

IN THE ARBITRATION UNDER THE CONVENTION ON THE SETTLEMENT OF  
INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, AND  
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM AND THE  
GOVERNMENT OF MALAYSIA FOR THE PROMOTION  
AND PROTECTION OF INVESTMENTS BETWEEN

**MALAYSIAN HISTORICAL SALVORS SDN BHD,**

Claimant/Investor,

and

**THE GOVERNMENT OF MALAYSIA,**

Respondent.

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ICSID Case No. ARB/05/10

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**CLAIMANT MALAYSIAN HISTORICAL SALVORS SDN BHD'S  
MEMORIAL ON JURISDICTION**

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## I. INTRODUCTION

Malaysian Historical Salvors Sdn Bhd (“MHS”) and the Government of Malaysia (the “Government of Malaysia”) entered into a contract in 1991 which called for, *inter alia*, MHS to locate and salvage the cargo of a British sailing vessel, the DIANA, that sank off the coast of Malacca in 1817 carrying Chinese porcelain and other valuable items.

MHS was required to locate the sunken vessel, salvage its cargo, engage in related tasks, and to invest and expend its own financial and other resources to cover all costs associated with the location of the vessel and the salvage of the cargo. In return, MHS would receive a share of the proceeds from the sale of the salvaged items. In short, MHS undertook an investment project in Malaysia, which, if successful, would bring funds into Malaysia’s treasury, a financial return to MHS, and yield valuable artifacts for museums in Malaysia.

MHS located the wreck of the DIANA and successfully salvaged her sunken cargo, made the salvaged Chinese porcelain and other valuable items available for sale, and facilitated the sale of the items at auction, as called for under the contract, and a subsequent contract.<sup>1</sup> The Government of Malaysia

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<sup>1</sup> MHS’s location and recovery of the DIANA’s cargo is chronicled in the book, *The Diana Adventure*, authored by MHS’s owner Mr. Dorian Ball. Mr. Ball, an experienced salvor, led and funded the Diana salvage operation and himself dove to the wreck of the Diana on numerous occasions. Copies of the book are available from Oceans Enterprises, <http://www.oceans.com.au/oe-treasure.html> In its description of the book, Oceans

breached the contract in question and expropriated MHS's property by, *inter alia*, withholding certain recovered items from sale without compensating MHS fully therefor; failing and refusing to pay MHS all the sums that it was due from the salvaged items that were sold; and outright theft of certain recovered items.

Beginning in 1995, after MHS's completion of the contract, in an effort to make itself whole, MHS persistently pursued various legal and other avenues in Malaysia in an effort to resolve its claims and grievances against, and disputes with the Government of Malaysia arising out of the investment contract. MHS and the Malaysian Government arbitrated their dispute in Malaysia, and MHS also sought the aid of Malaysia's courts in vindicating its rights under the contract. MHS did not succeed in the arbitral tribunal nor later in court.

Outside of the arbitral and legal proceedings in Malaysia, the officials of the Government of Malaysia ignored and stonewalled MHS's numerous pleas,

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Enterprises states:

Over four million dollars worth of porcelain was raised from the British ship Diana which went down off Malacca on the west Malaysian coast in 1817. Author Dorian Ball spent several years locating and raising the treasure which was eventually sold at auction. Like the raising of the famous Nanking cargo (which Ball worked on), the location and salvage of the Diana's cargo makes for fascinating reading. This is one of the finest books I have read on the whole process of a 'dream come true' - from the dream to reality of finding the wreck, overcoming bureaucracy, raising the treasure and the sale. The book is exceptionally well produced. Hardcover, dust jacket, 176 pages, full colour. \$52.50.

complaints, and efforts to resolve the matter, and in pass-the-buck fashion, continuously kept referring MHS from one minister or official to another.

More than 12 years after completing its required performance under the salvage contract to the satisfaction of the Government of Malaysia and having sought, to no avail, the aid of Malaysia's legal system to safeguard and enforce its rights against the Malaysian Government, MHS remains aggrieved and still awaits full payment of the sums that it is entitled to as result of its investment and performance of the salvage operation. MHS asserts that: (i) the Government of Malaysia has unlawfully taken MHS's money and violated MHS's rights to money; (ii) Malaysia's arbitral tribunals, courts and other institutions have been complicit in that process by denying required due of process of law to MHS; and that (iii) the Government of Malaysia has not afforded MHS and MHS's investment in Malaysia fair and equitable treatment as Malaysia is obligated to do.

MHS has now initiated arbitration proceedings at the International Centre for the Settlement of Investment Disputes ("ICSID" or the "Centre") and seeks the Centre's assistance in the satisfaction of its claims and grievances against the Government of Malaysia and redress for the harm that has been inflicted upon it by the Malaysian Government's illegal actions, which include the failure of the Malaysian legal system to protect MHS's investment in Malaysia.

This Tribunal has jurisdiction to arbitrate this case because MHS's claims meet all jurisdictional requirements.

## II. SUMMARY OF RELEVANT BACKGROUND FACTS

### *The Contract*

In August 1991, MHS, a small, privately-held company, created and operated for the specific purpose of conducting marine salvage operations in Malaysia, and the Government of Malaysia entered into a contract which called for, *inter alia*, MHS's location and salvage of the cargo of the DIANA, a British sailing vessel that sank off the coast of Malacca in 1817 carrying a cargo of Chinese porcelain and other items of value (the "Contract"). At **Exhibit A** is a copy of the Contract signed in 1991 and subsequent related follow-on contracts.

MHS is a company organized under the laws of Malaysia whose majority owner and managing director is Mr. Dorian Ball, a British national. Under the Contract, MHS was required to, *inter alia*, utilize its expertise, labor and equipment to carry out the salvage, and to invest and expend its own financial and other resources, and assume all risks of the salvage operation, financial and otherwise, including but not limited to, on numerous occasions, life and limb, to locate the submerged wreck of the DIANA in Malaysian territorial waters, and to salvage and recover her cargo. Under the Contract, MHS was also obligated

to, *inter alia*, clean, restore and catalog the recovered items. Under a separate and later contract, MHS was obligated to and did arrange for the auction of the recovered items in Europe by the renowned auction house of Christie's.

The Contract was on a "no finds-no pay" basis – which, in the established practice of marine salvage, means that all the costs of and investment necessary for the search and salvage operation, that the attendant risks would be borne exclusively by the salvor, in this case, MHS; and that the salvor would recover its investment and make a profit on its investment only if the salvage operation and the subsequent sale of the recovered items were successful. Under the Contract, MHS's ability to recover its investment and make a profit on its investment was contingent upon: (i) locating the sunken wreck of the DIANA, (ii) successfully recovering her cargo; (iii) the ability of the recovered cargo or items to be sold at a price sufficient to cover MHS's investment and its expected return on investment; and (iv) the Government of Malaysia's follow-through on its commitment to share the proceeds from the sale of the items with MHS, as required under the Contract.

