

**MALAYSIAN HISTORICAL SALVORS SDN BHD,**

Claimant/Investor,

and

**THE GOVERNMENT OF MALAYSIA,**

Respondent.

ICSID Case No. ARB/05/10

**CLAIMANT MALAYSIAN HISTORICAL SALVORS SDN BHD'S  
POST- JURISDICTION HEARING NOTES & POINTS**

**Sole Arbitrator**

The Honorable Michael Hwang, S.C.

**Secretary of the Tribunal**

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## **INTRODUCTION**

The hearing on jurisdiction in this case was held on May 25, 2006 in Frankfurt, Germany at the premises of the Frankfurt Stock Exchange ("Hearing"). The Hearing took place in the aftermath of the submissions by the parties of their respective memorials and reply memorials on jurisdiction.

Throughout and at the conclusion of the Hearing, the sole arbitrator, Michael Hwang, S.C., requested MHS to submit additional information on MHS's investment contribution and its UK/Malaysia BIT claims. Mr. Hwang also requested that both parties elaborate upon and refine their arguments and reasons in bullet-point form with respect to the issues that were raised during the Hearing. A transcript was made of the Hearing ("Tr.").

This submission constitutes Claimant, Malaysian Historical Salvors ("MHS")'s response to Mr. Hwang's requests and supplements and reinforces MHS's legal arguments in the submissions it has made to ICSID and the Tribunal to date.

## **DISTINGUISHING BETWEEN JURISDICTIONAL & MERITS ISSUES**

- The Tribunal has decided, and both MHS and the Government of Malaysia ("Malaysia") have agreed, that proceedings on the merits would remain suspended until the jurisdictional issues have been resolved. These proceedings are at the jurisdictional phase.
- Malaysia has made many arguments that go to the merits of the case in its attempt to win jurisdictional arguments.
- Consideration of Malaysia's arguments as to why there is no expropriation, no denial of justice, no failure to accord fair and equitable treatment, and no failure to observe obligations, which are MHS's causes of action or claims under the UK/Malaysia BIT, are for decision at the merits stage of these proceedings. Such challenges and the merits of Malaysia's arguments in this regard are irrelevant and cannot be considered at this stage of the proceedings. Tr. 17:5-14.<sup>1</sup>
- This Tribunal must review the threshold conditions or issues under the ICSID Convention and the UK/Malaysia BIT that a claim needs to meet for purposes of the jurisdiction of the Centre and the competence of the Tribunal.
- The material facts are not in dispute.
- Recalling the relevant provisions of the UK/Malaysia BIT and the ICSID Convention, the following are the discreet issues that this Tribunal must decide to satisfy itself that it has jurisdiction in this case. All other issues raised and discussed at the Hearing are not truly jurisdictional issues/challenges. Tr. 73:17-25.

## **JURISDICTIONAL ISSUES**

- I. Claimant's Standing** - whether MHS has standing to prosecute this case.
- II. Pre-ICSID Dispute Resolution Attempts** - whether MHS and Malaysia have attempted to resolve the dispute/claims at issue for longer than 3 months through the pursuit of remedies in Malaysia or otherwise prior to MHS's request for ICSID arbitration.

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<sup>1</sup> The first numeral after Tr. refers to the page of the transcript; the second numeral(s) refer to the line(s) of the page.

- III. **Consent** - whether Malaysia and MHS have consented in writing to submit the dispute to ICSID.
- IV. **Approved Project** - whether the investment at issue was in a project approved by the appropriate ministry in Malaysia.
- V. **Legal Dispute Arising from Investment** - whether the dispute between MHS and Malaysia is legal in nature and it arises directly out of an investment
- VI. **Investment** - whether there is an investment within the meaning of the UK/Malaysia BIT and the ICSID Convention.
- VII. **MHS's Claims** - whether MHS's claims (*e.g.*, expropriation, denial of justice) if ultimately proven true at the merits stage of these proceedings are capable of constituting a violation of the UK/Malaysia BIT.

## JURISDCITIONAL ISSUES

### I. CLAIMANT'S STANDING

#### *The "Moment of Truth"*

- *The Arbitrator: So the question is: what is the moment of truth, as it were, for determining the nationality of the investor, what is the legal position?* Tr. 25: 20-22.
- The "moment of truth" is the time before the disputes which are the subject of MHS's UK/Malaysia BIT claims arose, not at the time of contract. Tr. 77:19-25; 185:15-25.

#### Law

##### ICSID Convention

- The ICSID Convention and the UK/Malaysia BIT require that a British national own a majority of MHS's shares before the dispute arose, and not, as the Government of Malaysia contends, at the time of contract.
- 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.*

##### The UK/Malaysia BIT

- In the UK/Malaysia BIT, 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, states, in relevant part:

*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* (emphasis added).

