Government, and who make specific commitments as to how their capital will be utilized in Indonesia, bear direct risk of the invested capital and their investment is a *direct investment*. By contrast, a mere purchase of shares does not fall within this understanding of the term as it is less permanent and the shares may be sold at any time.⁹¹
115. The Respondent’s expert, Professor Sirait, also observes that definition of investment in FCIL Article 1 is limited to investments consisting of running companies in Indonesia, whereby shareholders bear direct management responsibility and risk of the investment. The FCIL’s definition of investment does not cover holding shares in a publicly listed company.⁹²
116. Finally, the Respondent argues that Article 2(1) reflects Indonesia’s policy choice to limit protection of foreign investment. This policy choice was made clear by

⁸⁸ Objections, para. 40.

⁸⁹ Tr. Day 3, 188:12-14.

⁹⁰ Tr. Day 3, 93:10-94:1, 23-25; 95:1-96:16.

⁹¹ Tr. Day 3, 97:6-18.

⁹² Professor Sirait Expert Report, para. 47 (Exhibit R28).

Indonesia to the UK negotiators⁹³ and it is also reflected in FCIL Article 1, which applies “only to direct investment”.⁹⁴

117. The Respondent pointed out that it follows from the *travaux* that the UK proposed an extension of the BIT to Hong Kong so that investments of UK nationals and companies made through companies in Hong Kong would be covered by it. This idea was opposed by Indonesia. The *travaux* makes clear, the Respondent argues, that the UK negotiators wanted to extend the scope of the treaty to Hong Kong because they saw the treaty, without such extension, as applying only to investments made ‘directly’ by UK nationals and companies. If a UK national or company decided to invest in Indonesia through a company in Hong Kong, such investment would not have been covered by the BIT if it were not extended to Hong Kong. Given Indonesia’s opposition, the UK negotiators accepted that the BIT will not cover investments made by UK nationals or companies through Hong Kong.⁹⁵

118. Respondent pointed to specific letters in the *travaux* to support its argument⁹⁶:

(1) A letter of 11 October 1974⁹⁷ relating to the BIT’s extension to Hong Kong with a comment that “*we think it would be much better for the Agreement to reflect the existing pattern of investment which shows some five times as much investment flowing from Hong Kong as from the UK itself.*”

(2) A letter of 11 October 1974⁹⁸ which states that “*the level of investment from Hong Kong has been some five times as high as from the UK itself. It is probable that a proportion of these investment proposals from Hong Kong concern UK investment routed through Hong Kong for taxation reasons. HMG suggests that it would be to the mutual advantage of both governments to recognise this investment pattern in the Investment Protection Agreement by extending it to Hong Kong.*”

⁹³ Objections, paras. 37, 39; Tr. Day 1, 134:3-12.

⁹⁴ Objections, para. 47.

⁹⁵ Objections, para. 36-38 and 42; Tr. Day 1, 134:9-135:2.

⁹⁶ Objections, para. 38; Documents attached as Exhibit R30.

⁹⁷ MFA 2/305/1, from Mr Kerr (FCO) to Mr O’Keeffe (British Embassy in Jakarta) (Exhibit R30).

⁹⁸ From Mr Kerr (FCO) to Mr O’Keeffe (British Embassy in Jakarta) (Exhibit R30).

(3) A letter of 11 November 1974⁹⁹ which states that “[a] very high percentage of total British investment in Indonesia has been routed through third parties to avoid UK taxation. (...) [A] great deal of British investments has been made through Hong Kong (...). We wish any agreement to be extended to Hong Kong to protect investment through that colony.”

119. Thus, the Respondent concludes that the Claimant’s stated investment was outside the scope of the BIT as it was an indirect investment, made through Chinkara, a company incorporated in the Bahamas.

b) Claimant’s Arguments

120. Claimant argues that the definition of “investment” in BIT Article 1(a), as a specific definition of a term used in the BIT, applies to the interpretation of BIT Article 2(1).¹⁰⁰ Thus, the starting point of the Tribunal’s enquiry should be whether there is a qualifying investor with a qualifying investment within the meaning of the defined terms adopted by the treaty parties. Only then should the Tribunal proceed to enquire whether the investment was “granted admission in accordance with” FCIL.¹⁰¹

121. Claimant argues that BIT Article 1(a) is “very wide”, “explicitly permits indirect investments” and also “explicitly envisages the type of situation in which the Claimant, as a national of the United Kingdom, finds himself”. Claimant defines indirect investments as investments held through one or more intermediaries and argues that the wording of the provision, applying to “*every kind of asset, and in particular, though not exclusively (...) [to] shares (...) of companies wherever incorporated*” covers Claimant’s investment.¹⁰²

122. Claimant particularly emphasises that the definition of “investment” refers to “*every kind of asset*” and to “*stocks (...) of companies wherever incorporated*”. (emphasis added). For Claimant, this last phrase directly refers to the ownership of shares in companies, wherever incorporated, by nationals or companies of the United Kingdom. It therefore applies to Claimant’s investment which is held indirectly via a

⁹⁹ from Mr Kerr (FCO) to Mr O’Keeffe (British Embassy in Jakarta) (Exhibit R30).

¹⁰⁰ Tr. Day 2, 15:6-7.

¹⁰¹ Tr. Day 2, 63:13-17.

¹⁰² Response, para. 24; Tr. Day 2, 51:10-13; Tr. Day 2, 16:11-13.

shareholding in a company incorporated in the Bahamas, which company in turn has invested in Indonesia”.¹⁰³

123. The reason for such conclusion is that the Claimant reads the phrase ‘wherever incorporated’ as including the intent of the treaty parties to extend the scope of the BIT to “companies incorporated *anywhere*”, also beyond those incorporated in the territory covered by the BIT. As a result, the term ‘investment’ covers also indirect investment. The Claimant argues that a restriction of the scope of the BIT would have been achieved by the reference by the Contracting Parties simply to ‘companies’ rather than ‘companies wherever incorporated’.¹⁰⁴

124. The Claimant argues that it is well established that an investment held through a company incorporated in a third country can constitute an investment for the purposes of investment treaty protection.¹⁰⁵ Although his investment ‘falls squarely’ within BIT Article 1(a)(ii), the Claimant points out that it also falls within the broad phrase of the definition of investment ‘any kind of asset’ as, according to the Claimant, “a beneficial indirect investment is an asset - it is any kind of asset, therefore it is an investment.”¹⁰⁶

125. The Claimant refers to interpretations of definitions of ‘investments’ in other investment treaties at issue in: *Alex Genin v. Estonia*¹⁰⁷, *Cemex v. Venezuela*¹⁰⁸, *Mobil v. Venezuela*¹⁰⁹ and *Azurix v. Argentina*¹¹⁰. The Claimant argues that this ‘compelling line of cases’ constitutes a ‘well established principle of international investment law’ and it supports his case.¹¹¹

¹⁰³ Response, para. 25; C 41(5) Response, para. 84; Tr. Day 2, 63:17-19; Tr. Day 3, 129:5-19.

¹⁰⁴ Rejoinder, paras. 46-50; Tr. Day 2, 49:14-50:3.

¹⁰⁵ C Response 41(5), para. 85.

¹⁰⁶ Tr. Day 2, 49:24-25, 50:4-8.

¹⁰⁷ *Alex Genin, Easter Credit Limited, and A.S. Baltoil v. Republic of Estonia*, Award of 25 June 2001, ICSID Case No. ARB/99/2.

¹⁰⁸ *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction of 30 December 2010, ICSID Case No. ARB/08/15.

¹⁰⁹ *Mobil Corporation, Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction of 10 June 2010, ICSID Case No. ARB/07/27.

¹¹⁰ *Azurix Corp. v. The Argentine Republic*, Decision on Jurisdiction of 8 December 2003, ICSID Case No. ARB/01/12.

¹¹¹ C Response 41(5), para. 85-94

126. The Claimant interprets the phrase ‘every kind of asset’ in light of the object and purpose of the BIT which, the Claimant argues, shows that the intention of the treaty parties was to include “investments of all shapes and sizes, and in any and all sectors”. The Claimant refers to the wording of BIT Article 3 (unlimited in scope reference to capital), the BIT’s preamble (no limitation with regard to ‘investments’) in support of this argument.¹¹²
127. The Claimant argues that there is no inconsistency between BIT Article 1 (which covers indirect investments) and Article 2(1) (which refers to FCIL, which in turn refers to ‘direct’ investment), as two provisions that should be interpreted in a harmonious way.¹¹³ These Articles refer to different aspects of the BIT: Article 1 defines the protected investments and BIT Article 2(1) sets out a requirement that investments be admitted in accordance with the legislation of the host State. The Claimant contends that Article 1 sets out the definition of the term ‘investment’ and that definition cannot be ignored in the interpretation of BIT Article 2(1).
128. The Claimant argues that proper interpretation of BIT Articles 1 and 2(1) means that the term defined by the treaty parties must be applied to the interpretation of another provision of that treaty, in accordance with VCLT Article 31(4).¹¹⁴ Article 1 and Article 2 deal with different aspects of the BIT, and the rule *lex specialis derogat legi generali* cannot serve to dilute or relegate the definition of investment in BIT Article 1.¹¹⁵
129. The Claimant argues that incorporation of the term ‘investment’, as defined in BIT Article 1, into the interpretation of BIT Article 2(1) does not limit the scope of BIT Article 2(1) to ‘direct’ investments, as understood by FCIL. BIT Article 2(1) is an admission standard, requiring UK investors to ensure that their investments into Indonesia are admitted in accordance with the FCIL if those investments are to fall within the scope of the BIT. Indonesia retains its powers, by using the FCIL, to deny admission to any investment that falls within the definition of investment under BIT Article 1. Thus, to be protected under the BIT, the UK investment in Indonesia must

¹¹² C Rebuttal, paras. 60-63.

¹¹³ Response, para. 16; Tr. Day 2, 49:8-11; Tr. Day 3, 146:16-25; 147:13-19; Claimant explained that this argument can be approached as dealing with inconsistency between two provisions but these two provisions do not have to be viewed as inconsistent. (Tr. Day 3, 147:13-19)

¹¹⁴ Response, para. 14.