The Contract provided for the Government of Malaysia to receive the sales proceeds of the recovered items, and thereafter disburse to MHS the portion of the sales proceeds belonging and due to MHS. Under the Contract, MHS was entitled to a stipulated share of the proceeds received by the

Government of Malaysia from the sale of the items recovered from the wreck of the DIANA.

The Contract further required MHS to: provide the salvage vessel, the salvage crew, and the salvage equipment; utilize its expertise and skills; finance the salvage operation in its entirety; search for, locate and secure the wreck on the sea floor; bring the cargo to the surface; clean, restore, inventory and photograph the salvaged items; provide for the safe keeping of the salvaged items and for adequate insurance; and arrange for the sale of the salvaged porcelain and other valuable items. Under the Contract, the Government of Malaysia reserved to itself the right to withdraw salvaged items from sale, provided that MHS was paid its share of the best attainable value for such items.

Although not provided for under the Contract, the Government of Malaysia nevertheless assumed oversight of all aspects of MHS's performance under the Contract through a committee (the "Salvage Committee"), which was comprised of a fluctuating number of about 20 often changing representatives from the Malaysian Marine Police, the Marine Department, the National Museum, the National Archives, the Ministry of Finance, the Ministry of Culture and Tourism, and the Ministry of Transport. The Chairman of the Salvage Committee was Dr. Abdul Aziz Muhammad of the Contracts and



Supply Division of the Malaysian Ministry of Finance. *See, Exhibit B.* The General Manager of Malacca Museums Corporation (PERZIM) was also a member of the Salvage Committee, but he later left the Salvage Committee after being accused of criminal breach of trust. In 2005, a Malaysian court convicted and jailed Dr. Aziz Muhammad on two charges of cheating the Malaysian Government of U.S. \$4.8 million in funds meant for the poorest in the community. *See, Exhibit B.* The Salvage Committee took all decisions on behalf of the Government of Malaysia in connection with the Contract. At **Exhibit B** are documents evidencing the existence and activities of the Salvage Committee.

The Contract gave the Malaysian Government control over MHS's performance of the salvage operation and over the recovered items. The Contract provided for MHS's performance to be: (i) approved by the Government of Malaysia at various stages, (ii) carried out according to the Government's instructions, and (iii) otherwise supervised by the Government.

### ***Malaysia's Breach of the Contract and International Obligations***

MHS's survey and salvage efforts, which lasted almost three (3) years, were successful. MHS located the wreck of the DIANA and salvaged all of her recoverable cargo, 24,000 pieces in all, to the satisfaction of the Malaysian Government. The salvaged items which were not withheld from sale by the

Government of Malaysia were sold at auction in March 1995 in Amsterdam by Christie's for approximately US \$2.98 million. However, the Government of Malaysia breached the Contract, most notably, *inter alia*, by failing to pay MHS the sums that MHS was entitled to under the Contract.

Under the contractual formula, MHS was entitled to 70% of the amount realized at auction, but it was paid by the Government of Malaysia only \$1.2 million or 40% of the amount realized from the auction sale at Christie's. *See*, the Contract, clause 4, page 3. MHS was further deprived of returns under the Contract when the Government of Malaysia withheld from sale salvaged items of Chinese origin valued at over US \$400,000 without paying MHS its share of the best attainable value of such items. In breaching the Contract and engaging in or failing to certain acts, the Government of Malaysia also breached its international obligations to MHS.

***MHS's Efforts to Settle its Claims Prior to Resorting to ICSID Arbitration***

***March – July 1995***

Between March and July 1995, MHS expended time, effort, and incurred costs in numerous meetings and attempted meetings with various Malaysian Government officials in an effort to get the Malaysian Government to pay MHS all sums due to it under the Contract, and to amicably settle and resolve all disputes that had arisen with the Government of Malaysia in connection with

the Contract. These efforts were futile. The Malaysian Government ignored and stonewalled MHS, denied MHS's claims and refused to pay MHS all it was due under the Contract. The Salvage Committee was disbanded and the Malaysian Government, having gotten all the salvaged items and money it wanted from the salvage project, was no longer interested in talking to MHS.

***July 1995 – May 1996***

In July 1995, as provided for under Clause 32 of the Contract, MHS commenced arbitration in Malaysia against the Government of Malaysia to obtain the sums due to it. MHS asserted 12 claims. In July 1995, MHS served a Notice of Arbitration on the Government of Malaysia and suggested two alternate individuals to be considered by the parties for the position of the sole arbitrator. It took the Government of Malaysia almost a year to engage in good-faith discussions with MHS to appoint an arbitrator and otherwise to meaningfully answer MHS's demand for arbitration; and it only did so after MHS applied to the High Court of Kuala Lumpur for the appointment of an arbitrator. **Exhibit C.**

On December 5, 1995, the Government of Malaysia refunded in full the performance bond which had been “payable to *the Government* for breach of any provision of [the] Contract on the part of MHS.” **Exhibit D.** Not only was the performance bond refunded five months after MHS had served the

Notice of Arbitration on the Government of Malaysia, but in releasing the bond, the Government of Malaysia affirmed that no provisions of the Contract had been breached by MHS.

***May 1996 – July 1998***

On May 27 1996, with the consent of MHS and the Government of Malaysia, the High Court of Kuala Lumpur ordered that the dispute between the Government of Malaysia and MHS arising out of the Contract be resolved through arbitration under the UNCITRAL Arbitration Rules of 1976 and the Rules of the Kuala Lumpur Regional Center for Arbitration (the “KLRCA”), and that the parties accept an arbitrator appointed by the KLRCA within one month of the order.<sup>2</sup> The Director of the KLRCA appointed one Richard Talalla as the sole arbitrator.

The appointed arbitrator, Mr. Richard Talalla (the “Arbitrator”), was a retired judge who was appointed *ex parte* by the KLRCA. He was unfamiliar with the law and procedure of arbitration, the UNCITRAL arbitration Rules which he was supposed to apply, and the arbitration rules that the KLRCA had adopted, and had never served as an arbitrator before.

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<sup>2</sup> Pursuant to the High Court’s consent order, MHS and the Government of Malaysia derogated from the provisions of clause 32. of the Contract by mutual agreement and agreed to arbitrate the dispute in Malaysia pursuant to UNCITRAL and KLRCA rules – the Contract had provided for arbitration in accordance with the Arbitration Laws of Malaysia.

## *July 1998*

In July 1998, the Arbitrator issued an “award” in the arbitration which dismissed both parties’ claims and counterclaims and ordered the parties to bear their own costs of arbitration and an equal share of the Arbitrator’s fees. In a few words and without satisfactory explanation, the Arbitrator declared the arbitration a “draw.” Curiously, all claims advanced by MHS were dismissed – even those which were conceded by the Government of Malaysia. No claims or counterclaims were quantified. No costs were quantified. The offset that the Arbitrator applied was unsubstantiated. A copy of the “award” without the 700-page record/transcript of the arbitration is at **Exhibit E**.