### **The Bulk of all the Investment Required for the DIANA Project Was Made by Mr. Ball After Mr. Ball Acquired a Controlling Majority Stake in MHS**

- MHS made all the investment and assumed all the risks required for the DIANA project.
- Mr. Ball owned the majority of and controlled MHS at all times when more than 90% of the investment in the DIANA project was made.
- Although Mr. Ball formally became MHS's majority shareholder on December 11, 1991, he started work on the DIANA project on September 29, 1991. Tr. 29:12-25; 30:3-25.
- Mr. Ball was directly and actively responsible for the capitalization of MHS and for MHS's investment in the DIANA project, and per the UK/Malaysia BIT and the ICSID Convention is the real party in interest.
- The fact that MHS was not majority owned by Mr. Ball at the time the Contract was signed is irrelevant.
- In consequence, MHS has standing to bring this action.

See Tr., 24:5-25; 75:18-20; 77:21-25; 185:15-22.

## **II. PRE-ICSID DISPUTE RESOLUTION ATTEMPTS**

### **The UK/Malaysia BIT**

- The standard in the UK/Malaysia BIT is clear. Pursuant to Article 7, the parties in dispute are required to attempt to resolve their dispute within three months through the pursuit of local remedies or otherwise before instituting arbitration or conciliation proceedings. See, Tr. 162:24-25; 163:1-5, 25; 164:1-15.
- The UK/Malaysia BIT makes no mention of and excludes any requirement to exhaust local remedies. MHS has met and exceeded the standard prescribed in the UK/Malaysia BIT. MHS has pursued local remedies and otherwise sought to settle its dispute with Malaysia for more than nine years, as explained in MHS's Memorial on Jurisdiction at 10-22 and its Reply Memorial on Jurisdiction at 61.

### **The Vienna Convention on the Law of Treaties**

- Looking outside the four corners of the UK/Malaysia BIT to understand what the above-mentioned portion of Article 7 means is unnecessary and improper.

The Convention provides that:

*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.* Article 31.

*Recourse may be had to supplementary means of interpretation [...] to determine the meaning [of a treaty provision] 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.*  
Article 32.

- The unambiguous language of the UK/Malaysia BIT excludes the general application of the doctrine of exhaustion of local remedies. The literal and plain meaning of its language does not lead to a result which is manifestly absurd or unreasonable.
- The Vienna Convention dictates that the required standard is only that which is expressly articulated UK/Malaysia BIT: "... resolve their dispute within three months through the pursuit of local remedies or otherwise before instituting arbitration ...." (emphasis added).

### **General Principles of Treaty Interpretation**

- The maxims *generalia specialibus non derogant* (general words do not derogate from special), *expressio unius est exclusio alterius* (express mention of one thing implies the exclusion of another) and *expressum facit cessare tacitum* (expression precludes implication), dictate that the required standard is only that which is expressly articulated UK/Malaysia BIT: "[The parties are to] ... resolve their dispute within three months through the pursuit of local remedies or otherwise before instituting arbitration ...." (emphasis added).
- The plain meaning of the specific language of the UK/Malaysia BIT plainly excludes the general application of the doctrine of exhaustion of local remedies.

### **Principles of International Law**

- While it is a general rule of international law that a claim will not be admissible on the international plane unless the individual alien or corporation has exhausted the legal remedies available to him in the state which is alleged to be the author of the injury, the application of the rule may be avoided by agreement.<sup>2</sup> When the act complained of is a breach of an international agreement or customary law, and is not a breach of local law, then the rule is inapplicable.<sup>3</sup>
- MHS's claims before this Tribunal (*e.g.*, expropriation, denial of fair and equitable treatment, denial of justice) arise under the UK/Malaysia BIT and under international law.
- Britain and Malaysia have avoided the rule by agreement (the UK/Malaysia BIT). The acts that MHS complains of constitute breaches of the UK/Malaysia BIT, an international agreement, and international law.
- While Malaysian courts or other authorities could decide to accept responsibility for UK/Malaysia BIT and international law claims, "...it is surely incorrect to state that resort to local remedies 'is required ... in order to determine ... whether or not an act or omission [complained of] is incompatible with international law.'"<sup>4</sup>
- In this case, the foregoing applies with even greater force as one of MHS' claims is based on the deficiency of Malaysia's legal system. A Malaysian court cannot sit in judgment of itself with respect to MHS's UK/Malaysia BIT claims.

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<sup>2</sup> I. Brownlie, *Principles of International Law*, (6<sup>th</sup> edition, 2003), pp. 472-475, reproduced in exhibit 1 hereto.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 474-475.

## ICSID Decisions

- The decision of the tribunal in *Salini v. Morocco*<sup>5</sup> supports MHS's understanding of the words of the UK/Malaysia BIT. The tribunal in *Salini* dealt with the issue of whether Salini's institution for arbitration was premature.
- The tribunal looked only to the bilateral investment treaty between Morocco and Italy for its decision on this issue. Like the UK/Malaysia BIT, the treaty between Morocco and Italy made no reference to the doctrine of exhaustion of local remedies. The provision in the treaty, in relevant part, provided:

*2) If the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, the investor in question may submit the dispute either:*

- a) to ... ;*
- b) to ... ;*
- c) to the International Centre for Settlement of Investment Disputes (ICSID) (emphasis added).*

*Salini* at 612-613.