¹¹⁵ C Rebuttal, para. 67; Rejoinder, para. 41.

first fall within the definition of investment under BIT Article 1 and, secondly, be granted admission in Indonesia in accordance with the FCIL, as specified in BIT Article 2(1).¹¹⁶

130. Following VCLT Article 31(1), the Claimant also refers to the BIT's object and purpose. He argues that the BIT's goal is to create favourable conditions for investments and a narrowing interpretation suggested by the Respondent is manifestly incompatible with this object and purpose, as it would exclude from the BIT's protection entire sectors of Indonesian economy that are open to foreign investment.¹¹⁷ Moreover, the BIT's preamble refers to reciprocal protection, which is reflected by BIT Article 2(2). The Claimant reads the requirement of reciprocity as a requirement of equal protection of investors in both Contracting Parties. Thus, concludes the Claimant, since Indonesian investments in the UK are protected in all sectors of the economy, reciprocity of protection requires that UK investors in Indonesia are protected with regard to every class of investment, howsoever made and regardless of the economic sector in question.¹¹⁸

131. The Claimant also responds to the contention that, because FCIL Article 1 refers to 'direct' investment, BIT Article 2(1) only contemplates admission for direct investments. According to the Claimant, the FCIL operates on a different level than does the BIT. The BIT, in Article 1, defines investment broadly, using a non-exhaustive list of assets. This non-exhaustive list includes indirect investments, for example, ownership interests in companies, wherever located. In order for an investment to benefit from the BIT, however, BIT Article 2(1) requires that it be granted admission in accordance with the FCIL. Because the FCIL is limited to direct investments, any admission of an investment must be at the level of a direct investment.¹¹⁹ The limitation to direct investment in Indonesia's national law cannot have the effect of changing the definition of 'investment' in the BIT. So long as the admission requirement has been met at the direct level, the indirect investment (falling

¹¹⁶ Rejoinder to Rule 41(1) Application, para. 43, in response to an argument made by Respondent's expert Mr. Churchill in his supplementary affidavit (Exhibit R39). Tr. Day 3, 148:3-17. See also Auckland Hearing Tr. Day 2, 178:14-15; 213:18-27.

¹¹⁷ Response, para. 45-46.

¹¹⁸ Response, paras. 46-49.

¹¹⁹ Tr. Day 3, 141:13-20 (Claimant) and 146:15-147:19 (Claimant, responding to President's questions)

within the definition of BIT Article 1) is protected.¹²⁰ In the Claimant's view, at the level of applying Indonesian law, Chinkara's investment in the Pre-Merger Banks and in Bank Century satisfied the criterion of being a 'direct' investment.

132. With regard to Respondent's observation that BIT's Article 2(1) reference to investments 'by', as opposed investments to 'of', UK nationals or companies means that BIT requires that the investment into Indonesia be direct, the Claimant points out that substantive provisions of the BIT refer to investments 'of' investors and thus the use of the preposition 'by' does not have any special, limiting, meaning.¹²¹
133. The Claimant argues that resort to *travaux préparatoires* is not necessary for the interpretation of BIT Article 2(1). However, if referred to, they support his interpretation.¹²² The Claimant argues that, at the least, *travaux préparatoires* referred to by the Respondent do not show that a reference to the FCIL was intended to limit investments by UK nationals or companies in Indonesia to certain economic sectors.¹²³
134. The Claimant also contends that, had the Respondent wanted to restrict the scope of the BIT to certain categories or classes of investments, e.g. only direct investments, it should have explicitly done so in the definition of 'investment'. However, it had not done so.¹²⁴
135. With regard to the Respondent's argument concerning Indonesia's opposition to the extension of the territorial scope of the BIT to Hong Kong, the Claimant argues that Indonesia's opposition was not to indirect investment but to the possibility of granting protection to investments made by Chinese, rather than UK, investors and channelled through Hong Kong. A note¹²⁵ proposed to resolve the problem included a mechanism of UK governmental clearing of capital invested from Hong Kong as "Hong Kong proper or British". Moreover, by exchange of notes of 1999, the Respondent

¹²⁰ Tr. Day 3, 129:1-132:25; 135:24-25; 136:1-5; 141:21-25; 140:1-141:25, 142:1-8; 146:16-25, 147:1-19 (Claimant, answering questions from the Tribunal)

¹²¹ Response, paras. 25-27.

¹²² Response, para. 28.

¹²³ Response, para. 52.

¹²⁴ Rejoinder to Rule 41(1) Application, para. 44.

¹²⁵ Note of 13 December 1974, Exhibit R29.

extended¹²⁶ territorial application of the BIT to Jersey, Guernsey, Bermuda and the Isle of Man.¹²⁷

J. TRIBUNAL'S ANALYSIS

The following is the reasoning of the majority, leading to the award. A separate concurring opinion of Professor Sornarajah is attached. Professor Sornarajah joins the majority in reasoning on the issues of the MFN clause and costs.

a) *With regard to the BKPM-administered process*

136. The Tribunal first considers the question whether only the BKPM-administered admission suffices for purposes of BIT Article 2(1), as summarised in Section H above.

137. The Tribunal recognizes that the BKPM regime and the regulatory regime governing the banking sector are separate and distinct. However, neither the BIT nor the FCIL indicate that all foreign investment in Indonesia is subject to the BKPM regime. On the contrary, foreign investment in certain sectors is *not* subject to BKPM procedures. The Tribunal notes in particular that FCIL Article 5, was part of the FCIL when the BIT was concluded. That provision makes it clear that Indonesia had the flexibility to decide what sectors would foreign investment be allowed and under what conditions. Article 5 does not specify that those conditions of admission could *only* be found within the FCIL itself. The reference to the banking sector in the negative list of the amended FCIL confirms the conclusion that the FCIL itself is broad enough to address the banking sector without also requiring investments in that sector to obtain admission through the BKPM. Were this not so, banking would not be included in parts of the negative list.

138. In this regard the Tribunal need not reach any conclusion about the range of Indonesian authorities other than the BKPM that would have the competence to grant

¹²⁶ Exchange of Notes extending the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland for the Promotion and Protection of Investments signed at London on 27 April 1976 to Bermuda, the Isle of Man and the Bailiwicks of Guernsey and Jersey (entered into force on 30 July 1999) (Exhibit CLA 99).

¹²⁷ Response, paras. 35-39.

admission to an investment of a UK company or national in a manner that meets the requirements of BIT Article 2(1). Here, it suffices for the Tribunal to observe that the banking sector in Indonesia is regulated by Bank Indonesia and that foreign investment in that sector has been gradually liberalized to lend strength to the Claimant's contention that any procedures relevant to the establishment of foreign investment in the banking sector are administered by Bank Indonesia.

139. For these reasons the Tribunal concludes that by referring to investments "granted admission in accordance with" the FCIL, BIT Article 2(1) potentially can embrace not only investments granted admission by the BKPM or pursuant to authority delegated by BKPM, but also investments granted admission pursuant to conditions imposed by Indonesia with respect to sectors that are open to investment but not governed by the BKPM procedures. For the banking sector, such conditions of admission would be administered by Bank Indonesia. Hence, the Tribunal accepts that the Claimant is not excluded from contending that his investment was granted admission pursuant to a procedure other than the one administered by the BKPM.

140. The Tribunal also notes that the Claimant relies on certain of the cited cases (notably, *Desert Line* and *H&H Enterprises*) to support his contention that, even if only BKPM procedures constitute "admission" for purposes of BIT Article 2(1), the course of dealings between the Claimant and the Respondent means that the Respondent waived any such specific requirement or is estopped from invoking them. In view of the Tribunal's conclusion that the BKPM is not the only admission procedure contemplated by BIT Article 2(1), there is no need for the Tribunal to address these contentions by the Claimant. However, some of the arguments raised by the Claimant in this context are relevant to the Tribunal's analysis of the Claimant's secondary interpretation of BIT Article 2(1). It is to this issue that the Tribunal now turns.

b) With regard to the issues of 'direct' investment

141. The Tribunal has summarized the views of the Parties and the directions given by the Tribunal regarding the scope of these bifurcated proceedings (see paras. 27-31) As previously noted, the Claimant has provided information regarding his stated investment, without supporting evidence, and the Tribunal has accepted the Claimant's assertions for the sole purpose of evaluating Respondent's preliminary

objections. In this proceeding, the Tribunal will decide on the correct interpretation of Article 2(1) and, applying that interpretation, will determine whether Claimant's stated investment was admitted in accordance with the FCIL.

142. In support of their respective interpretations of BIT Article 2(1), the Parties have presented divergent views on the implications of FCIL Article 1, which states that "investment" in that law "denotes only direct investment." The significance of that provision is an issue that is closely intertwined with the question whether the definition of investment under Article 1 of the BIT extends to an investment through a third-country intermediary. The Tribunal stated prior to the Hearing that this latter point was excluded from this stage of the bifurcated proceedings (see para. 31). Because of the conclusion that the Tribunal reaches below regarding the evidence supporting Claimant's contention that his stated investment was admitted, the Tribunal has no need to reach a conclusion in this award regarding the meaning of "direct" investment in Article 1 of the FCIL or the related question of third-country incorporation. Thus, for purposes of analysis only, the Tribunal proceeds on the basis that Claimant's "indirect" ownership of his stated investment does not preclude his claim, and thus sets to one side the respective arguments of the Parties on these two aspects of "direct" investment, without deciding them.

K. WAS CLAIMANT'S STATED INVESTMENT "GRANTED ADMISSION" BY COMPLIANCE WITH REQUIREMENTS SET BY BANK INDONESIA?

143. In light of the preceding conclusions regarding the interpretation of BIT Article 2(1), and taking into account the assumptions being made, for purposes solely of this analysis, the Tribunal turns to the next question whether the Claimant's stated investment was "granted admission" through the regulatory steps taken by Bank Indonesia.

a) Claimant's Arguments

144. *General description of the admission process by Claimant:* The Claimant argues that his investment was subjected to an intense four-year process of admission, from 2000

to 2004, which was long, detailed and drawn-out.¹²⁸ This admission process began with the approvals by Bank Indonesia of purchases by Chinkara of shares in banks Danpac and Pikko and was completed by the merger of Bank Century in December 2004.¹²⁹

145. The Claimant argues that the formal approval process required under Indonesian banking law operated at the level of legal ownership and was limited to Chinkara.¹³⁰ The process, the Claimant admits, was not identified as an admission process of a foreign investment. However, it amounted to an admission process of the Claimant's investment in Indonesia because as a matter of fact it was known to the Indonesian authorities that the Claimant was a shareholder in Chinkara and therefore ultimately a shareholder in Danpac, Pikko and, in the end, Bank Century.¹³¹ This *de facto* admission process, according to the Claimant, was devised by Bank Indonesia and included an interrogation of his ultimate beneficial ownership in the Indonesian banks in question.¹³²
146. The Claimant argues that his investment in Indonesia, via Chinkara, was “granted admission in accordance with” the FCIL as he, as a shareholder of Chinkara, was subjected to procedures prescribed by Bank Indonesia: Bank Indonesia looked at Chinkara and then looked further and identified the ultimate beneficial owners of Chinkara.¹³³ In practice, the Claimant was subjected to a very thorough admission procedure led by Bank Indonesia, which was fully aware that the Claimant was the ultimate owner of the business it was admitting.¹³⁴
147. The Claimant identifies the main elements of this *ad hoc* admission process as:
- (1) Bank Indonesia's approval of Chinkara's share purchases in Danpac and Pikko,
 - (2) The approval of the merger of Bank Century, and
 - (3) The ‘fit and proper’ test to which the Claimant then had been subjected.