The Arbitrator’s lack of knowledge of arbitration law and practice was clearly established when he was reminded that, under UNCITRAL rules, he was required to state reasons for his “award.”<sup>3</sup> Thereafter, as reasons for his “award,” he simply certified the 700-page transcript/evidence/record of the arbitration proceedings, and appended the same to the “award.” *See, Exhibit E*.

The KLRCA arbitration turned out to be a charade, not a proceeding that merits the appellation “arbitration.” As MHS will prove in the merits stage of this proceeding, the KLRCA arbitration that was conducted by the ex-judge was

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<sup>3</sup> Article 32 (3.) of UNCITRAL arbitration rules 1976 requires the arbitral tribunal to state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

not in accordance with UNCITRAL rules and it lacked the critical elements of a proper arbitral proceeding.

MHS's concerns about the Arbitrator's egregious violation of the UNCITRAL rules, the way in which he treated and analyzed the evidence, his apparent bias in favor of the Government of Malaysia, and, in general, with respect to the questionable manner in which the Arbitrator had conducted himself and the arbitration, led MHS to ask the KLRCA and the Malaysian courts to have the "award" reviewed and set aside. However, MHS's efforts to challenge the "award" at the KLRCA and in the Malaysian court system were rejected.

### *August 1998*

MHS presented a list of its criticisms of the "award" to the Director of the KLRCA. The Director did nothing except inform MHS that the KLRCA had no power to review the "award." **Exhibit F.** MHS thereafter attempted to obtain review of the "award" by the Kuala Lumpur High Court.

In its attempts to settle its contractual dispute with the Malaysian Government and also to address its grievances against the KLRCA arbitration proceedings, MHS went to extraordinary lengths and took numerous steps during the period after the arbitration "award" was issued in July 1998 and the

decision of the Kuala Lumpur High Court on February 4, 1999. As evidenced by the documents in **Exhibit G**, MHS, *inter alia*,

1. Sought the assistance of the British High Commissioner on 12 August 1998.
2. Sought the assistance of the Minister of Special Functions in the Malaysian Prime Minister's Office on 1 September 1998. This Minister (Tun Daim Zainuddin) was previously the Minister of Finance. The Chairman of MHS was invited by the Minister to outline the problem. The Minister seemed sympathetic but when he heard that MHS had already complained to the Prime Minister, he indicated that there was nothing he could do.
3. Wrote to the Malaysian Prime Minister, and (separately) to his wife, as he had met both when they opened the DIANA exhibition in Malacca. The Prime Minister referred the matter to the Minister of Tourism within whose department the matter rested and to whom the chairman of MHS had already written. The Malaysian Minister of Tourism did nothing except too assure MHS that "... as the Malaysian Government, we will honour our commitment through the process of law." (13 January 1999).

## **February 1999**

MHS petitioned the Kuala Lumpur High Court for a review of the “award.” The petition came up before Judge Azmel of the Malaysian High Court. Judge Azmel had heard two cases before MHS’s petition and MHS had observed his procedure. With respect to MHS’s petition, however, in a departure from the diligence and time he had devoted to the other cases earlier that day, the judge growled: “dismissed with costs,” and then proceeded to the next case. Neither MHS nor counsel for MHS was allowed to speak, and there is no evidence to suggest that Judge Azmel had read MHS’s submission. Mr. Dorian Ball who was present, was not allowed to speak. An armed guard deterred protest. No written decision was issued, and no reasons or reasoning were given for the decision in writing. And, there is no record of the case in the Malaysian Law Journal. The absence of a written decision by the High Court and reasoning for the decision deprived MHS of due process at the High Court and of further due process by cutting off any rights that MHS may have otherwise had for appeal of the Kuala Lumpur High Court’s decision.

## ***February 1999 – 2003***

Following the High Court’s rejection of MHS’s attempts to obtain review of the “award,” in addition to filing a complaint with the Chartered Institute of Arbitrators in London, as noted below, MHS expressed its grievances,



complaints, and misgivings regarding the KLRCA arbitration and the High Court's decision by writing to and meeting with numerous Malaysian Government ministers and officials and others, again, all to no avail. As evidenced, in part, by the documents at **Exhibit H**, after the Kuala Lumpur High Court's decision of February 4, 1999, MHS took, *inter alia*, the following steps:

1. MHS followed the Malaysian Prime Minister's January 1999 referral of the matter to the Minister of Tourism. On March 17, 1999 MHS's chairman met with the Minister of Tourism for 10 minutes, at which, in the presence of his subordinates, the Minister of Tourism effectively stated that he would follow the KLRCA arbitration award. The Minister of Tourism turned a deaf ear to any criticism of those proceedings.
2. MHS complained to the Malaysian International Chamber of Commerce, which replied on December 3, 1999 stating: "The Malaysian international business community has expressed and will continue to express serious concerns regarding the Judiciary, particularly as regards the backlog of cases currently in the Law Courts." (At the time that backlog was reported to be

750,000 cases and that litigants were dying of old age before their cases were being heard).

3. MHS complained to and sought the assistance of the Malaysian Bar Council as the Council had recently taken the unprecedented step of publishing a list of complaints about the state of justice in Malaysia. The Bar Council stated: "The Malaysian Bar, at its 53rd Annual General Meeting on 20 March 1999, resolved to consider, amongst other issues, alleged judicial improprieties, irregularities, indiscretions and misdemeanours and if thought fit, to make recommendations calling for an appropriate formal inquiry by an independent Royal Commission."
4. As described in greater detail below, MHS appealed to the Chartered Institute of Arbitrator's for an internal review of the KLRCA "award" by that Institute.
5. On 16 March 2001 MHS learned that the Malaysian Prime Minister, to whom MHS had again complained, had referred the matter to Malaysia's Minister of Legal Affairs.
6. MHS approached the Malaysian Minister for Legal Affairs. The Minister (Dato Rais Yatim) sat on the matter for two years doing nothing while MHS and the American Ambassador, the British

High Commission, and MHS's chairman all repeatedly called his office and tried to meet with the Minister in an attempt to at least discuss MHS's claims and grievances.<sup>4</sup>

7. MHS also sought the assistance of the Washington, D.C. - based US-ASEAN Business Council. Although sympathetic, the Council could not help, because MHS was a Malaysian company, and their resources were dedicated to assisting American companies.

All of MHS efforts to negotiate and settle with the Government of Malaysia took place against the backdrop of a difficult period in the Malaysian legal system. A Straits Times headline of 15 January 2001 stated: "No trust in Malaysian courts; judges." The publication also stated: "foreign investors are reluctant to invest because they perceive there is no level playing field in the Courts." It continued that: "Multinationals don't trust the court system - holding up development; the Chief Justice wants urgent change." On January 8, 2002, the Malaysian Bar Council released its findings: "Lawyers in Malaysia's capital have branded the country's legal system abusive, corrupt and

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<sup>4</sup> In an address to the Conference on Arbitration in Kuala Lumpur on 28 February 2003, the Minister of Legal Affairs, Dato Rais Yatim, admitted the many shortcomings of the Malaysian legal system. *See, Exhibit I.*

incompetent, in a memorandum submitted to the Government," said the headlines.