- In *Salini*, the tribunal further stated:

*The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute (emphasis added).*

*Salini*, at 614.

- The *Salini* tribunal found that (i) there was a written request presented to Morocco aimed at the amicable settlement of the dispute and that the same satisfied the requirement set forth in the treaty, and (ii) that Salini's Request for Arbitration to ICSID was submitted 8 months after Salini's transmission of a written communication to Morocco aimed at amicable settlement. The tribunal consequently concluded that Morocco's argument that Salini's Request for ICSID Arbitration was premature failed. *Salini*, at 614.

### *Azurix v. Argentina*<sup>6</sup>

The tribunal in *Azurix* considered the issue of whether the relevant provision in the bilateral investment treaty between Argentine and the United States bearing on the issue of the timing of instituting ICSID arbitration was satisfied. The tribunal did not consider whether there had been an exhaustion of local remedies.

#### *a) Attempt at amicable settlement*

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<sup>5</sup> *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of July 23, 2001, 42 *ILM* 610 (2003), available at: <http://ita.law.uvic.ca/documents/Salini-English.pdf>

<sup>6</sup> *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, (2003) available at <http://www.worldbank.org/icsid/cases/azurix-decision-en.pdf>

55. *Under paragraphs 2 and 3 of Article VII of the BIT the parties to the dispute should initially seek a resolution through consultation and negotiation and the national or company concerned may have recourse to arbitration only after six months from the date that the dispute arose. The Claimant delivered notice of the existence of an investment dispute under the BIT to the President of the Argentine Republic on January 11, 2001. According to the Arbitration Request, dated September 19, 2001, Azurix pleaded repeatedly for assistance from the Respondent. The Argentine Republic responded on September 5, 2001 disclaiming the existence of an investment dispute or attribution of responsibility for the acts of the Province. The Tribunal is satisfied that the Claimant attempted to resolve the dispute through consultation or negotiation had failed (emphasis added).*

*Azurix, 29: 1. a).*

- The reasoning and conclusions of *Salini* and *Azurix* support MHS's arguments with respect to the issue of pre-ICSID dispute resolution attempts.

### **The ICSID Convention**

Article 26 of the ICSID Convention provides that:

*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.*

- In signing and ratifying the ICSID Convention, Malaysia has not stipulated exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

\* \* \*

- For the foregoing reasons, Malaysia cannot succeed in defeating this Tribunal's jurisdiction on the basis that there was a failure to exhaust local remedies.
- 3 months is the standard.
- In any event, the exhaustion of local remedies rule applies when effective remedies are available in the national system. Part of MHS's denial of justice claim is that there were no effective remedies available, which is an issue that is proper for the merits stage of these proceedings.

### **III. CONSENT TO ICSID ARBITRATION**

- Although interrelated, the issue of consent must be distinguished from *locus* or *jus standi*.

#### **Law**

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

*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.*

## Facts

- MHS is a Contracting Party and MHS is a national of the other Contracting Party.<sup>7</sup>
- Both MHS and the Government of Malaysia have expressly consented, in writing, to submit UK/Malaysia BIT disputes/claims to the Centre.
- Malaysia, a Contracting Party under the UK/Malaysia BIT, has given its consent in writing to submit its UK/Malaysia BIT dispute with MHS to the Centre by its signature and ratification of the UK/Malaysia BIT.
- Malaysia's consent in writing to submit UK/Malaysia BIT claims to ICSID is further evidenced by Malaysia's signature and ratification of the ICSID Convention.
- MHS's consent in writing to submit its disputes/claims against the Government of Malaysia to the Centre is evidenced by MHS's September 30, 2004 written request for ICSID arbitration.

## ICSID Decisions

- The tribunal in *Azurix v. Argentina*, *supra*, rejected Argentina's jurisdictional challenge on the basis of lack of Argentina's consent to submit to ICSID arbitration.
    - The tribunal found that the open invitation to investors provided by the State Parties to the U.S./Argentine BIT 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. The tribunal was, therefore, satisfied that both parties had consented to ICSID jurisdiction.
- Azurix*, 30: 1. b).
- Argentina's lack of consent and "fork in the road" arguments would have succeeded if Azurix's claims were only breach of contract claims and not breach of BIT claims.
    - 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.
  - MHS's claims in this proceeding (*e.g.*, expropriation, denial of justice, denial of fair and equitable treatment) are grounded and based on the UK/Malaysia BIT. Accordingly, any "fork in the road" argument made by Malaysia is inapplicable. Tr. 55: 9-25; 133:11-24; 104:3-13.

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<sup>7</sup> The issue of investment and legal dispute are separately addressed elsewhere in this submission.



- As correctly observed by Arbitrator Hwang at the Hearing in response to Malaysia's assertions with respect to the "fork in the road" issue: *Yes, but the problem with the fork in the road argument is that it is not the same road, it is a different road that he is on.* Tr. 133:11-16.