¹²⁸ Response, para. 73; Tr. Day 2, 9:1-9.

¹²⁹ Tr. Day 2, 44:21-24; Tr. Day 3, 23:8-21.

¹³⁰ Tr. Day 1, 71:3-16; 80:8-25; 81:11.

¹³¹ Tr. Day 1, 80:14-18; Tr. Day 2, 68:20-25.

¹³² Tr. Day 3, 148:11-13.

¹³³ Auckland Hearing Tr. Day 1, 192:9-21.

¹³⁴ Tr. Day 3, 141:8-11

Moreover, the Claimant argues that he was at all times, during and after the admission process, treated as the ultimate shareholder of Bank Century.

148. The Claimant also states that most of the documents detailing the admission process were on the files of Bank Century and Bank Indonesia and, as a result, Claimant does not have access to those documents.¹³⁵ In the exchanges in January 2013 described in paras. 26-30 Claimant said that he had “provided ample evidence covering the issues” of “whether Mr. Rizvi complied with provisions of Indonesian law in respect of admission of his investment”.¹³⁶
149. *The approval of purchases of shares in CIC, Danpac and Pikko:* As noted, it is common ground that procedures concerning admission of foreign investment by way of purchasing shares in Indonesian banks are established by Bank Indonesia. Claimant’s expert, Mr. Iiril Hiswara stated that if a purchase of shares in an Indonesian bank results in a change of control, it triggers Bank Indonesia acquisition procedure.¹³⁷ Change of control occurs when the investor owns (i) more than 25 per cent of the total subscribed shares of the relevant bank or (ii) less than that but the investor controls the bank. The acquisition procedure requires, among other things, approval of the share purchase by Bank Indonesia.¹³⁸ Any shareholder who becomes a controlling shareholder is also required to undergo a ‘fit and proper’ test by Bank Indonesia.¹³⁹
150. According to Mr. Hiswara, in case of a purchase of shares in an Indonesian bank the ultimate controlling shareholder of that bank needs to be disclosed as this shareholder will be subject to the ‘fit and proper’ test. If a purchase of shares is made by a company, its shareholders must also be disclosed. The disclosure is made in a written application submitted by the Indonesian bank to Bank Indonesia.¹⁴⁰
151. According to Mr. Hiswara, the ‘fit and proper’ test is regulated in Bank Indonesia Regulation No. 12/23/PBI/2010 concerning the Fit and Proper Test, that applies to

¹³⁵ Tr. Day 2, 43:6-11.

¹³⁶ Claimant’s letter (electronic) of 15 January 2013.

¹³⁷ Hiswara Expert Statement, para. 73. The expert referred to the Decree of Board of Director of Bank Indonesia No. 32/50/KEP/DIR on the Procedure of and Requirement of Purchasing Shares of Commercial Banks as the regulation containing the relevant procedure.

¹³⁸ Hiswara Expert Statement, para. 73.

¹³⁹ Hiswara Expert Statement, para. 74.

¹⁴⁰ Tr. Day 2, 133:11-135:5.

every potential and/or existing controlling shareholder of a bank (either foreign or domestic). It is applied to ensure such controlling shareholder has the integrity and accountability to be a controlling shareholder of the bank.¹⁴¹ Regulation 12/23/PBI/2010 replaced Bank Indonesia Regulation No. 5/25/PBI/2003 but the procedure had not changed materially.¹⁴²

152. Additionally, anyone purchasing shares in a commercial bank in Indonesia must (a) not be listed in the black list in the field of banking maintained by Bank Indonesia, (b) be considered to have a high standard of integrity. The evaluation of a person's standard of integrity covers the person's character and morals, compliance with prevailing laws and regulations and commitment to the development of a healthy banking system as well as his/her fitness to be a shareholder of a bank.¹⁴³
153. The above regulations applied to the purchase of the shares in the Pre-Merger Banks. The shares in Danpac and Pikko, constituting 65 per cent and 55 per cent of these banks' shareholding respectively, were purchased from existing shareholders. These purchases triggered a statutory requirement to make open offers on the stock market for the remaining shares. As a result of those open offers Chinkara finally acquired almost 90 per cent of shares in each of those banks.¹⁴⁴
154. According to the Claimant the share purchase in CIC consisted of two sets of shares of slightly less than 10 per cent each, bought from an investment fund. The Claimant explained that Chinkara's purchase of shares in CIC in 2000 did not require Bank Indonesia's approval because it concerned fewer than 25% shareholding.¹⁴⁵ Chinkara's purchases of shares in Pikko and Danpac triggered Bank Indonesia's approval process and the share purchases were subject to full approval process by Bank Indonesia, reflected in letters of 5 July 2002.¹⁴⁶

¹⁴¹ Hiswara Expert Statement, para. 77; Response, para. 80; Tr. Day 1, 66:12-19.

¹⁴² Response, para. 80.

¹⁴³ Hiswara Expert Statement, para. 76.

¹⁴⁴ Tr. Day 2, 78:21-25; 79:13.

¹⁴⁵ Tr. Day 2, 43: 13-20.

¹⁴⁶ Tr. Day 1, 66:22-24, Day 2, 44: 14-20; Letters No. 4/54/DpG/DPIP/Confidential and 4/55/DpG/DPIP/Confidential, Exhibit R22.

155. The Claimant argued that the approval was granted in the knowledge of the merger of the Pre-Merger Banks.¹⁴⁷ Chinkara was also required to make an offer for all remaining shares in the two banks, which ultimately led to the acquisition of about 90% of the shares in each of the banks.¹⁴⁸
156. ***The ‘fit and proper’ test:*** The Claimant observes that, even though Chinkara’s purchase of shares in CIC did not require approval by Bank Indonesia, following that acquisition the Claimant nonetheless underwent and passed Bank Indonesia’s ‘fit and proper’ test in relation to his appointment as President Commissioner of CIC.¹⁴⁹
157. The Claimant gives two explanations to the fact that he had not been submitted to the ‘fit and proper’ test as a shareholder.¹⁵⁰ One is that the ‘fit and proper’ test to which he was submitted was, in fact, triggered by the awareness of Indonesian authorities that the Claimant was the ultimate shareholder in the Pre-Merger Banks and, ultimately, in Bank Century. Had it not been known to the authorities and had he not been considered to be a relevant shareholder, he would not have had that test applied.¹⁵¹ Secondly, the Claimant argues that the test he passed as the President Commissioner of CIC sufficed for Bank Indonesia for compliance with the character requirements also in the Claimant’s capacity as a shareholder. This conclusion was justified by the fact that Bank Indonesia was aware that the Claimant was an ultimate owner of Chinkara and thus an ultimate owner of what became Bank Century.¹⁵² The Claimant argues that although Bank Indonesia had powers to ask anybody who is a shareholder or ultimate shareholder to go through a ‘fit and proper’ test, it only asked the Claimant to go through ‘fit and proper’ test once, and he passed that test. This suffices to constitute compliance with the applicable requirements as it establishes that Bank Indonesia was comfortable with the Claimant’s position as a shareholder and as President Commissioner (an officer of the bank), without submitting him to

¹⁴⁷ Tr. Day 2, 44:6-7.

^e Tr. Day 2, 44:7-13.

¹⁴⁹ Claimant’s Reply to Rule 41(5) Application, para. 33; Tr. Day 2, 43: 21-44:1. (Claimant explained that a commissioner (or *commissar* in Bahasa Indonesian) is a title of a member of a supervisory board of a company. (Tr. Day 2, 18:22-25; 73:8-9))

¹⁵⁰ Claimant stated that he was never required to undergo another ‘fit and proper’ test. (Tr. Day 1, 66:12-19) Respondent argued that there was another ‘fit and proper’ test which Claimant did not pass, but did not provide any evidence. (Tr. Day 1, 78:10-79:1)

¹⁵¹ Tr. Day 1, 80:14-22.

¹⁵² Tr. Day 1, 73:10-74:1; 87:2-7.

additional ‘fit and proper’ tests, seeing the one that he had already passed as sufficient.¹⁵³

158. The Claimant argues that the ‘fit and proper’ test separately is part of the process of vetting of the foreign investor.¹⁵⁴ Even though the ‘fit and proper’ test is a test of an individual rather than investment, it is also part of the process of the Claimant’s investment being admitted to Indonesia.¹⁵⁵
159. Claimant accepts that Bank Indonesia could have applied the ‘fit and proper’ test vis-à-vis the Claimant in connection with Chinkara’s acquisition of Pikko and Danpac. However, it chose not to do so. The Claimant argues that full compliance is constituted by the fact that everything that the Claimant was required to do by Bank Indonesia in respect of his investment in Bank Century was done by him. Bank Indonesia, being aware that he was the ultimate shareholder, and using its discretion, did not require anything more.¹⁵⁶
160. The Claimant argued that Bank Indonesia had discretion to reopen the issue of the ‘fit and proper’ requirements later if something else arose. However, the record shows that it did not feel obliged to do that and thus the Claimant’s conclusion from this behaviour of Bank Indonesia is that the requisite approval based on the first ‘fit and proper’ test continued.¹⁵⁷ Further, that the subsequent conduct of Bank Indonesia shows that it regarded the Claimant as ‘fit and proper’. The Claimant relies here on the documents illustrating later dealings with Bank Indonesia connected with his stated investment.
161. At the Hearing, Claimant’s counsel was unable to answer the question whether at any point in time Claimant’s interest in Bank Century exceeded 25%, thus triggering a ‘fit and proper’ test. He noted that the percentage moved up and down over time and ended up shy of 10%. However, the Claimant argues that recognition of the Claimant

¹⁵³ Tr. Day 2, 73:24-74:5.

¹⁵⁴ Tr. Day 2, 70:16-17.

¹⁵⁵ Tr. Day 2, 72:14-22.

¹⁵⁶ Tr. Day 1, 87:8-89:4; 90:14-22.