***February 2000 – January 2001***

In its further search for some semblance of justice, due process, and fairness in Malaysia, MHS in December 2000 applied to the Chartered Institute of Arbitrator's in London ("CIARB") for an internal review administered by that Institute regarding the conduct of arbitrators. In such a review, a "Professional Conduct Committee" of the Institute reviews the record of an arbitration to determine whether there is "prima facie evidence of misconduct by the Arbitrator." In the case of the arbitration between MHS and the Government of Malaysia which had been presided over by Mr. Talalla, a fellow of the CIARB, the Committee determined that there was *prima facie* evidence of misconduct by the Arbitrator and a review before the Institute's "Disciplinary Tribunal" followed. **Exhibit J.** On the day of the hearing before that body, Mr. Talalla, who was in attendance, moved that the representative of MHS and MHS's legal representative be excluded from the hearing. The Arbitrator's motion was granted.

Some weeks later, in January 2001, without having been afforded an opportunity to be heard on the matter, let alone observe the hearings, the Disciplinary Tribunal informed MHS that the charges brought by the MHS

against the Arbitrator were not proven, and accordingly, that the matter was dismissed. **Exhibit J.**

No transcript of the Disciplinary Tribunal's hearing was made available to MHS. And, no basis or rationale, other than the conclusory "...charges ... were not proven..." was given for the Disciplinary Tribunal's decision. MHS did not know, and has no way of knowing, what issues were raised in the hearing nor how the Disciplinary Tribunal arrived at its decision to dismiss the matter. The Chairman of the Disciplinary Tribunal, Mr. Andrew Rogers, expressed his separate view of the Tribunal's decision, stating in his own hand writing that:

The Arbitrator in his award determined the rights of the parties with a willful disregard of their legal rights and refused to grant damages to either party as a way of giving effect to his personal views of their actions. **Exhibit J.**

The conclusion of this proceeding exhausted viable legal and other remedies available to MHS in Malaysia.

*April 2003 – September 2004*

On April 3, 2003, the Chairman of MHS wrote to the Minister of Legal Affairs reminding him that he had failed to reply to MHS. On the 13<sup>th</sup> of May 2003, the Minister replied advising that the Government would abide by previous legal decisions and implied that MHS should continue to pursue the

case in the courts. **Exhibit K.** MHS found this reply to be unsatisfactory.

After giving further thought to the Minister of Legal Affairs' mild suggestion to continue to pursue the matter through the courts some more, MHS decided to explore and pursue the only remedy it may have left against the Government of Malaysia, *viz.* before ICSID.

In September 2004, after instituting arbitration proceedings in Malaysia against the Government of Malaysia and being dragged through the Malaysian legal and political system for more than a nightmarish 9 years, MHS filed a request for arbitration against the Government of Malaysia under the auspices of ICSID pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), and the bilateral Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of Malaysia for the Promotion and Protection of Investments that entered into force on 21 October 1988 (the "UK/Malaysia BIT"). *See*, MHS's September 2004 request for ICSID arbitration, including, *inter alia*, a copy of the UK/Malaysia BIT.

#### ***September 2004 – December 29, 2005***

ICSID registered MHS's request for arbitration on June 14, 2005 and this Tribunal was constituted on November 1, 2005. Mr. Michael Hwang, S.C. of Singapore was appointed as the sole arbitrator. On December 29, 2005,

at the first session of the Tribunal held at the Hague, agreement was reached on a variety of issues, including the submission of memorials and counter memorials regarding the Tribunal's jurisdiction over MHS's claims against the Government of Malaysia. This document constitutes MHS's memorial on jurisdiction.

### **III. JURISDICTION**

This Tribunal has jurisdiction to hear and decide MHS's international claims against the Government of Malaysia. The jurisdiction of this Tribunal is based on the ICSID Convention, which Malaysia has ratified, and the UK/Malaysia BIT which has been ratified by both countries and continues to be in force.

For this Tribunal to have jurisdiction, the following requirements must be satisfied under the ICSID Convention and the UK/Malaysia BIT:

1. MHS must allege claims or disputes which are justiciable under the UK/Malaysia BIT,
2. the legal claims or disputes mentioned above must arise directly out of an investment,
3. the investment must be between Malaysia or the Government of Malaysia and a national or company of the United Kingdom,

4. the parties to the dispute, MHS and the Government of Malaysia, must consent in writing to submit the dispute to the Centre,
5. the investment at issue has to fall within the definition of the term “investment” set forth in the UK/Malaysia BIT,
6. the qualifying investment must be approved by the Government of Malaysia, and
7. the parties in dispute, *viz.* MHS and the Government of Malaysia, must have attempted to resolve their dispute within three months through the pursuit of remedies in Malaysia or otherwise prior to instituting arbitration proceedings under the ICSID Convention.

**A. MHS’s CLAIMS UNDER THE UK/MALAYSIA BIT**

Article 2(2) of the UK/Malaysia BIT dealing with the promotion and protection of investments, provides, in relevant part:

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.



It is noteworthy that the UK/Malaysia BIT contains the foregoing “umbrella clause” which commits a Contracting Party, in this case, Malaysia, to comply with its contractual commitments and elevates mere contractual obligations, in this case, those assumed in the Contract and related contracts, to international obligations justiciable under the UK/Malaysia BIT.<sup>5</sup>

Article 4(1) of the UK/Malaysia BIT dealing with expropriation provides, in relevant part:

Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party and against prompt, adequate and effective compensation . . . . The legality of any such expropriation and the amount of compensation shall be determined by due process of law in the territory of the Contracting Party in which the investment has been expropriated.

Article 5 of the UK/Malaysia BIT, in relevant part, provides:

Each Contracting Party shall, in respect of investments, allow nationals or companies of the other Contracting Party free transfer of their capital and of the returns from it.

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<sup>5</sup> In ICSID Additional Facility, Waste Management, Inc. v. United Mexican States, Case No. ARB(AF)/00/3 (April 30, 2004) (Award), the Tribunal conceded the possibility of “umbrella clauses” and observed that NAFTA Chapter 11-“unlike many bilateral and regional investment treaties” does not provide “jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an “umbrella clause” committing the Host State to comply with its contractual commitments.”