#### IV. APPROVED PROJECT

##### **Malaysia Approved the DIANA Project as Required Under the UK/Malaysia BIT**

- It is undisputed that MHS applied for Malaysian Governmental approval and authorization for the DIANA project and that it took part in the 3 year process of being selected and licensed for the DIANA salvage project by the Government of Malaysia -- in conformity with applicable Malaysian legal rules and procedures.
- It is also undisputed that Malaysian ministries with jurisdiction over the subject matter of marine and wreck salvage and associated financial matters (*e.g.*, the Marine Department, the Museums Department, and the Ministry of Finance) signed and closely oversaw the implementation of the DIANA salvage contract by MHS after 3 years of contract negotiation and deliberation.
- The negotiation of and entry into a contract constitutes approval of a contract and approval of all activities called for under a contract.
- The approval received by MHS is the type of approval required by the UK/Malaysia BIT. Tr. 40:22-25; 41:1-3; 42:2-25; 43:1-25; 44:1-25; 45:1-6.
- It is undisputed that:
  - the DIANA salvage contract was extended by these ministries and by MHS several times, and that Malaysia and its ministries benefited from MHS's performance under the salvage contract and also from the later contract with Christie's.
  - MHS's investment in the DIANA project was the object of the salvage contract that was approved by Malaysian ministries with competence in marine matters, salvage, and associated financial matters pursuant to specific Malaysian legislation.
  - the Malaysian ministries with competence in and jurisdiction over the subject matter of marine, salvage and associated financial matters, supervised, controlled and monitored MHS's performance under the salvage contract, as detailed in the DIANA salvage contract.
  - all of MHS's investment in and contractual performance with respect to the DIANA project was, without reservation, approved, authorized, and licensed by relevant Malaysian authorities in accordance with applicable Malaysian law, and it was otherwise lawful under the laws of Malaysia.
- It has not been shown that MHS infringed the laws and regulations of Malaysia.

##### **No Additional Approval for the Project Required**

- Malaysia admits that the DIANA project was approved, as set forth above, but contends that such approval is not sufficient for purposes of the UK/Malaysia BIT. Tr. 152: 2-8. Malaysia further contends that there was a separate, additional and specific or special Malaysian Government approval that was required in order for MHS's investment/performance with respect to the DIANA to be covered under

the UK/Malaysia BIT. Tr. 151:18-22. Such additional or special procedure of approval, if it exists or existed, is not provided for in the UK/Malaysia BIT and is unknown to the public.

- If such a special and additional procedure for treaty protection existed, MHS had no notice of such separate approval “for purposes of the UK/Malaysia BIT” procedure. Tr. 11-15.

- The exchange on this point at the hearing on jurisdiction between the Arbitrator and the Attorney General of Malaysia is instructive:

*The Arbitrator: But I take it that the answer to my specific question is that there was no gazette notification that for purposes of approval under the IGA (a) applications needed to be made and (b) applications needed to be made to MITI in particular.*

*The Attorney General: Yes, there are no gazettes to this effect.*

Tr. 13:1-7; 33:14-25, 34; 35:1-8.

*The Attorney General: Obviously, we have shown from all the documents that we have produced, [...], that is the practice in our country and everybody knows that. You go through the relevant authority –*

*The Arbitrator: I cannot accept statements from the bar that “everybody knows that”. Frankly, I do not think that really counts. We are concerned here with an issue of law. It is not whether they know it or do not know it. [...].*

Tr. 152:9-23.

- The “separate and additional approval for purposes of the UK/Malaysia BIT requirement” advanced by Malaysia is not provided for in the UK/Malaysia BIT.

- *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.* Vienna Convention on the Law of Treaties, Article 31.

- Malaysia’s reading of the UK/Malaysia BIT is in bad faith and not in accordance with the ordinary meaning to be given to terms of the UK/Malaysia BIT in their context and in light of the UK/Malaysia BIT’s object and purpose.

- This is amply demonstrated, *inter alia*, by the ill-considered and untenable position adopted by Malaysia in response to a direct question from the Arbitrator at the hearing on the issue of approval.

- *Dato Vohrah: So actually our practice has been very consistent; you apply for approval; we give it to you after considering it. We even have a situation, your Honor, where there was an activity, a non-manufacturing activity in relation to reforestation, which is completely non-manufacturing, and this is in F. Again addressed to the Ministry of International Trade and Industry.*

- *The Arbitrator: Do you have any applications from British companies?*

- *Dato Vohrah: No, I think they are quite comfortable with our investment climate.*

• *The Arbitrator: So you are saying that the British Government, having negotiated an investment protection treaty for its nationals, have not bothered to advise their nationals that in order to get this protection they need to apply for registration? That is what you are saying, is it?*

• *Dato Vohrah: Yes. Yes. [...].*

• *The Arbitrator: So currently you are saying that no British investor is protected?*

• *Dato Vohrah: There is none. They have not applied.*

• *The Arbitrator: And if they do not apply they have no protection?*

• *Dato Vohrah: Yes. [...].*

Tr. 140:9-25; 141:1-15.