¹⁵⁷ Tr. Day 1, 89:24-90:9.

as a shareholder came from the direct interaction between the Claimant and Bank Indonesia and from conditions set by Bank Indonesia which the Claimant fulfilled.¹⁵⁸

162. ***The approval of the merger of Bank Century:*** The Claimant argues that after the above share purchases work started on the merger of Bank Century.¹⁵⁹ The Claimant points to two annual reports of Bank Century, one from 2007 and one from 2009, stating that the merger of the three pre-merger banks into Bank Century was approved by Bank Indonesia's Governor Decision No. 6/87/KEP.GBI/2004, dated December 6, 2004. The 2009 annual report also refers to the decision of Bank Indonesia to approve the change of business license from CIC to Bank Century.¹⁶⁰

163. ***At all times the Respondent treated the Claimant as a shareholder in Bank Century:*** The Claimant argues that at all times the Respondent treated him as a shareholder in the Pre-Merger Banks and subsequently in Bank Century in that:

- (1) The process characterized by the Claimant as constituting the process of granting admission, was encouraged by Respondent who was at all times during this process fully aware of the Claimant's position as a shareholder of Bank Century;
- (2) After the merger of Bank Century, during the actions taken in connection with financial difficulties of that Bank, Respondent at all times treated the Claimant as a shareholder of Bank Century; and
- (3) The criminal proceedings against the Claimant were based on the premise that the Claimant was a shareholder of Bank Century.

164. The Claimant also bases his awareness argument on subsequent dealings between Bank Century and Bank Indonesia. (The documents on which Claimant relies are discussed in section J(c), below.) The Claimant explains that it does not have documents from Bank Century or Bank Indonesia files, however, he relies on letters of commitment and minutes of meetings. The Claimant argues that his investment was carefully vetted by Respondent in full awareness that the Claimant was investing

¹⁵⁸ “[H]e talked to Bank Indonesia for four years. They asked lots and lots and lots of things of him. He did them. Ultimately, he satisfied them that everything they needed to know and that they needed to have in place was there, which is why they approved each component and then gave approval for the final merger.” (Tr. Day 2, 78:9-16).

¹⁵⁹ Tr. Day 2, 79:13-15.

¹⁶⁰ Tr. Day 2, 46:21-47:3; Copy of the 2009 Annual Report of Bank Mutiara (ex Bank Century) (Exhibit C43).

through a separate entity.¹⁶¹ He also points out that the Claimant is described as shareholder of Bank Century in the indictment and verdict and throughout the criminal proceedings against him.

165. (a) *Treatment as a shareholder during admission process*: The Claimant asserts that the merger of the Pre-Merger Banks into Bank Century involved discussions, exchanges of information and requests and a particular attention being paid by Bank Indonesia to the Claimant's and Mr. al-Warraq's future plans with respect to Bank Century and its capitalization requirements.¹⁶²
166. The Claimant argues that the admission process before Bank Indonesia was less superficial than a process before the BKPM and it required disclosure and analysis of ultimate beneficial ownership and that such analysis here was performed by Bank Indonesia, in the context in which indirect shareholding is not unusual, and that the Indonesian authorities understood how investments generally, and in particular in this case, are structured and arranged. In case of the investment in a bank, the Claimant argues, the Indonesian authorities really wanted to know who was behind the shareholders that were registered. As a result, the Indonesian documents record the Claimant as being a shareholder.¹⁶³
167. (b) *Treatment as shareholder during financial difficulties of Bank Century*: The Claimant argues that from 2004 to 2008 he was required by Indonesian authorities to attend meetings concerning Bank Century in his capacity as a shareholder.¹⁶⁴ In support of this argument the Claimant refers to a number of documents, including minutes of meetings with Bank Indonesia and letters of commitment.¹⁶⁵ This evidence will be evaluated in detail below.
168. (c) *Treatment as shareholder in connection with criminal proceedings*: The Claimant argues that had he not been considered the ultimate shareholder he would not have been investigated and prosecuted by the Indonesian authorities years later. Both

¹⁶¹ Tr. Day 2, 47:8-20.

¹⁶² Tr. Day 2, 67:10-19; 69:2-5.

¹⁶³ Tr. Day 2, 135:6-121; Tr. Day 3, 138:4-23; 141:7-11, 154:6-12.

¹⁶⁴ Rejoinder, para. 28.

¹⁶⁵ Exhibit R9.

indictment and verdict against him refer to him as a shareholder of Bank Century and his indirect shareholding was a basis on which he was convicted.¹⁶⁶

169. The Claimant refers to the following documents in support of this argument:

(1) The indictment by the Office of the Attorney General of Indonesia related to criminal investigations commenced in December 2009, which refers to Claimant as President Commissioner of CIC and “Majority Shareholder of PT Bank Century Tbk via First Gulf Asia Holdings Limited/Chinkara Capital Limited” and “Controlling Shareholder for the three banks”.¹⁶⁷

(2) The Verdict in the criminal proceedings.¹⁶⁸

170. The Claimant also noted that he has no access to records of Bank Indonesia or of Bank Mutiara (as Bank Century is now known) bearing on the regulatory steps relevant to the grant of admission of the Claimant’s investment.¹⁶⁹

b) Respondent’s Arguments

171. The Respondent acknowledges that the Claimant and Chinkara were eligible under Law No. 7 of 1967 and Bank Indonesia regulations to make their investments in the banking sector in addition to further compliance with controlling interest regulations. However, the Respondent argues that, because the process was not administered by the BKPM as 1) no application was submitted to the BKPM and 2) the FCIL does not apply to the banking sector, the investment was not ‘granted admission in accordance with’ the FCIL, as required by BIT Article 2(1), and thus should not be granted protection under the BIT.¹⁷⁰

172. The Respondent argues that the processes referred to by the Claimant are not processes for granting admission to foreign investors. They apply to any persons

¹⁶⁶ Response, para. 82, Rejoinder, para. 30; Tr. Day 1, 81:4-11.

¹⁶⁷ Tr. Day 2, 47:21-48:20; Request for Arbitration, para. 49; Exhibit C14.

¹⁶⁸ Response, para. 82; Rejoinder, para. 30.

¹⁶⁹ Tr. Day 1, 43:6-11

¹⁷⁰ Opinion of Tan Sri Cecil Abraham, paras. 72-75 (Exhibit R26).

purchasing shares in a bank, whether foreigners or Indonesians. Those procedures are not about allowing such an investor into Indonesia.¹⁷¹

173. The Respondent contends that under Bank Indonesia regulations a ‘fit a proper’ test is required if someone wishes to enter a bank as a shareholder, director or commissioner, or “when there is a problem in the bank and Bank Indonesia is trying to find a solution”.¹⁷²
174. Respondent contends that the Claimant passed the ‘fit and proper’ test required from him by Bank Indonesia in 2000 and 2002. However, that test was passed in relation to the Claimant’s position as a member of management board of Chinkara, when it acquired more than 25% of Pikko and Danpac, of which he became a commissioner (member of the supervisory board).¹⁷³ The Respondent argues that the Claimant was required to take the ‘fit and proper’ test in 2004, due to the problems suffered by Bank Century, but he did not complete the test and resigned as a director.¹⁷⁴
175. The Respondent argues that the ‘fit and proper’ test referred to by the Claimant concerns the Claimant as an individual. It is not directed at his investment, i.e. his ultimate shareholding in the banks. The element of awareness by Indonesian institutions, alleged by the Claimant, could not have been there, as Indonesian law does not recognise beneficial ownership, which was the basis of the Claimant’s shareholding in Bank Century when the events allegedly showing such awareness took place. The procedures referred to by the Claimant do not refer to the link between the Claimant and Chinkara and thus they do not ‘grant approval’ of that link. The procedures refer to the Claimant and Chinkara separately, not as a chain of ownership.¹⁷⁵
176. The Respondent contests that the procedures the Claimant is referring to represent granting admission in accordance with FCIL to the Claimant’s beneficial shareholding. The Respondent argues that those procedures did not represent ‘granting admission in accordance with’ the FCIL but constituted an approval, not

¹⁷¹ Tr. Day 3, 27:14-24.

¹⁷² Tr. Day 1, 166:10-15.

¹⁷³ Tr. Day 1, 166:1-7.

¹⁷⁴ Tr. Day 1, 166:7-9 and 16-19. This fact is contested by Claimant.

¹⁷⁵ Tr. Day 1, 125:2-16; 130:1-16.

admission, process, a “post admission regulatory consent” or “post admission requirement.”¹⁷⁶ According to the Respondent the process of allowing for a purchase of shares in a bank in Indonesia is not an admission procedure.

177. In relation to the Bank Indonesia’s letters with regard to Chinkara’s purchase of shares in Danpac and Pikko¹⁷⁷, the Respondent observes that characterisation of those letters as part of an approval procedure as problematic. It is because Bank Indonesia does not approve anything in those letters but it simply states that it does not have any objection to the purchase of the shares.¹⁷⁸ Even accepting that the letter is a letter of approval, it only refers to examination of shareholding by Chinkara. Such approval is not an admission of foreign investment to Indonesia because it is required regardless of whether the shareholder is a foreigner or an Indonesian national. Moreover, shares may be bought and held by foreigners who never even set foot in Indonesia, so such approval is not an *admission* to Indonesia. From an immigration point of view, a foreigner who is a shareholder in an Indonesian company does not have a right for an Indonesian visa simply because he is a shareholder. He needs to come as a tourist or be invited by a company. If he is a company director he has a right to visa in his capacity as a company director.¹⁷⁹

178. The Respondent argued that, even if the requirements of approval of share purchase were treated as ‘admission’, these requirements are not applicable to Bank Century. At the time of the merger the shareholding of Chinkara in Bank Century was 9.5% and thus fell below the threshold of requirement of approval to purchase shareholding. On this basis the Respondent argues that there would not have been any approval process in relation to Chinkara’s shareholding and thus, if treated as admission process, there would have been no admission process. Thus, even accepting the Claimant’s argumentation, such investment could not be treated as ‘granted admission in accordance with’ the FCIL.¹⁸⁰

179. The Respondent argues that although the Claimant played several roles in relation to his investment vis-à-vis Bank Indonesia he was officially recognised as a

¹⁷⁶ Tr. Day 3, 35:14-19, 36:1-16; 74:18-25.

¹⁷⁷ Exhibit R22.

¹⁷⁸ Tr. Day 3, 85:21-86:6.

¹⁷⁹ Tr. Day 3, 85:12-17, 86:1-19; 87:20-88:13.