MHS alleges that: (1) the UK/Malaysia BIT protects MHS's investment in Malaysia; (2) Malaysia has breached its obligations to MHS under the UK/Malaysia BIT and under general international law; and (3) that MHS has suffered loss and damage by reason of Malaysia's breaches. As MHS will prove and seek damages therefor in the merits stage of these proceedings, MHS alleges that the Government of Malaysia has violated: (i) Articles 2(2) (Protection of Investment, Fair and Equitable Treatment, Unreasonable and Discriminatory Measures, Observance of Obligations), 4(1) (Expropriation), and 5 (Repatriation of Investment) of the UK/Malaysia BIT; and (ii) international law.

**B. THE JURISDICTIONAL REQUIREMENTS OF THE ICSID CONVENTION**

The arbitration sought by MHS is within ICSID's jurisdiction pursuant to the ICSID Convention, which in relevant part, provides:

(1) the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. . . .

Article 25(1) of the ICSID Convention.

MHS's request for ICSID arbitration satisfies all the requirements for this Tribunal's jurisdiction pursuant to the ICSID Convention.

**1. A Legal Dispute Arising Directly out of an Investment**

**a. Legal Dispute**

MHS claims that the Government of Malaysia has unlawfully deprived MHS of all sums that it is entitled to as a result of its investment involving the DIANA salvage project and that the Government of Malaysia has also violated several provisions of the UK/Malaysia BIT and of international law. The Government of Malaysia has denied and persists in denying such claims.

As demonstrated by (i) the legal proceedings conducted in Malaysia, described above, (ii) the Government of Malaysia's actions to ignore, stonewall and simply pay lip service to MHS's claims, also described above; and (iii) now the Government of Malaysia's defense of this ICSID action, the Government of Malaysia has denied and persists in denying that it has any unfulfilled obligations to MHS. The Malaysian Government is also of the view that this Tribunal lacks jurisdiction to hear and decide MHS's ICSID claims, whereas MHS contends the opposite. Hence, the legal dispute between the parties arising directly out of MHS's investment under the Contract.

**b. Investment**

MHS's performance under the Contract is the quintessence of investment and its legal claims against the Government of Malaysia arise directly out of this investment. Pursuant to the Contract, MHS, *inter alia*, utilized its

expertise, equipment and manpower; invested and expended its own financial and other resources; assumed all the risks, including but not limited to, life and limb, to locate the submerged wreck of the DIANA in Malaysian waters and to salvage her cargo. The whole salvage operation was financed by MHS.

As noted above, MHS's ability to recover its investment and to make a profit on its investment was wholly contingent upon: (i) locating the sunken DIANA; (ii) successfully recovering her cargo; (iii) the ability of the recovered cargo or items to be sold at a price sufficient to cover MHS's investment and its expected return on investment; and (iv) the Government of Malaysia's follow-through on its solemn commitment to share the proceeds from the sale of the items with MHS, as provided for in the Contract. As noted above, MHS was to derive its return of and return on investment from a stipulated share of the proceeds received from the sale of the items recovered from the DIANA.

## ***2. Contracting State and a National of Another Contracting State***

The Contract, pursuant to which MHS made a sizeable investment in the salvage project in Malaysia, is between Malaysia and MHS. *See*, the Contract, **Exhibit A**. Malaysia, as a party to the ICSID Convention, is a "Contracting State" within the meaning of the ICSID Convention. As shown below, MHS is a national of the United Kingdom. The United Kingdom, as a party to the

ICSID Convention, is “Another Contracting State” within the meaning of the Convention.

**3. *Consent to Submit the Dispute to the Centre***

Both MHS and the Government of Malaysia have expressly consented, in writing, to submit the dispute to the Centre. The Government of Malaysia, a Contracting Party under the UK/Malaysia BIT, has given its consent in writing to submit its dispute with MHS to the Centre. Article 7 of the UK/Malaysia BIT, in relevant part, states:

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes . . . for settlement by conciliation or arbitration under the [ICSID Convention]. . . any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

The Government of Malaysia’s consent in writing to submit the dispute in question to ICSID is further evidenced by Malaysia’s signature and ratification of the ICSID Convention.

MHS’s consent in writing to submit its dispute with and claims against the Government of Malaysia to the Centre is evidenced by MHS’s September 30, 2004 written request for ICSID arbitration. *See*, MHS’s request for Arbitration, filed at ICSID on September 30, 2004, as supplemented by

subsequent written filings on November 30, 2004, January 26, 2005, March 4, 2005, and April 18, 2005.

To the extent needed, two recent ICSID cases on the issue of consent to ICSID arbitration are instructive in support of MHS's arguments with respect to consent.

In Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, 43 Int'l Legal Materials ("ILM") 262 (2004), Argentina challenged the Tribunal's jurisdiction, claiming (1) that Azurix had agreed to submit the instant disputes to the administrative courts of the City of La Plata in Argentina, thereby waiving any other jurisdiction and forum, and (2) that having elected to seek redress under the arbitration clause in the relevant contract, Azurix had made an irreversible choice of remedies – sometimes referred to as choosing a "fork in the road."

The Tribunal rejected Argentina's first challenge, holding that Article VII(4)(a) of the Argentine/U.S. BIT<sup>6</sup> embodies the consent of Argentina and of the U.S. to the submission of any investment dispute to binding arbitration, and further provides that such consent satisfies the requirement for written consent for purposes of Chapter II of the ICSID Convention. In addition, the Tribunal found that the open invitation provided by the State Parties to the U.S./Argentine

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<sup>6</sup> As used and referred to in this memorial, "BIT" means bilateral investment treaty.

BIT to investors to settle their claims through arbitration was taken up by Azurix in its letter to Argentina and the Centre consenting to ICSID jurisdiction.

Furthermore, the Tribunal found that the filing of the request for arbitration was by itself sufficient evidence of Azurix's consent. (43 ILM at 272-274).

Argentina also argued that the dispute had already been submitted to and adjudicated by the courts of Argentina under Article VII of the relevant BIT (the "fork-in-the-road" argument), and that Azurix should not be allowed to litigate the same matter a second time. The Tribunal pointed out that under the relevant BIT an investor's right to assert a claim under the treaty can be exercised independently from any assertion of rights under the investment contract; and that an investor may always seek the international responsibility of the host state under the applicable treaty, without prejudice to the forum selected by the parties under the agreement for purely contractual claims. As to the "fork-in-the-road" doctrine, the Tribunal held that even if there was recourse to local courts for breach of contract, this would not prevent resorting to ICSID arbitration for violation of treaty rights. (43 ILM at 279-280).

In Salini Costruttori S.P.A., et al., v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001, 42 ILM 609 (2003), the Tribunal held that the dispute settlement procedures in a bilateral investment treaty supersede or trump contractual forum selection clauses.

#### ***4. National of Another Contracting State***

MHS is a “National of another Contracting State” within the meaning of Article 25(2)(b) of the ICSID Convention.

Article 25(2)(b) of the ICSID Convention, in relevant part, defines “National of another Contracting State” as:

any juridical person which had the nationality of the Contracting State party to the dispute on that date and which because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Malaysia and the United Kingdom have agreed that a juridical person such as MHS should be treated as a “National of another Contracting State,” in this case, the United Kingdom.