• Malaysia's argument and position is that there are no British investments covered under the UK/Malaysia BIT because there has been no separate, additional, and specific approval issued for such investments of the type described by and insisted upon Malaysia in this proceeding.

• This declaration was made and argument advanced even though British companies/nationals are one of the largest if not the largest group of long-standing foreign investors in Malaysia. Statements in this regard were neither contradicted nor denied by Malaysia. Tr. 165:21-25; 166:1.

• Malaysia's declaration and persistent position that there are no British investments in Malaysia which are protected by the UK/Malaysia BIT constitutes Malaysia's violation of the UK/Malaysia BIT vis-à-vis the United Kingdom as well as a blatant disregard of the Vienna Convention on the Law of Treaties.

• *Pacta sunt servanda. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.* Vienna Convention on the Law of Treaties, Article 26.

• *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46 [regarding a State's consent to be bound by a treaty].* Vienna Convention on the Law of Treaties, Article 27.

• When given an opportunity by MHS to retract its position on the absence of UK/Malaysia treaty protection for British investments in Malaysia, Malaysia consciously and adamantly refused to do so. *See*, Tr. 163:15-20.

• The negative impact of such a reckless and ill-considered position is far-ranging. Among other things it:

• is a self-inflicted injury to Malaysia which causes Malaysia irreparable harm,

• detracts from Malaysia's prestige and credibility in all matters, including the credibility of its arguments in these proceedings; and

• reduces the legal protection enjoyed by British and other investors in Malaysia, to the detriment of foreign investors in Malaysia as well as to the detriment of Malaysia itself and the Malaysian people.

## The UK/Malaysia BIT

- The words of the UK/Malaysia BIT are clear. It limits investments in the territory of Malaysia to those that are in projects that are approved by the Malaysian Government, *viz.*:

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

- *The Arbitrator: I am just observing that does not say “a protected project” or “an approved project for purposes of this treaty.”* Tr. 40:15-17.
- There is no indication in the above provision that an additional or special procedure is required in Malaysia for purposes of the above provision.
- There is also nothing in the legislation or practice of Malaysia vis-à-vis British investors that might substantiate any such additional requirement.
- As noted by the tribunal in *Salini v. Morocco*, *supra*, the purpose of such a provision “... [is] to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.” *Salini* at 621. *Also*, Tr. 92:13-20.
- In *Yaung v. Myanmar*,<sup>8</sup> as elaborated below, the tribunal stated: “if a State Party to the 1987 ASEAN Agreement unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for purposes of the [ASEAN] Agreement.”

## The Vienna Convention on the Law of Treaties

- To look outside the four corners of the UK/Malaysia BIT to understand what the above-mentioned paragraph with respect to “approval” means would be unnecessary and improper.
  - *The Arbitrator: We are not surely going to look at your domestic legislation. We have to look at the treaty and interpret the treaty.* Tr. 39:22-25.
  - *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.* The Vienna Convention on the Law of Treaties, Article 31.
  - *Recourse may be had to supplementary means of interpretation [...] to determine the meaning [of a treaty provision] 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.* The Vienna Convention on the Law of Treaties, Article 32.
- The clear and unambiguous language of the UK/Malaysia BIT simply requires an appropriate Malaysian ministry to approve investment in a project.
- *The Arbitrator: ... as you know, in treaty interpretation you can only advert (sic) to travaux preparatoires if there is doubt in the meaning of the words.* Tr. 90:7-9. *See also*, Tr. 90:12-25; 91:1-5.

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<sup>8</sup> *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, 42 ILM p. 540 et seq. (2003).

- The meaning of the words in the UK/Malaysia BIT are not open to doubt.
- The object and purpose of the UK/Malaysia BIT is to afford investors protection for investments in projects approved by the Malaysian Government. And, to the extent there is doubt about what the words of the UK/Malaysia BIT mean, the doubt should be resolved in favor of the investor, MHS, in light of the object and purpose of the UK/Malaysia BIT.
- The literal and plain meaning of language the UK/Malaysia BIT does not lead to a result which is manifestly absurd or unreasonable.
- The interpretation advanced by Malaysia is contrary to the object and purpose of the UK/Malaysia BIT and leads to a manifestly absurd and unreasonable result. This is amply demonstrated, as noted above, by Malaysia's declaration at the Hearing that there are no British investments in Malaysia that are protected under the UK/Malaysia BIT.
- Because the meaning of the UK/Malaysia BIT is not ambiguous or obscure, recourse to supplementary information or means of interpretation such as that presented by Malaysia (other treaties, letters of approval from MITI, etc.) with respect to this issue is not warranted and is irrelevant.