¹⁸⁰ Tr. Day 3, 189:8-190:4.

management board member of Chinkara.¹⁸¹ Bank Indonesia's awareness of the Claimant's shareholding in Chinkara is irrelevant, as Bank Indonesia's contacts with the Claimant were limited to his capacity as a director or as a member of the bank's management entitled to its representation.¹⁸² The Respondent also points out that Bank Indonesia could not have been aware that the Claimant was a beneficial shareholder in Chinkara as it was informed by the company secretary that all shares in Chinkara were held by Mr. al-Warraq as of 8 October 1999 and 24 May 2004.¹⁸³

180. In relation to Bank Indonesia's behaviour vis-à-vis the Claimant after the merger of Bank Century, the Respondent argues that Bank Indonesia was not concerned with the ultimate shareholders of shareholders of Indonesian banks. It was only dealing with Chinkara as a shareholder and with Chinkara's management.¹⁸⁴ Respondent argues that Claimant was prosecuted as a member of management of the bank, not as shareholder. It was Chinkara that was a defendant in these proceedings, not Chinkara's shareholders. It was also only in his capacity as a manager of Bank Century that the Claimant had been subjected to the 'fit and proper' test.¹⁸⁵

c) Tribunal's Analysis

181. The Tribunal next engages in an assessment of the evidence presented by the Claimant in support of his argument that his investment in Indonesia was subjected to a specific approval process which constituted a grant of admission in accordance with FCIL. The question is whether the Claimant met the evidentiary threshold. For the purposes of the Tribunal's analysis as limited by the Bifurcation Decision, it is outside the Tribunal's present inquiry whether Claimant in fact held shares in Chinkara at the time that his stated investment was granted admission. The Tribunal understands the stated investment (for present purposes) to comprise Claimant's acquisition of ownership in Indonesian banks (via corporate intermediaries), in the expectation of a merger.

¹⁸¹ Tr. Day 3, 123:16-124:5.

¹⁸² Tr. Day 3, 105:10-18; 117:8-13.

¹⁸³ Reply, para. 3; Secretary's Certificates, Exhibit R34; Tr. Day 1, 166:20-25.

¹⁸⁴ Tr. Day 3, 124:8-12 and 124:24-125:2.

¹⁸⁵ Tr. Day 1, 82:21-83:3; Tr. Day 3, 123:16-20.

182. The Tribunal recalls that it has rejected the Claimant's primary interpretation of BIT Article 2(1). As such, it is not sufficient for Claimant to establish simply that he met all requirements imposed by Respondent with respect to the establishment of Claimant's stated investment. Claimant does not rely on Bank Indonesia procedures that are particular to foreign investors or that are formally denominated as admission procedures. Thus, the question before the Tribunal is whether, taken as a whole, the regulatory steps taken by Bank Indonesia comprised a *de facto* grant of admission of Claimant's stated investment. Unlike Claimant's primary interpretation, Claimant's secondary interpretation means that the Tribunal must closely examine the facts on which Claimant relies. The steps in the *de facto* admission procedure on which Claimant relies (see para. 147) are: the approval of Chinkara's share purchases in Pikko and Danpac; the approval of the Bank Century merger and the 'fit and proper' test to which Claimant was subjected. Claimant emphasizes that Bank Indonesia was aware of his ultimate ownership of the Pre-Merger Banks and Bank Century at the time of the steps in what he regards as a *de facto* admission process (the years 2000-2004). (As previously noted, the Tribunal here sets aside the respective Party positions on the implications of Claimant's investment through a third-country corporate intermediary.)
183. There is no dispute about Claimant's contention that Bank Indonesia approved Chinkara's purchases of shares in Danpac and Pikko or that it did so with awareness of Chinkara's intention to merge those banks with another bank.
184. The Claimant invokes various documents which confirm the fact that the merger was approved,¹⁸⁶ which Respondent does not dispute. This approval occurred in 2004, four years after Chinkara first acquired an ownership interest in pre-merger banks. The gap in time could suggest that the merger was a regulatory step taken after establishment of Claimant's stated investment, not a part of a *de facto* admission process. However, given the evidence that Bank Indonesia approved the acquisition of pre-merger banks with the expectation of a merger, the Tribunal takes account of the merger approval in evaluating the evidence advanced by Claimant in support of his assertion of a *de facto* admission process.

¹⁸⁶ Annual Report of Bank Century (now Bank Mutiara) for 2009, referring to shareholder resolutions and the decision of the Governor of Bank Indonesia No 6/87/KEP.GBI/2004 of 6 December (submitted at the Hearing), Tr. Day 2, 44:24-45:8; 46:19-47:3.

185. As to the ‘fit and proper’ test, the Claimant relies on a test administered to him because of his role as President Commissioner of Bank CIC. The Respondent does not contest Claimant’s assertion that the Claimant was subjected to this test or that he passed it. The Parties disagree about various details of the ‘fit and proper’ test.¹⁸⁷ Taken as a whole, however, the evidence establishes that Claimant passed the ‘fit and proper’ test conducted by virtue of his position as President Commissioner of CIC.
186. Claimant also maintains that Bank Indonesia could have required him to pass a ‘fit and proper’ test as a result of his ownership interest in Danpac and Pikko and that it did not do so because it saw no need for an additional test. Claimant presented no details to the Tribunal about the ‘fit and proper’ test that he passed. In particular, there is no indication of the way that a ‘fit and proper’ tests administered vis-à-vis a shareholder compares to the test applied to a President Commissioner of a bank.¹⁸⁸ Claimant’s expert, Mr. Hiswara, limited his expert report to the ‘fit and proper’ test required of the shareholders or potential shareholders of Indonesian banks, without describing the test to which Claimant was subjected, triggered by his position as President Commissioner. It is also not clear what regulation applied to the ‘fit and proper’ test referred to by the Claimant, as the regulations referred to by him were dated 2003 and 2010, and the Claimant became President Commissioner of CIC in 2000. Imprecision about the size of Claimant’s individual share in the two banks (as distinct from Chinkara’s share),¹⁸⁹ further undermines the conclusion that Claimant would have the Tribunal draw – that Bank Indonesia implicitly considered Claimant to be ‘fit and proper’ as a shareholder, not only as President Commissioner.
187. Although the ‘fit and proper’ test was administered as a consequence of Claimant’s position as President Commissioner, Claimant contends that it would not have been administered if Claimant had not been known as the ultimate shareholder of Chinkara.¹⁹⁰ The assertion about Bank Indonesia’s knowledge of Claimant’s ultimate

¹⁸⁷ The Respondent asserted, without any supporting evidence, that the Claimant was required to pass the ‘fit and proper’ test in 2004 in relation to Bank Century but did not complete that test, a point that Claimant contested. The Respondent stated that the Claimant went through and passed two ‘fit and proper’ tests in his capacity as a member of the management of Chinkara and as member of the supervisory board of Pikko and Danpac, but Claimant only claimed to have passed one test.

¹⁸⁸ Claimant did not provide an English translation of Bank Indonesia Regulation No. 12/23/PBI/2010, only Bahasa version (Exhibit CIL17); no copy of Regulation No. 5/25/PBI/2003 was provided.

¹⁸⁹ See fn, 3 and para. 209.

¹⁹⁰ Tr. Day 1, 80:14-22.

ownership of the three pre-merger banks is important to Claimant's effort to rely on the 'fit and proper' test as part of a process admitting an investment, because the test was conducted on Claimant as an individual, not on the stated investment, and the regulatory trigger was his position as President Commissioner, not his ownership interest. As discussed below, however, the evidence does not support Claimant's contention that the steps on which the Claimant relies, which include the 'fit and proper' test, were conducted with awareness of his shareholding.

188. Taking into account all of this evidence, the Tribunal considers that there is an attenuated link between the 'fit and proper' test that the Claimant passed in his capacity as President Commissioner of CIC and the asserted *de facto* admission of Chinkara's investment in the pre-merger banks.

189. The Tribunal turns next to Claimant's contention that his ultimate ownership of Chinkara was known to Bank Indonesia during the period when Bank Indonesia gave the three approvals on which he relies. A significant weakness in this assertion is that the evidence adduced by Claimant derives not from the years 2000-2004, but from the period after Bank Indonesia approved the Bank Century merger in 2004. It is understandable that Claimant would lack access to documents that may be in the possession of Bank Mutiara or Bank Indonesia. But this does not sufficiently explain the absence of evidence to support an assertion that was repeatedly made. No request was made for Respondent to produce documents that would have supported those assertions. Claimant did not testify in person, or via video link, nor did he submit an affidavit describing events, to the best of his recollection. He proffered no other witness who might have been able to provide evidence on this point. Claimant did not contend that Bank Indonesia was aware of his British nationality or that he believed, as of 2000-2004, that Bank Indonesia approvals would constitute a grant of admission that would bring his investment within the scope of the BIT.

190. The Tribunal summarizes evidence from the period after the approval of the Bank Century merger below.

(1) Minutes of Meeting between Bank Indonesia and "*the Ultimate Shareholder*" of Bank Century of 3 October 2005, concerning discussions of 'ownership alteration' in Bank Century. The document records the meeting between Bank Indonesia and "*PT Bank Century, Tbk (management and ultimate shareholder)*". In this

document Mr. al-Warraq declares his “*willingness to be the controlling/ultimate shareholder of PT Bank Century, Tbk.*” The document refers to “*the controlling/ultimate shareholder*” as a singular term. However, both the Claimant and Mr. al-Warraq signed it as “the ultimate shareholder”. The document is also signed by other persons acting in their capacities as “Chairman of commissioner”, “Commissioner”, “President Director” and “Vice President Director”. The document includes the following reference: “*As a controlling/ultimate shareholder of PT Bank Century Tbk, Mr. Hesyam Al Warraq and Mr. Rafat Ali Rizvi, in Jakarta hereby acknowledged and declared as follows: (...)*”. It is unclear in what capacity this sentence refers to the Claimant. The document makes two more references to “*Mr. Hesyam Al Warraq and Mr. Rafat Ali Rizvi*”, without referring to the capacity in which they are acting.¹⁹¹

- (2) Letter of commitment of 15 October 2008, in which Mr. al-Warraq is referred to as “*the controlling shareholder of*” and the Claimant and Mr. Robert Tantular as “*majority shareholders of*” Bank Century. Mr. al-Warraq signed this document “*For and on behalf of First Gulf Asia Holding Ltd.*” (i.e. Chinkara). The Claimant signed “*For and on behalf of Outlook Investment Limited, Plc*”, Mr. Tantular signed “*For and on behalf of PT Century Mega Investindo*”.¹⁹² Another document in the file refers to Outlook Investment Plc as “*directly or indirectly owned, controlled, and managed by Mr. Rafat Ali Rizvi*” and being, together with PT Century Mega Investindo “*majority shareholders of*” Bank Century.¹⁹³ Another document in the file, a list of shareholders of Bank Century dated 10 October 2008, submitted by Bank Century to Bank Indonesia, uses the term “majority shareholder” with reference to shareholders holding 5 or more per cent of shares. The term appears to be used in relation to stock exchange reporting requirements.¹⁹⁴

¹⁹¹ Minutes of Meeting: Bank Indonesia and the Ultimate Shareholder of PT Bank Century, Tbk Date of 3 October 2005 (Exhibit R9).