Article 7 of the UK/Malaysia BIT, in relevant part, states:

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2) (b) of the [ICSID] Convention be treated for the purpose of the Convention as a company of the other Contracting Party.

MHS has been and continues to be a company organized under the laws of Malaysia. MHS was incorporated in Malaysia in 1987. *See, Exhibit B* of MHS’s September 30, 2004 Request for ICSID Arbitration. The United Kingdom is a Contracting Party to the UK/Malaysia BIT. Mr. Dorian Francis



Ball is a British or United Kingdom national. *See*, **Exhibit C** of MHS’s September 30, 2004 Request for ICSID Arbitration. MHS was majority-owned and controlled by Mr. Dorian Francis Ball, prior to the dispute or claims which MHS seeks to arbitrate before ICSID. Mr. Ball became MHS’s majority owner on December 11, 1991, and his majority ownership, which has continued without interruption until the present, is reflected in the Claimant’s April 25, 1992 and later roster of shareholders. **Exhibit L.** Mr. Ball controls and has controlled MHS since 1991.

MHS, although incorporated and organized under the laws of Malaysia, falls within the definition of “National of another Contracting State” within the meaning of Article 25(2)(b) of the ICSID Convention because, at all relevant times, it was and continues to be majority owned, and controlled by Mr. Dorian Ball, a British/United Kingdom national.

### **C. THE JURISDICTIONAL REQUIREMENTS OF THE UK/MALAYSIA BIT**

In addition to the ICSID Convention, this Tribunal’s competence to hear and decide MHS’s claims against the Government of Malaysia is based on the UK/Malaysia BIT that was in force between Malaysia and the United Kingdom before, during and after the nearly three-year period that MHS discharged its responsibilities under the Contract.

The UK/Malaysia BIT requires the satisfaction of three (3) jurisdictional requirements in addition to the jurisdictional requirements discussed above under the ICSID Convention in order for jurisdiction to be conferred on this Tribunal. *First*, the investment at issue has to fall within the definition of the term “investment” that is set forth in the UK/Malaysia BIT. *Second*, to the extent applicable in this case, the qualifying investment has to have been approved by the Government of Malaysia. *Third*, pursuant to Article 7 of the UK/Malaysia BIT, the parties in dispute are required to have attempted to resolve their dispute within three months through the pursuit of local remedies or otherwise before instituting arbitration proceedings under the ICSID Convention. *See, generally*, the UK/Malaysia BIT.

Under Article 1(1) (a) of the UK/Malaysia BIT, the term “investment” is broadly (and non-exhaustively) defined to mean:

every kind of asset and in particular, though not exclusively, [to include]:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares, stock and debentures of companies 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 rights and goodwill;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

Under Article 1(1)(b)(ii) of the UK/Malaysia BIT, the term “investment” refers, in respect of investments in the territory of Malaysia, to:

all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an “approved project.

**1. Investment**

MHS’s performance under the Contract is the quintessence of investment and constitutes an “investment” that is within the purview of Article 1 of the UK/Malaysia BIT. The activity that MHS engaged in under the Contract gave rise to claims to money or to performance under a contract having a financial value. *See*, Article 1(1) (a) (iii) of the UK/Malaysia BIT, and the Contract, clause 4, page 3, at **Exhibit A**.

In the KLRCA arbitration, MHS claimed monies from the Government of Malaysia based on the Contract. MHS was to derive its return of and return on investment from a stipulated share of the proceeds received from the sale of the items recovered from the DIANA. The Contract’s value to MHS was, at a minimum, 70% of the U.S. \$2.98 million realized from the salvaged items auctioned at Christie’s. *See*, the Contract, clause 4, page 3; and also, the contract with Christie’s at **Exhibit M**.

Additionally, under the Contract, MHS, *inter alia*, utilized its expertise, equipment and manpower, and invested and expended its financial capital and

other resources, and assumed all risks, including but not limited to, life and limb, to locate the submerged wreck of the DIANA in Malaysian waters and to salvage her cargo. MHS financed the entire salvage operation.

MHS performed its duties under the Contract on a “no finds-no pay” basis – which, in the jargon of the salvage trade, means that all expenses of and investment with respect to the search and salvage operation and the attendant risk would be borne by MHS, and if the salvage was unsuccessful the MHS would get nothing. *See*, the Contract, clause 2, page 3. Under the Contract, MHS was entitled to receive a percentage of the value of the salvaged items only if the search for and salvage of the cargo was successful. MHS’s ability to recover its investment and make a profit on its investment was wholly contingent upon: (i) locating the sunken wreck of the DIANA; (ii) successfully recovering her cargo; (iii) the ability of the recovered cargo or items to be sold at a price sufficient to cover MHS’s investment and its expected return on investment; and (iv) the Government of Malaysia’s follow-through on its commitment to share the proceeds from the sale of the items with MHS, as required under the Contract.

MHS performed its duties under the Contract, and in doing so expended and invested funds and other financial resources and took all the risk that the salvage operation would not succeed – the quintessence of investment.

MHS's performance under the Contract is evidenced by, *inter alia*, by the documents at **Exhibit N**, which include various photographs as well as an excerpt of the catalog published by Christie's in connection with the auction of items from the DIANA,<sup>7</sup> and it is the type of activity that is clearly within the UK/Malaysia BIT's definition of investment.

Several ICSID arbitration Tribunals have examined the definition of investment under bilateral investment treaties. In Salini, *supra*, the Tribunal dismissed Morocco's argument that the contract to build a highway was not an "investment." The Tribunal ruled that the Italian contractors' work was plainly covered by the relevant BIT's definition of that term. Article 1 of the treaty defined an investment broadly, including, as relevant with respect to MHS's ICSID claim against the Government of Malaysia, "all categories of assets invested . . . on the territory of the other Contracting Party in accordance with the laws and regulations of the aforementioned party." In Salini, the Tribunal determined that Article 1 of the relevant treaty defined investment to also include: (i) rights to any contractual benefit having an economic value; any right of an economic nature conferred by law or by contract; capital and additional contributions of capital used for the maintenance and/or the accretion of the investment. The Tribunal found that the construction contract clearly created a

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<sup>7</sup> *The Diana Cargo – Chinese Export Porcelain and Marine Artifacts*, Christie's Amsterdam, Monday, 6 and Tuesday, 7 March 1995, published by Christie's.

right to a “contractual benefit having an economic value,” and that it was therefore an “investment.”

## ***2. Approved Investment Project***

As noted above, with respect to investments in the territory of Malaysia, Article 1(1) (b) (ii) of the UK/Malaysia BIT provides that to qualify as an “investment” within the purview of the UK/Malaysia BIT, an investment must be made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an “approved project.”