#### **ASEAN & ISCID Decisions**

##### **ASEAN Arbitral Tribunal: Yaung Chi Oo Trading Pte. Ltd.v. Myanmar**

- Tr. 144:10-25; 145; 146-148; 149:1-16.
- The Tribunal in *Yaung*, supra, examined, *inter alia*, the question of whether the investment in question was specifically approved and registered in writing for the purposes of the 1987 ASEAN Agreement, where the ASEAN Agreement, provided that the investment must be "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement." *Yaung*, ¶ 53.
- The Tribunal noted that under Article II of the 1987 ASEAN Agreement, there is an express requirement of approval in writing as well as registration of a foreign investment if it is to be covered by the Agreement. *Yaung*, ¶ 58. It noted that the 1987 ASEAN Agreement in this respect went beyond the general rule that for a foreign investment to enjoy treaty protection it must simply be lawful under the law of the host State. *Yaung*, ¶ 58.
- In reaching its decision, the tribunal in *Yaung* stated:

*No doubt a Party to the 1987 ASEAN Agreement could establish a separate register of protected investments for purposes of that Agreement, in addition to or in lieu of approval under its internal law. But if Myanmar had wished to draw a distinction between approval for the purpose of the 1987 ASEAN Agreement and approval for purposes of its internal law, it should have made it clear to potential investors that both procedures co-exist and further, how an application for treaty protection could be made. At the least it would be appropriate to notify the ASEAN Secretariat of any special procedure. None of these things was done.*

*Yaung*, ¶ 59. See also, Tr. 145: 11-17.

- The *Yaung* tribunal's decision:

*In the Tribunal's view, if a State Party to the 1987 ASEAN Agreement unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for purposes of the ASEAN Agreement. In other words, when a foreign investment, brought into Myanmar by a national or a company of a Party to the 1987 ASEAN Agreement, has been approved and registered in writing as such by the relevant authorities under the laws of Myanmar after the entry into force of the Agreement for Myanmar, this investment should be deemed specifically approved in writing and registered for purposes of [the Agreement], and it is entitled to treaty protection.*

*Yaung*, ¶ 59. See also, Tr. 149: 8-13.

- The *Yaung* tribunal found that the general approval Myanmar gave for *Yaung's* investment under its internal law prior to the coming into force of the ASEAN Agreement would have satisfied the approval requirement of the ASEAN Treaty if such approval had also been given after the ASEAN Agreement had come into force.

- If this Tribunal applies the rule announced in *Yaung*, it must rule in favor of MHS. Tr. 167:15-25

***Gruslin v. Malaysia***, *ICSID Reports*, Vol. 5, 2000, 483, *et seq.*

- Tr. 141:20-25; 142; 143; 166:19-25; 167:1-7.

- The tribunal in *Gruslin* addressed the issue of approval or “approved project” and stated that the relevant question was whether Mr. Gruslin:

*invested in a project classified as an “approved project” by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon ...*

*Gruslin*, 501: 22.2.

- The relevant portion of the “approved project” text in the bilateral investment treaty (“BIT”) at issue in *Gruslin* is virtually identical to the “approved project” text of the UK/Malaysia BIT.
- Similar to what it has done in this case, in *Gruslin*, Malaysia advanced arguments and submitted materials to support the contention that the protections of the pertinent BIT extended to certain investments and not others. Malaysia asserted that the protections of the relevant BIT or IGA extended to the subject matter of primary and productive investment (as opposed to passive investment in a portfolio of securities trading on a public secondary market (stock exchange). *Gruslin*, 501: 21.3.
- Mindful of its need to adhere to the treaty interpretational provisions of the Vienna Convention on the Law of Treaties, the tribunal stated:

*... resort to extrinsic materials of the sort invoked by [Malaysia] for the purpose of colouring the meaning of the particular terms of the IGA is of limited utility in determining whether Article 1(3) of the IGA by its terms restricts the application of the entire IGA to investments made in an “approved project.*

*Gruslin*, 501: 21.4.

- The Tribunal went on to state:

The Tribunal has considered [Malaysia's] materials from sources ranging from 1960 [...] to 2000 [...]. Its approach is to first consider the terms of [the approved project] proviso [...]. If its meaning is found to be clear, the Tribunal will not reduce its reach by reference to general considerations or assumptions derived from extrinsic sources of the sort relied upon by [Malaysia] in its materials and arguments.”

*Gruslin*, 501: 21.6.

- The *Gruslin* tribunal agreed with the notion that there must be specific approval and based its decision on the issue of “approved project” on the plain, ordinary meaning of the words of the BIT.
- In reaching its decision, the tribunal seized upon the meaning of the term “project,” and distinguished between general approval of a company’s general business activities (e.g., ability to issue shares on the Kuala Lumpur Stock Exchange) given by Malaysia’s securities industry regulators, and approval for an investment in a specific project of a company.