¹⁹² Letter of Commitment of 15 October 2008 (Exhibit R9).

¹⁹³ Letter of Commitment of 16 November 2008 (Exhibit R9).

¹⁹⁴ Letter from Bank Century to Bank Indonesia dated 10 October 2008 (Exhibit R27), Outlook Investment is not listed as a shareholder in that document, so its shareholding might have increased.

(3) In other minutes of meetings between Bank Indonesia and Bank Century the Claimant is not referred to as a shareholder ('controlling', 'ultimate' or otherwise) of Bank Century:

(a) One document refers only to Mr. al-Warraq as "*ultimate shareholder*" of Bank Century. The Claimant signed the minutes without indicating the capacity in which he was acting. According to this document, it records a meeting with "*management and ultimate shareholder*" of Bank Century.¹⁹⁵

(b) Another document refers to the meeting as a meeting between Bank Indonesia and "*the Controlling Shareholder (Mr. Hesham Al Warraq), Mr. Rafat Ali Rizvi and the management of the bank*", "*the Controlling Shareholder, Mr. Rafat Ali Rizvi Mr. Robert Tantular and the management of the bank*". The document registers that "*the shareholder of the bank will inform that Mr. Rafat Ali Rizvi is searching the investor [sic]...*".¹⁹⁶

(4) The Claimant signed three letters of commitment in relation to Bank Century:

(a) First letter of commitment is signed by the Claimant and Mr. al-Warraq but the capacity in which they signed the letter is not revealed. The letter refers to Chinkara (by then renamed "First Gulf Asia Holdings") as "*the controlling shareholder*" of Bank Century.¹⁹⁷

(b) Second letter of commitment is signed by the Claimant without stating any capacity and by Mr. al-Warraq as "*The Ultimate Shareholder*". The document states: "*Mr. Hesham al-Warraq as the controlling shareholder of PT Bank Century Tbk and Mr. Rafat Ali Rizvi commit...*" The document is signed: by "*Rafat Ali Rizvi*" and "*Hesham Al Warraq The Ultimate Shareholder*".¹⁹⁸

(c) Third letter of commitment is signed by the Claimant only, without stating any capacity in which he was acting. The document states: "*Today, November 28, 2006, I Rafat Ali Rizvi commit to Bank Indonesia to do the*

¹⁹⁵ Minutes of Meeting: Bank Indonesia and the Ultimate Shareholder and Management of PT Bank Century Tbk Date January 26th, 2006 (Exhibit R9).

¹⁹⁶ The Minutes of Meeting Bank Indonesia and PT Bank Century, Tbk. Of 15 October 2008.

¹⁹⁷ Letter of Commitment of 4 October 2005 (Exhibit R9).

¹⁹⁸ Letter of Commitment of Bank Century of 5 April 2006 (Exhibit R9).

following...” One of the commitments concerned injection of additional cash capital to Bank Century. The document is simply signed “*Rafat Ali Rizvi*”.¹⁹⁹

(5) The Claimant also submitted a letter of Chinkara of 5 December 2005 (by then renamed “First Gulf Asia Holdings Limited”) entitled “*Letter of Statement of Shareholder Legal Entity (for Bank which is Indonesian Legal Entity)*” in which Chinkara makes undertakings in relation to deposit insurance guarantees. The undertakings were made by Chinkara, represented by Mr. al-Warraq, as shareholder of Bank Century.²⁰⁰

191. This evidence, all relating to the period after what Claimant regards as a *de facto* admission procedure, provides little, if any, support for Claimant’s assertion that Bank Indonesia was aware that Claimant was an ultimate owner of Bank Century and the pre-merger banks during the period of the asserted *de facto* grant of admission. It is, in effect, too little and too late.

192. It appears that Bank Indonesia was aware that Claimant transferred legal ownership to Mr. al-Warraq, at least as of 2005. The affidavit of the Deputy Governor of Bank Indonesia states that Bank Indonesia did not recognise the Claimant as a shareholder of Chinkara from 9 December 2005, when it “approved Mr. Al-Warraq to become the controlling shareholder of Bank Century.”²⁰¹ There is a disagreement about precisely when during 2005 this transfer occurred, but this has no effect on the above conclusion of the Tribunal.²⁰²

¹⁹⁹ Letter of Commitment of 28 November 2008 (Exhibit R9).

²⁰⁰ Letter of Statement of Shareholder Legal Entity (for Bank which is Indonesian Legal Entity) of 5 December 2005 (Exhibit R12).

²⁰¹ *Ibid.* (Exhibit R2), para. 3d): “*On December 9, 2005, BI approved Mr. Al-Warraq to become the controlling shareholder of Bank Century through Chinkara, as Mr. Al-Warraq has become the sole member of Chinkara as shown in the Member’s Written Resolution of Chinkara dated 1 December 2004. Therefore, Mr. Rizvi did not have any equity interest in Bank Century through Chinkara from that time on.*” Concluding his statement Mr. Alamsyah stated that “*Rafat Ali Rizvi, through Chinkara, was neither a direct nor indirect shareholder in Bank Century after 2005, and certainly not at the time of the rescue of Bank Century.*” (*ibid.*, p. 3)

²⁰² Secretary Certificates of Chinkara presented by the Respondent and dated 20 and 8 March 2005 do not mention the Claimant as a shareholder in Chinkara, and each refer only to Mr al-Warraq as a sole shareholder. However, the first certificate gives a date of 24 May 2004 as the commencement date of his sole shareholding, whereas the certificate of 8 March 2005 gives a date of 8 October 1999 as the commencement date of his sole shareholding (Exhibit R34). The Claimant explained, relying on a letter from the Company Secretary, that one of the certificates contains numerous mistakes, including that the date of 8 October 1999 was incorrect and it should read 24 May 2004. In that letter, the Company Secretary stated that the Claimant was a shareholder in Chinkara from 8 October 1999 to 23 May 2004. Rejoinder, para. 12-14; Letter from Matthew Leong to Salans LLP of 12 December 2012 (Exhibit C41).

193. As mentioned at the outset, the Tribunal is not addressing at this stage the implications of Claimant's contention that he maintained a beneficial ownership in Chinkara – and thus in Bank Century – after the transfer to Mr. al-Warraq of legal ownership. The record before the Tribunal does not indicate that Bank Indonesia was aware of this change in ownership during the period 2005-2008 when, according to Claimant, Bank Indonesia engaged with him on the understanding that he was a shareholder. The change in the character of Claimant's stated ownership, unbeknownst to Bank Indonesia, further weakens Claimant's reliance on any documents from the period after the transfer of legal ownership.
194. Claimant is correct that documents from criminal investigations referred to by the Claimant as a shareholder of Bank Century. There, is however, no dispute about whether Claimant was a shareholder (via one or more intermediaries) of the pre-merger banks or of Bank Century, as of the time that the merger was approved. Rather, the question is whether Bank Indonesia was aware of his shareholding when it took the regulatory steps on which Claimant relies. The documents from the later criminal proceeding shed no light on that.
195. The Affidavit of the Deputy Governor of Bank Indonesia, submitted by Respondent, contains affiant's present-day description of Bank Indonesia's approval in 2000 of acquisition by Claimant (through Chinkara) of shares in Pikko and Danpac.²⁰³ Bank Indonesia was also aware of the Claimant's shareholding in Chinkara when the latter purchased shares in CIC.²⁰⁴ The Deputy Governor's specific statement that Bank Indonesia approved the acquisition of shares by Claimant (and others) through Chinkara could lend support to Claimant's contention that Bank Indonesia was aware of Claimant's ownership interest in the pre-merger banks in the period 2000-2004. But it is not clear whether the Deputy Governor's affidavit is a description of shareholding that later became known to Bank Indonesia or of Bank Indonesia's

²⁰³ Affidavit of Dr. Halim Alamsyah, SE, SH, MA, Deputy Governor of Bank Indonesia dated 17 October 2011, para. 3a) (Exhibit R2): "*In the year 2000, BI [i.e. **Bank Indonesia**] approved the acquisitions of the shares of PT Bank Pikko, Tbk ("**Pikko**") and PT Danpac, Tbk ("**Danpac**") by **Mr. Rafat Ali Rizvi** ("**Rizvi**"), together with Mr. Hesham al-Warraq ("**al-Warraq**") and Mr. Tommy Kim Tong Bhun through Chinkara Capital Limited ("**Chinkara**" – subsequently renamed First Gulf Asia Holdings Limited) amounting to 66.65% and 54.94% of the banks' shares respectively.*" (emphasis added)

²⁰⁴ *Ibid.* (Exhibit R2), para. 3b): "*Pursuant to the list of shareholders of Bank CIC registered by BI, **Chinkara was recorded as a shareholder of Bank CIC as at March 2003 amounting to 14.65% which holding had increased to 16.72% by November 30, 2003. Mr. Rizvi was also recorded as President Commissioner of Bank CIC in June 26, 2000 (...).***" (emphasis added)

awareness, as of 2000-2004, of Claimant's shareholding. Claimant offered no comment on this aspect of the Deputy Governor's statement.

196. Thus, the evidence before the Tribunal establishes that Bank Indonesia took the three regulatory steps on which Claimant relies, although Claimant overstates the significance of a 'fit and proper' test that was performed by virtue of his role as President Commissioner of CIC, not as a shareholder, as a step in admission of his stated investment. Claimant has not established that Bank Indonesia took these three steps in awareness of Claimant's shareholding in the investment. That is an important deficiency in his contention that Bank Indonesia's approvals, which apply equally to foreign and local investors, amount to a grant of admission of his stated investment. On the examination of the documentation before the Tribunal and having regard to the fact that in this procedure under Rule 41(1) it is for the Claimant to establish that such admission as was required was granted, the Tribunal's conclusion is that it has insufficient evidence before it that the Claimant's investment was "granted admission in accordance with" the FCIL

197. As previously noted, Claimant likened the facts in his case to those considered by tribunals in *Desert Line* and *H&H Enterprises*, and invoked concepts of waiver and estoppel to bolster his contention that Bank Indonesia had conducted a *de facto* admission process in respect of his investment. In neither of those cases did the investment treaty have the specificity of BIT Article 2(1), which requires a grant of admission in accordance with a particular law. As to the facts, Claimant's situation differs markedly from those of the investors in the cases on which he relies. In *Desert Line*, the tribunal found that the investment had been "accepted" in light of "overwhelming evidence" and then concluded "surabundantly" that the respondent had also waived the requirement of a certificate "in light of the mass of uncontradicted written and oral evidence."²⁰⁵ In *H&H Enterprises*, the tribunal also relied on extensive evidence of "acceptance" (the term used in the relevant treaty) by senior officials, which also gave rise to estoppel, in the view of that tribunal.²⁰⁶ By contrast, Claimant relies on three regulatory actions undertaken in awareness of his shareholding in the banks, an awareness that has not been supported by evidence, in order to establish a *de facto* grant of admission.