The Government of Malaysia seized upon the foregoing provision when corresponding with MHS, ICSID, and the Tribunal, and impliedly contended that the salvage project undertaken and executed by MHS was not approved by Malaysia and that it did not meet the definition of “investment” under the UK/Malaysia BIT because of the lack of evidence to demonstrate that the salvage project: (i) invested in and undertaken by MHS had been classified by an appropriate Malaysian Ministry as an “approved project,” or (ii) had been issued some sort of a special written license or other authorization from a Malaysian ministry. The contention is plainly specious and is indicative of the Government of Malaysia’s desperate attempts to evade and avoid the jurisdiction of this Tribunal. It begs credulity that the Contract, which was

negotiated for several years, signed and approved, and supervised and controlled by the Malaysian Government and several of its Ministries and agencies somehow lacked the necessary approval of the Malaysian Government.

The classification foreseen by Article 1(1)(b)(ii) of the UK/Malaysia BIT is not required in this case, and even if it were required, the Contract and the assent to the Contract manifested by the Government of Malaysia and its ministries and departments at the time of its execution and throughout the period of MHS's performance under the Contract meets any requirement for the classification of the salvage project by the appropriate Ministry in Malaysia as an "approved project" in accordance with the relevant Ministry's legislation and administrative practice. The purpose of Article 1(1)(b)(ii) is to limit the coverage of the UK/Malaysia BIT only to those foreign investment projects that have been approved by the Government of Malaysia – an approval which was given in this case by the Malaysian Government's action.

***a. Classification as an "approved project" not required in this case***

It stands to reason that investment projects in Malaysia need no classification of the sort set forth in Article 1(1)(b)(ii) of the UK/Malaysia BIT when, as in this case, the Government of Malaysia itself is a party to a contract involving an investment in Malaysia by a foreign party. Article 1(1) (b) (ii)

applies in instances where the Government of Malaysia itself is not a party to and is otherwise not directly involved in the contract entailing investment in Malaysia. For example, a foreign investor may contract with a private Malaysian individual to invest in and build a resort hotel designed to cater to tourists in Malaysia on land owned by such an individual. In such a setting, where neither the Government of Malaysia nor any of its ministries or departments is a party to the contract entailing foreign investment, classification of the hotel investment project by the appropriate Ministry in Malaysia as an “approved project” or other action manifesting the Government of Malaysia’s approval of the project would be expected, required, and most probably even desired by the foreign investor prior to embarking on such a project. If a governmental classification scheme of the type alleged to exist does in fact exist, a hotel investment project in Malaysia between and involving private parties would be approved by the Government of Malaysia through the classification of the same as an “approved project” by the Malaysian Ministry of Culture and Tourism or some other appropriate Malaysian government ministry or department.

Even a cursory reading of the Contract here reveals the fact that the Malaysian party to the Contract is none other than the Government of Malaysia itself. In this case, because the Government itself was a party to the Contract,



and by entering and taking steps to enter into the Contract, the Government approved the Contract, there was no need or reason for a subordinate ministry of the Government of Malaysia to separately approve or classify MHS's investment or the salvage project as an "approved project."

***b. In Any Event, Classification as an "approved project" Exists***

If, in addition to the Contract, an approval classification of the sort set forth in Article 1(1) (b) (ii) of the UK/Malaysia BIT were required, such requirement has been met here.

The Contract here was signed by the Marine Department of Malaysia "for and on behalf of the Government of Malaysia" and the Marine Department and other agencies of the Malaysian Government were intimately involved in the negotiation of the Contract prior to its signature and later throughout its implementation. The Malaysian National Museum Department, the Marine Department, and other ministries and agencies of the Government of Malaysia participated in negotiations and deliberations in the several years running-up to the signature of the Contract. At Exhibit P, along with other documents evidencing the Malaysian Government's involvement in negotiations prior to the Contract, are copies of correspondence in 1988 between the Malaysian

Ministry of Finance and Pacific Sea Resources Sdn Bhd,<sup>8</sup> correspondence in 1988 between Pacific Sea Resources Sdn Bhd and the Malaysian National Museum. **Exhibit O.** At Exhibit P is also a copy of a September 1988 Minutes of Meeting with respect to an internal Malaysian Government discussion regarding the application to locate the DIANA and salvage her cargo. The Minutes of Meeting, in relevant part, provides:

The Chairman welcomed all present and stated that the meeting was called to order to determine the guidelines that will be exercised in granting to successful applicants the survey and salvage of shipwrecks in Malaysian waters.

The Contract was signed “FOR AND ON BEHALF OF THE GOVERNMENT OF MALAYSIA” by Hj. Ghazali B. Abu Hassan. JSM AMN. Pengarah Laut, Semenanjung Malaysia. *See*, the Contract, pages 1 and 13. Under section 1.5 of the Contract, the term “GOVERNMENT” is defined to include, *inter alia*, the Malaysian Ministry of Finance, the Director General of [the Malaysian] Museums, and the Director of Marine Peninsular Malaysia or their authorized representatives. *See*, the Contract, clause 1.5, page 2.

Pengarah Laut is the Marine Department that has jurisdiction over all marine matters in Malaysia. The Contract concerns the location and salvage of the cargo of a sunken sailing vessel, a marine matter.

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<sup>8</sup> MHS was, at the time, known as Pacific Sea Resources Sdn Bhd.

The Contract was signed by a ranking Malaysian Minister who intended to and had the authority to bind the Government of Malaysia. This government official was also presumably aware that the contract that he signed manifested the approval of the Government.

Given the subject matter of the Contract (marine salvage), the Malaysian Government appropriately nominated its Marine Department to prepare and for and to sign the Contract, and by doing so, effected the classification and manifested approval of MHS's investment as an "approved project" by the appropriate ministry according to that ministry's (or department's) legislation and administrative practice. The Malaysian Marine Department's execution (signature) of the Contract on behalf of the Government of Malaysia and the Malaysian Government's acceptance of the benefits of MHS's investment and performance under the Contract constitute the Marine Department's classification of the salvage project as an "approved project," and the Government of Malaysia's concomitant approval of the salvage project.

The Malaysian Government, through its Marine Department: (i) prepared for and took part in negotiating the Contract; (ii) expressly approved the project at the outset by entering into the Contract, and thereafter (iii) repeatedly

affirmed its approval by extending the Contract on several occasions<sup>9</sup> and by permitting and accepting MHS's performance under the Contract. *See*, the Contract and **Exhibits O and P**.

The activities of the Salvage Committee, and the existence of the Malaysian Government's "Supervision Team," established under Clause 9 of the Contract, that had the ability oversee MHS's salvage operations is further evidence of the manifestation of classification and approval of MHS's investment project by specific Malaysian Government ministries and departments. The "Supervision Team" consisted of officers from the Marine Department and officials of the Malaysian museums as well as other experts. The Contract required MHS to submit to the "Supervision Team" for approval, *inter alia*, a list of all personnel and equipment that MHS intended to use in carrying out the initial survey. *See*, the Contract, clause 9.3, page 5. Clause 12 of the Contract imposed the same obligation on MHS with respect to the follow-on salvage operation. MHS's duties and responsibilities under the Contract were, at all relevant times, subject to close control and oversight by Malaysian Government officials, including those from the Malaysian Marine Department and the Ministry of Tourism and Culture and others who were members of the Salvage Committee and the Supervision Team. The Marine

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<sup>9</sup> After the signature of the Contract, the Contract was extended on several occasions by the Marine Department. *See*, **Exhibit A**.