*What is required is something constituting regulatory approval of a “project”, as such, and not merely the approval at some time of the general business activities of a corporation. Gruslin p. 507: 25.5; Tr. 47:18-25.*

- Paying attention to the meaning of the term “project,” the tribunal found that Malaysian government regulatory approval of the general business activity of a company to list shares on the Kuala Lumpur Stock Exchange and investments in such companies based on such approval constituted approved investment in such companies but that such investments, as required under the relevant BIT, did not constitute investments in a “project” of the company.
- A careful reading of *Gruslin* demonstrates that tribunal found that there was an approval for an investment but that the approval was not specific to a project. *Gruslin*, 507:25.5; Tr. 48:2-5.
- *Gruslin* stands for the proposition that the approval must be for investment in a project of a company or a project company rather than for investment in a company in general.
- The rule of *Gruslin* supports and buttresses MHS’s approved project arguments. MHS investment was approved and it was in a project.
- If this Tribunal applies the rule and reasoning of *Gruslin*, it must rule in favor of MHS.
  - In contrast to the facts in *Gruslin*:
    - all of the investment necessary for the DIANA project, financial and otherwise, was made by MHS.
    - MHS’s investment at issue in this case was in the DIANA project.
    - All of the investment made and at issue in this case was invested in the DIANA salvage project directly by MHS pursuant to a detailed contract with the Government of Malaysia and the related contract with Christie’s for the sale of the salvaged items.
    - MHS’s its recourse to its return of and return on investment was only to the DIANA project,

- Malaysia does not deny that MHS undertook activities under the Contract and that such activities were with respect to a particular and specific project.
- Furthermore, in contrast to the investor in *Gruslin*:
  - MHS, the investor in this case, was known to the Government of Malaysia. The Government of Malaysia evaluated MHS's qualifications and capabilities and negotiated with MHS for 3 years prior to signing the contract and granting MHS authorization for the investment in the DIANA project.
  - The Government of Malaysia's approval of the contract to which the DIANA project related was in addition to the general approval given by the Government of Malaysia's to MHS under MHS's Malaysian corporate charter and its articles of association/incorporation.
  - The Government of Malaysia specifically approved the DIANA project as demonstrated by its 3 year negotiations with MHS of the contract, its signature of the contract, its close involvement in and oversight of the performance of the contract throughout its term, and by receiving all the benefits of MHS's performance and investment under the contract. Malaysia negotiated for 3 years, was a party to, and specifically approved a detailed contract obligating MHS to engage in activities with respect to the DIANA project.
  - MHS did not passively invest in a Malaysian company by anonymously buying shares traded on a stock exchange.
  - MHS, known to the Government of Malaysia, was an active investor and invested in the DIANA project by raising and expending all the financial and other capital needed to cover the entire cost of the DIANA project.
  - MHS actively controlled and managed how the investment in the DIANA project was allocated and used.
  - MHS assumed all the risk in the DIANA project. Mr. Ball and his crew risked their lives for the success of the DIANA project.
  - MHS was the source of primary and productive investment in the DIANA project, which investment occurred after Mr. Ball acquired control and majority ownership of MHS.
  - MHS's investment simply did not replace a primary investment that had already been made such as that when is made when a company first issues shares.
  - In acquiring MHS's shares and gaining majority ownership and control of MHS from two of MHS's shareholders, Mr. Ball paid MHS's shareholders a nominal amount for their shares, and thereafter made the required substantial investments in MHS and the DIANA project.
  - The DIANA project would not have succeeded but for MHS's investment in it.
  - MHS employed Malaysians for and during the DIANA project.
  - MHS invested directly in the DIANA project and did not make its investment through a UK mutual fund or other similar intermediary.



- MHS's investment in the DIANA project constituted direct, active, foreign investment in a project in Malaysia, and not an indirect and passive portfolio investment in the publicly-traded securities of a company or collection of companies, where such investment (in secondary market) results in money going to the shareholder of the company selling the securities (or shares) rather than going to or being invested in the company itself.

- *See also*, Tr. 94:5-25; 95-96; 97:1-5.

### ***Salini v. Morocco***

- In *Salini*, supra, Morocco, the respondent, attempted to define approved investment in terms of its own laws rather than by reference to the definition of investment in the relevant treaty. The treaty provided that the investment at issue "must be the object of contracts approved by the competent authority." *Salini*, 620: 45, 46.

- The tribunal in *Salini* ruling on the issue of approved investment examined the process of approval and the approval obtained by Salini and stated:

*The Tribunal cannot follow the Kingdom of Morocco in its view that paragraph 1 of Article 1 refers to the law of the host State for the definition of "investment." In focusing on "categories of invested assets (...) in accordance with the laws and regulations of the aforementioned party," this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.*

*Yet, in the present case, the Claimants [Salini] took part in the tender process in conformity with the legal rules applicable to invitations to tender. At the end of this procedure, they also won the bid and concluded the corresponding contract for services in conformity with the laws in force at that time.*

*Thus, [...], it has never been shown that the Italian companies [Salini] infringed the laws and regulations of the Kingdom of Morocco.*

*To be considered as investments, the rights enumerated under [the definitions of investment in the treaty] "must be the object of contracts approved by the competent authority" ....*