²⁰⁵ *Desert Line*, p. 26.

²⁰⁶ *H & H*, pp. 17-18.

198. As a result, the Tribunal finds that the Claimant has not established that he was “granted admission in accordance with” the FCIL.

199. The Tribunal now turns to the Claimant’s argument that he can bypass the requirement of being “granted admission in accordance with” the FCIL on the basis of the BIT’s most-favoured-nation provision.

L. THE MOST-FAVOURED-NATION PROVISION

a) Claimant’s arguments

200. The Claimant invokes BIT Article 4(1)²⁰⁷ and argues that it allows him to rely on provisions in investment treaties to which Indonesia is a party that are more favourable than BIT Article 2(1). Those other treaty provisions either impose less stringent requirements of admission in relation to his investment or do not contain a “scope of agreement” provision.²⁰⁸ The Claimant invokes²⁰⁹ here the benefit of Indonesia’s investment treaties with: the Netherlands²¹⁰, Switzerland²¹¹, Organization of the Islamic Cooperation states²¹², Belgium²¹³, Germany²¹⁴, India²¹⁵ and Singapore²¹⁶.

201. The Claimant observes that this is the first time an investment treaty tribunal is faced with an application of the MFN clause to admission criteria. Previous tribunals dealt with the issue of application of MNF clauses to the definition of ‘investment’, dispute

²⁰⁷ BIT Art 4, entitled “Most-favoured-nation provisions” contains three paragraphs. It appears that Claimant invokes BIT Article 4(1). (Rebuttal, paras. 88, 93; Response, paras. 88, 91, 93, 96, 97; 41(5) Rebuttal para. 88)

²⁰⁸ C Rebuttal, paras. 89, 92; Response, para. 95; 41(5) Rebuttal para. 89 .

²⁰⁹ Response, para. 95.

²¹⁰ CLA105.

²¹¹ CLA106

²¹² CLA107.

²¹³ Article 9 (CLA11).

²¹⁴ Article 2 (CLA108).

²¹⁵ Article 2 (CLA109).

²¹⁶ Article X (CLA110).

settlement clauses and fair and equitable treatment. As a result, their findings are of limited use.²¹⁷

202. The Claimant recognises that MFN clauses cannot automatically extend to conditions for the enjoyment of treaty rights *ratione materiae*, *ratione personae* or *ratione temporis* as defined in the relevant investment treaty. As a result the Claimant states that the Parties to this arbitration agree that BIT Article 4(1) could not be used to extend the definition of ‘investment’ in the BIT.²¹⁸ The Claimant invokes here the *Société Générale*²¹⁹ award, where, according to the Claimant, the tribunal found that an MFN clause cannot apply to a definition of ‘investment’ which, together with other treaty definitions, “defines what [the treaty] considers a protected investment and who is entitled to that protection”.²²⁰
203. The Claimant contends that BIT Article 2(1), unlike the definition of ‘investment’ in BIT Article 1, is not a condition for the enjoyment of treaty rights and therefore that he may claim MFN treatment. The Claimant makes two arguments to support this contention.
204. First, the Claimant points out that treaty definitions, contained in BIT Article 1 and defining *who* and *what* the treaty applies to, are the foundations of the ‘gateway’ to the BIT, i.e. the conditions for the enjoyment of rights under the BIT and for the Tribunal’s jurisdiction. MFN clauses generally do not apply to such provisions. However, the Claimant argues, BIT Article 2(1) is not a treaty definition. He does not accept Respondent’s characterization of BIT Article 2(1) as a “gateway” provision.²²¹ As a result, if it is established that the investment and the investor meet the BIT’s definitions, the BIT is applicable. The Claimant invokes the *Société Générale* observation that, although the MFN clause does not apply to the definition of investment, it applies to “treatment accorded to such defined investment.”²²² This

²¹⁷ Tr. Day 3, 161:12-17; 162:12-163:1.

²¹⁸ Rejoinder, para. 82.

²¹⁹ *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribudora de Electricidad del Este, S.A.*, Award on Preliminary Objections to Jurisdiction of 19 September 2008, LCIA Case No. UN 7927 (hereafter as “*Société Générale*”)

²²⁰ Response, para. 92, *Société Générale*, para. 41.

²²¹ Response, para. 89; Rejoinder, para. 82

²²² *Société Générale*, para. 41.

means that conditions of admission (i.e. BIT Article 2(1)) belong to the realm of the treaty to which an MFN clause applies.²²³

205. The Claimant's second argument is that the admission regime specified in BIT Article 2(1) does not pertain to definition of investment but to its validity. The Claimant invokes here the decision in *Saipem*, where the tribunal characterised a provision requiring conformity with local laws as referring to the "validity of the investment and not to its definition", even though the requirement was part of an investment provision.²²⁴ Such provisions, unlike provisions containing definitions of treaty terms, fall within the scope of the MFN provision.²²⁵ According to the Claimant, jurisdiction is the subject of BIT Article 1, not Article 2(1).²²⁶
206. Thus, in the Claimant's view, the approval process required by BIT Article 2(1) is a form of treatment with regard to validity of investment. In applying this provision Indonesia is obliged to treat UK investments no less favourably than the investments of investors of other treaty parties, referring in particular to treaties in which an admission standard is not applied.²²⁷ Referred to by the Claimant as conditions of validity of investment, 'admission criteria' or 'admissibility qualification', the conditions specified in BIT Article 2(1) need to be applied by Indonesia "properly and fairly".²²⁸ The Claimant argues that application of admission criteria under BIT Article 2(1) represent "a form of treatment as regards the validity of an investment".²²⁹
207. In support of this second argument, Claimant invokes the *ejusdem generis* rule which, in his words, mean that "no other rights can be claimed under a most-favoured-nation clause than those falling within the limits of the subject-matter of the clause." This

²²³ Response, paras. 89, 92-94; Rejoinder, 82.

²²⁴ *Saipem S.p.A. v The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, ICSID Case No. ARB/05/07 (hereafter as "*Saipem*"), para. 79 (footnote 11), Tr. Day 2, 62:23-63:6,

²²⁵ Tr. Day 2, 64:13-18.

²²⁶ Response, para. 93.

²²⁷ Tr. Day 3, 163:6-16.

²²⁸ Response, para. 93; Tr. Day 1, 63:13-64:4; Tr. Day 2, 63:20-25.

²²⁹ Tr. Day 3, 162:6-16.

requirement is always met if the MFN provision in an investment treaty is used to refer to another investment treaty.²³⁰

208. The Claimant further argues that the term ‘treatment’ used in BIT Article 4(1) is very broad and it allows for application of the MFN clause to BIT Article 2(1). The Claimant points out that the word ‘treatment’ used in BIT Article 4(1) is not defined in the BIT. That term is not limited to particular types of treatment or particular sectors, types of investment, specific investment obligations or specific categories of activity, such as use, maintenance or operation of the investment. The Claimant invokes here the ILC Draft Articles on Most-Favoured-Nation Clauses with commentaries which state that MFN cannot be invoked to claim advantages that are not stipulated in the MFN clause.²³¹ Claimant argues that the elements not expressly excluded from the MFN clause are included in its scope as long as they satisfy the *ejusdem generis* rule. Since BIT Article 4(1) does not contain any exclusions, the scope of this MFN clause is broad and covers also BIT Article 2(1). Therefore, BIT Article 4(1) covers also ‘admissibility qualifications’ enshrined in BIT Article 2(1).²³²

209. Further, the Claimant argues that application of BIT Article 4(1) to Article 2(1) is not precluded based on public policy considerations. The Claimant points out that not all investment treaties signed by Indonesia contain provisions concerning the treaty’s scope similar to that found in the UK-Indonesia BIT and some merely require a low-threshold requirement of investment being in accordance with Indonesian laws and regulations.²³³

210. Finally, the Claimant points out that in its treaty practice Indonesia allows for the application of the MFN clause to admissibility criteria. The Claimant points here to Article III of the Indonesia - Australia investment treaty which is a provision defining the scope of the treaty and stipulating the admission criteria, and which incorporates an MFN clause²³⁴:

That provision reads:

²³⁰ Response, para. 90.

²³¹ Response, para. 90, Rejoinder, para. 83, referring to: Yearbook of ILC, Vol. II, Part 2, A/CN.4/Ser.A/1978/Add.1 (Part 2).

²³² C Rebuttal, paras. 90, 93; Response, para. 91, 93; Rejoinder, para. 83.

²³³ C Rebuttal, para. 89. See treaties referred to in para. 200.

²³⁴ C Rebuttal, para. 94; Response, para. 93.

“1. This agreement shall apply to:

(a) investments by investors of Australia in the territory of the Republic of Indonesia which have been granted admission in accordance with the Law No. 1 of 1967 concerning Foreign Investment or with any law amending or replacing it.

(b) investments by investors of the Republic of Indonesia in the territory of Australia whenever made.

2. Notwithstanding the provisions of paragraph 1, if a Party shall accord to a legally admitted investment of an investor of a third country any treatment, benefit or protection of a kind provided for in this Agreement, then the scope of this Agreement shall extend to investments of investors of the other Party similarly admitted.”

211. In short, the Claimant argues that the admission requirement contained in the provision on the scope of the treaty is a substantive provision that enters into the ambit of a broad MFN clause and that BIT Article 4(1) contains a broad MFN clause.

b) Respondent’s arguments

212. The Respondent engaged with the Claimant’s MFN argument only at the Hearing.²³⁵

213. The Respondent disagrees with the Claimant’s proposition that conditions of treaty application are limited to definitions in BIT Article 1. The Respondent points out that acceptance of the Claimant’s proposition would result in a fundamental change to the scope of the BIT solely through the application of the MFN provision.²³⁶

214. The Respondent argues that the Claimant cannot avail himself of the MFN clause unless he meets the requirements of BIT Article 2(1). The starting point of application of BIT Article 4(1) is establishing whether an investment had been made in accordance with BIT Article 2(1). Only after that threshold is reached can the MFN clause be taken into consideration.²³⁷ This requires not only that the Claimant and his investment meet the definitions of BIT Article (1) but also that his investment meets the requirement of admission in accordance with BIT Article 2(1).²³⁸

²³⁵ Reply, para. 30; Tr. Day 1, 183:23-184:3.