Department and the Salvage Committee were MHS's principal counterparts during the Contract. At **Exhibit P** are documents evidencing the intimate involvement of, *inter alia*, the Salvage Committee and the Marine Department in the DIANA salvage project.

As explained above and demonstrated by the relevant documents in the exhibits attached hereto, it is readily apparent that the actions and conduct of the Malaysian Government's several ministries and agencies during the time running up to the signature of the Contract, the Marine Department's signature of the Contract, and its conduct and involvement during MHS's performance of the Contract was in accordance with that the Marine Department's legislation, including but not limited to, *the Antiquities Act, 1976 (Act 168)*, *the Malaysian Antiquities and Treasure Trove Ordinance, 1957*, and administrative practice, and that such actions satisfy any requirement, beyond and in addition to the Contract alone, that may apply with respect to the classification of the salvage project as an "approved project" within the meaning of Article 1(1) (b) (ii) of the UK/Malaysia BIT.

\* \* \*

For all of the foregoing reasons, MHS's investment in Malaysia under the

Contract and otherwise in connection with the salvage operation that is the subject of the Contract was and is in an approved project within the meaning of Article 1(1) (b) (ii) of the UK/Malaysia BIT.

Negotiations conducted and other acts undertaken prior to the entry into the Contract by the Government of Malaysia and its several ministries, the assent of these ministries to the Contract, and their acceptance of the benefits of the investment made by MHS under the contract:

- a. demonstrates the express approval and ratification by the Malaysian Government and its ministries of the project that MHS invested in; and to the extent required,
- b. constitutes the requisite classification of the project as an “approved project” in accordance with Malaysia’s legislation and administrative practice.

Any pretense or claim raised for the first time now – some 15 years after the Contract was executed – that MHS’s investment is somehow not covered under the UK/Malaysia BIT is patently absurd.

At no time during MHS’s performance of the Contract beginning in 1991 or during anytime thereafter until September 2004 did the Malaysian Government or any of its ministries object to, try to stop or prohibit, or otherwise indicate that the project that MHS invested in was not an “approved

project.” Furthermore, the Malaysian ministries which gave their assent and approval to MHS’ investment and supervised MHS’s investment and work in Malaysia under the Contract were ministries whose authority and function relates specifically to the subject matter of MHS’s investment in Malaysia, *viz.*, the Ministry of Culture and Tourism, the Director General of Museums, and the Director of Marine, Peninsular Malaysia. It would have been utterly redundant for these ministries to take any further step to approve the salvage project in light of the Contract that they had already entered into with MHS for the salvage project and their involvement in the Contract, especially after having negotiated and deliberated the Contract for 3 years prior to its signature.

It is difficult to imagine that the Malaysian Government’s signature of the Contract, and the acts of its ministries prior to and after the signature of the Contract did not constitute approval of and assent to the salvage project in accordance with or under the authority of Malaysia’s legislation and administrative practice within the meaning and intent of Article 1(1) (b) (ii) of the UK/Malaysia BIT. Yet, by contending just the opposite, the Government of Malaysia is denying reality, and seems to be in the somewhat peculiar position of accusing itself, a sovereign, and its subordinate ministries of failing to follow Malaysia’s own legislation and practice, and the Government of

Malaysia is now attempting to use such failure to immunize itself from the jurisdiction of this Tribunal.

Apart from the foregoing, the Government of Malaysia is, in any event, barred by the venerable principle of estoppel, well-established in municipal and in international law, from successfully asserting at this stage as a jurisdictional defect the lack of approval or ministerial classification as an “approved project” the project that MHS invested in under the Contract. Having entered into the Contract and accepted and kept the benefits and fruits of MHS’s investment of labor, expertise, time, and money, whether entitled to or not, the Government of Malaysia may not now be heard to argue that the investment made by MHS was not in an “approved project.”

### ***3. Pursuit of Local Remedies Prior to ICSID Arbitration***

Pursuant to Article 7 of the UK/Malaysia BIT, the parties in dispute are required to have attempted to resolve their dispute within three months through the pursuit of local remedies or otherwise before instituting arbitration or conciliation proceedings under the ICSID Convention. Article 7, in relevant part, states:

If any [investment] dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by . . . arbitration under the Convention, either



party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre . . . .  
*(emphasis added)*

To the extent applicable in this case, MHS and the Government of Malaysia have fulfilled the foregoing requirement by pursuing remedies in Malaysia for more than nine years, as described above. The standard in the UK/Malaysia BIT for the local resolution of disputes is limited to three months and it does not require the exhaustion of all local remedies. Article 7 of the UK/Malaysia BIT. Under this standard, MHS could have come to ICSID after the conclusion of the KLRCA arbitration in 1998 – three years after its dispute with the Government of Malaysia arose, or even much earlier.

As explained in detail above and evidenced by the relevant documents in the exhibits hereto, between March 1995 and September 2004, MHS expended much time, effort, and incurred costs in correspondence, meetings and attempted meetings with various Malaysian Government officials and others, in arbitration and court proceedings, and before the CIARB, in an effort to resolve and settle its claims against and dispute with the Malaysian Government. Finally, on September 30, 2004, some nine years after its dispute with and claims against the Government of Malaysia arose and its claims could not be resolved, MHS filed its request for ICSID arbitration which has led to the constitution of this Tribunal.

#### IV. CONCLUSION

For the foregoing reasons, this Tribunal should confirm its jurisdiction to hear and decide MHS's claims against the Government of Malaysia pursuant to the ICSID Convention and the UK/Malaysia BIT.

Respectfully submitted,



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Dated: March 15, 2006

## **V. EXHIBITS**

### List of Exhibits

- A The Contract and Related Follow-on contracts
- B The Existence and Activities of the Salvage Committee
- C Application to the Court for Start of KLRCA Arbitration
- D Release of Performance Bond
- E The KLRCA Arbitration "Award"
- F Response of the KLRCA
- G Efforts to Resolve Dispute: July 1998-February 4, 1999
- H Efforts to Resolve Dispute: Post-February 4, 1999
- I Dato Rais Yatim Address to Conference on Arbitration
- J The CIARB's Review of the "Award"
- K Response from the Malaysian Minister of Legal Affairs
- L MHS's Shareholders
- M The Christie's Contract
- N Evidence of and the Result of MHS's Investment
- O Pre-Contract Negotiations
- P The Involvement of the Salvage Committee and the Marine Department