²³⁶ Tr. Day 1, 185:22-23.

²³⁷ Tr. Day 1, 184:17-22.

²³⁸ Tr. Day 1, 189:17-25; 193:14-17.

215. The Respondent agrees with the Claimant that MFN clauses do not apply to *ratione materiae* conditions for the enjoyment of treaty rights. The Respondent relies on Professor Stern’s opinion in *Impregilo*.²³⁹
216. Respondent has compiled a list of twenty-seven investment treaty awards and decisions in which tribunals considered application of MFN clauses.²⁴⁰ The Respondent argues that only three of these are relevant to the issue of conditions of application of the treaty which is before this Tribunal. The Claimant invokes award in *Société Générale*, where the tribunal analysed application of an MFN clause to the condition *ratione materiae* of treaty application as the only one in which the issue of access to the treaty “was even discussed”.²⁴¹ The issue in that dispute was that claimant was trying to expand the definition of ‘investment’ by using the MFN provision. The *Société Générale* tribunal observed that a treaty must first apply to an investment before the MFN clause can be used. The Respondent argues that all requirements of BIT Article 2(1) have to be satisfied before the treaty applies to the Claimant and thus before the Claimant can invoke the MFN clause.²⁴² The *Société Générale* award is not directly relevant, in that it refers to the definition of investment. However, the definition of ‘investment’, like BIT Article 2(1), governs the *ratione materiae* application of the treaty.²⁴³
217. The Respondent also refers to *Tecmed*²⁴⁴ and *M.C.I.*,²⁴⁵ in which the tribunals considered application of MFN clauses to conditions of *ratione temporis* application of respective treaties.²⁴⁶

²³⁹ *Impregilo S.p.A. v. Argentine Republic*, Concurring and Dissenting Opinion of Professor Brigitte Stern attached to the Award of 17 May 2011, ICSID Case No. ARB/07/17, Tr. Day 1, 185:25-186:22.

²⁴⁰ Tr. Day 1, 184:3-6.

²⁴¹ Tr. Day 1, 185:2-6.

²⁴² Tr. Day 1, 185:7-20.

²⁴³ Tr. Day 3, 180:5-12.

²⁴⁴ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award of 29 May 2003, ICSID Case No. ARB(AF)/00/2 (hereafter as “*Tecmed*”).

²⁴⁵ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, Award of 26 July 2007, ICSID Case No. ARB/03/6 (hereafter as “*M.C.I.*”), para. 127

²⁴⁶ Tr. Day 1, 188:4-17; Tr. Day 3, 180:5-20.

c) *Tribunal's analysis*

218. As is well known, investors traditionally invoked MFN provisions in the context of substantive rights. Beginning with the *Maffezini* decision in 2000²⁴⁷, there have been a range of awards and decisions addressing the relationship of MFN provisions to investor-State dispute settlement. These awards and decisions, taken together with dissenting opinions and the scholarly literature, reveal sharply divergent views about the scope of MFN provisions. Professor Stern's dissenting opinion in *Impregilo* illustrates an approach at odds with *Maffezini* and its progeny.
219. However interesting this wider debate may be, the Tribunal sees no reason to wade into it in order to respond to Claimant's invocation of the most favoured nation provision of this BIT. The question before this Tribunal is a narrow one. It begins, of course, with the particular MFN provision at issue (BIT Article 4(1)) and the treatment that Claimant regards to be more favourable, that is, the replacement of the admission requirement BIT Article 2(1) with a more flexible admission procedure or with a treaty to which Indonesia is a party that contains no admission procedure.
220. The Parties to this proceeding both take the view that Claimant cannot rely on the BIT's MFN provision to overcome conditions *ratione materiae* of the treaty and cannot be used to alter the BIT's definition of "investment." The Tribunal's analysis proceeds on basis of this agreement between the Parties.
221. BIT Article 2(1) specifies that investments in the territory of Indonesia only come within the scope of the treaty if they have been granted admission in accordance with the FCIL. Thus, by its terms BIT Article 2(1) it is clearly a provision which stipulates a condition which must be fulfilled for the treaty beneficiary to have access to treaty protection.
222. BIT Article 2 is entitled "Scope of the Agreement". It sets out conditions that need to be fulfilled in order for the BIT to apply to an investment (as defined in Article 1). Both the definition of investment and the admission requirement clearly have a jurisdictional dimension; if there is no investment, or if the investment has not been granted admission in accordance with FCIL, there is no jurisdiction. But these provisions are also substantive criteria that determine whether or not Indonesia has

²⁴⁷ *Emilio Augustin Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7 (hereafter "*Maffezini*")

any obligations under the BIT in respect of assets or activities of a UK national. Those criteria apply whether or not that UK national has initiated arbitration.²⁴⁸

223. BIT Article 2 expressly states that the BIT applies only if the conditions specified in its provisions are met. Article 2(1) states that the BIT ‘*applies only*’ to UK investments which have been granted admission in Indonesia in accordance with FCIL. In case the UK introduces similar requirement of admission, Article 2(2) stipulates that *only* after such admission is granted by the UK would Indonesian investments ‘*enjoy protection*’ under the BIT. Thus, there is no doubt that being granted admission is a *conditio sine qua non* for the BIT to apply at all to UK investments in Indonesia.
224. Thus, the activity or assets of a UK national in the territory of Indonesia must fall within the definition of “investment” in BIT Article 1(a) and must meet the admission requirement of BIT Article 2(1) in order for that UK national to benefit from Indonesia’s obligations under the BIT, including its obligation to accord MFN treatment under BIT Article 4(1). For this reason, the Tribunal finds unpersuasive Claimant’s invocation of *Société Générale* to distinguish the admission requirement in BIT Article 2(1) from the definition of investment that was before the tribunal in that case. The Claimant stresses that BIT Article 2(1) is not part of the definition of investment, relying on *Saipem*, but this observation does not detract from the conclusion that BIT Article 2(1) is a condition of access to treaty protection. Like the definition of investment, it is a condition that determines the scope, *ratione materiae*, of the treaty.
225. The Tribunal therefore agrees with the Respondent that for the treaty to be applicable, an investment must not only fall within the definition of investment in Article 1, but must also satisfy the requirement of BIT Article 2(1). Because the Tribunal has decided that Claimant’s stated investment did not meet this requirement, it is not necessary for the Tribunal to examine the breadth of the MFN provision, that is, which sorts of “treatment” fall within its scope. The MFN provision does not apply to an investment that has not been granted admission in accordance with BIT Article 2(1).

²⁴⁸ For this reason, the decisions and awards of other investment treaty tribunals concerning application of MFN provisions to dispute settlement provisions of investment treaties shed little light on the question before this Tribunal, and the Parties do not focus their attention on those.

226. The Respondent called attention to the award in *Tecmed*, in which the tribunal rejected the claimant's effort to rely on another treaty to change the temporal scope of the basic treaty. This award does not detract from Respondent's position, but the question of application *ratione temporis* is distinct from the issue before this Tribunal. Respondent also invokes the *M.C.I.* award, but its relevance is even less clear. There, the claimant attempted to use the MFN clause for the purpose of extending the temporal scope of the relevant treaty, but the tribunal seems to have rejected this attempt after finding that the MFN provision at issue only extended to other treaties between the two parties to the main treaty, precluding claimant's reliance on a treaty with a third State.
227. The Tribunal does not accept Claimant's contention that Article III of the Indonesia-Australia investment treaty supports his argument. Paragraph 1(a) of Article III is an admission provision that is similar to BIT Article 2(1), but the last section of the article is an MFN provision. That provision appears to keep intact the requirement of being granted admission as a condition of MFN treatment, rather than giving MFN advantages to an investment of Australia that has not been granted admission. In any event, that is not the provision at issue in these proceedings.
228. In light of the foregoing the Tribunal finds that BIT Article 4(1) cannot apply to BIT Article 2(1) and thus that Claimant's invocation of the MFN provision does not overcome the fact that his stated investment was not granted admission in accordance with FCIL.

M. COSTS

229. With regard to costs under Respondent's Rules 41(5) and 41(1) applications the Respondent seeks an order that the Claimant pays all costs of the arbitration as well as all costs, disbursements, expenses incurred by the Respondent²⁴⁹ and Claimant seeks an order that the Respondent pays all costs Claimant has incurred in dealing with those applications.²⁵⁰

²⁴⁹ Application, para. 152; Objections, para. 68; Tr. Day 3, 194:18-21.

²⁵⁰ C 41(5) Response, para. 154; Response, para. 146; Tr. Day 3, 199:18-200:9.

230. Even in case of successful objections under Rule 41(1), tribunals commonly go no further on termination of the proceedings than to award the respondent the amount of ICSID deposits that it has paid as its share.
231. Here, there were applications made successively under sections (5) and (1) of Rule 41, with each Party in turn successful, albeit the last in order success of the Respondent results in termination of the proceedings.
232. However, the Tribunal's Decision of 4 April 2012 to dismiss the Respondent's Objection under Rule 41(5) of 4 April 2012 reserved costs of that application. As the Claimant was put to not inconsiderable extra expenses of this prior application, including the Auckland Hearing in February 2012, the Tribunal regards it as appropriate on finality to allocate the costs between the Parties equally with each Party bearing its own costs and legal representation rather than to engage in what might be an abstract analysis having regard to costs and outcomes. The Tribunal finds this result as both appropriate and falling comfortably within the usual range of exercise of discretion in cost orders on Rule 41 applications.
233. In these circumstances and having regard to the Parties' exchanges on costs in their written submissions and at the end of the Hearing, the Tribunal is of the opinion that its obligation to accord procedural fairness does not run to calling for the Parties to make further submissions as to principle or quantum on costs orders.

DECISION

For the foregoing reasons, the Tribunal:

- 1) Accepts Respondent's jurisdictional objection that Claimant's investment was not granted admission in accordance with the Foreign Capital Investment Law of Indonesia, as required by BIT Article 2(1) and therefore does not fall within the scope of the BIT.**
- 2) Rejects Claimant's reliance on the most-favoured-nation provision of the BIT as inapplicable to the question of the scope of the BIT in the circumstances of the present case.**
- 3) Declares that the Centre and the Tribunal do not have jurisdiction over the present dispute.**
- 4) Makes an order as to costs allocating the costs between the Parties equally with each Party bearing its own costs and legal representation.**

[Signed and Dated]

Judge Joan Donoghue

[Signed and Dated]

Professor Muthucumaraswamy Sornarajah

[Signed and Dated]

Gavan Griffith QC (President)