*The Bilateral Treaty does not indicate who the competent authority is, this being likely to vary according to the contract in question. The competent authority is determined according to the laws and regulations of the State on the territory of which the investments are made [...].*

*The Tribunal considers that the contract in question was indeed the object of an authorization from the competent authority for the following reasons:*

- *The allocation of the contract to the Italian companies occurred in accordance with the rules and procedure fixed by the President of ADM, acting in virtue of the powers conferred on him by the Board of Directors of his company. [...] the Ministry of Infrastructure approved the conclusion of public procurement contracts by ADM in accordance with the mandatory procedure, which was not alleged to have been violated.*

- *The different stages leading to the signature of the construction contract involved various interventions by the authorities concerned. This, the invitation to tender was put out by the Minister of Infrastructure and Professional & Executive Training, President of ADM; the presentation of the bid was made to ADM's Chief Executive Officer; the evaluation and awarding of this bid were carried out by a commission chaired by ADM's Chief Executive Officer and composed of various public organs; and lastly it was ADM's Chief Executive Officer, as Owner, who signed the construction contract for the project at issue.*

*As a result, the Tribunal considers that the condition of Article 1(g) [investment must be the object of contracts approved by the competent authority] is satisfied. The contract concluded between ADM and the Italian companies [Salini] is an investment within the meaning of the Bilateral Treaty. [...].*

*Salini, 620-621:46.-49.*

- The rule and reasoning of *Yaung*, *Gruslin* and *Salini* support MHS's arguments with respect to the "approved project" issue.

\* \* \*

- There is no indication of a special or additional approval requirement in the UK/Malaysia BIT, or in the correspondence between the Malaysian and British governments. Malaysia's arguments to the contrary are devoid of merit. Tr. 33:19-24; 50:18-25; 51:1-21; 93:19-25; 94:1-4.

- MHS correctly reads and understands the relevant words of the UK/Malaysia BIT to mean approval to come into Malaysia to do what you want to do as opposed to requiring a specific approval qua the UK/Malaysia BIT. Tr. 93:15-18; 13:20-25.

- Such a reading and understanding of the UK/Malaysia BIT is supported by the Vienna Convention on the Law of Treaties and consistent with the decisions of the tribunals noted above that have addressed the issue of approval.

- Neither the UK/Malaysia BIT or any other authority imposes an affirmative obligation or burden on MHS to make special application for treaty protection. The protection is automatically given by the UK/Malaysia BIT as long as the investment is approved and is not illegal under Malaysia's laws.

\* \* \*

- For the foregoing reasons as well as for all the reasons stated in previous written and oral submissions made to ICSID and this Tribunal, MHS's investment in the DIANA project was in a project classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an "approved project."

- Malaysia cannot succeed in defeating this Tribunal's jurisdiction on the basis that it approved MHS's performance under a detailed contract specifically related to the DIANA project but that such approval somehow did not constitute approval for a project for purposes of the UK/Malaysia BIT.

- *See also*, Tr. 84:24-25; 85-89.

## V. LEGAL DISPUTE ARISING FROM INVESTMENT

- Quoting the tribunal in *Azurix v. Argentina*, supra, and substituting the parties and the treaty involved in this case:

*The dispute as raised by [MHS] – an alleged breach by [Malaysia] of obligations owed by it to [MHS] under the [UK/Malaysia BIT] – is a legal dispute which, in the words of the Report of the Executive Directors of the World Bank on the Convention, concerns, “the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation, and is more than a mere ‘conflict of interest.’*

*Azurix*, 31: 58.

- The tribunal's decision in *Azurix* supports a finding of jurisdiction in this case.
- The dispute raised/claims made by MHS in this case is Malaysia's breach of the UK/Malaysia BIT and these claims arise out of MHS's investment in Malaysia.

## VI. INVESTMENT

Tr. 78:5-25; 79-83; 84:1-23; 121:1-6; 162:2-8; 175:3-25; 176 -185; 186:9-25; 187: 1-25; 188:1-4.

### Law

#### The UK/Malaysia BIT

- Article 1(1) (a) of the UK/Malaysia BIT, defines the term “investment” broadly (and non-exhaustively) 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.*

#### The ICSID Convention

- Article 25 of the ICSID Convention, without defining the term “investment” simply provides that:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between [...].*

- As noted in several ICSID cases, under the ICSID Convention, although the term “investment” is not defined, it stands to reason that “investment” cannot mean something entirely different from, or totally unrelated to, its objective or commonly understood meaning.

## ICSID Decisions

### *Salini v. Morocco (2003)*

• In *Salini*, supra, the tribunal noted that with the exception of a decision of the Secretary-General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale, the ICSID awards to date only very rarely turned on the notion of investment.

• The tribunal in *Salini* noted that an objective definition of investment generally considers that that term includes:

- (i) contributions,
- (ii) certain duration of performance of the contract,
- (iii) participation in the risks of the transaction, and
- (iv) contribution to the economic development of the host State

*Salini*, ¶ 52.

• The construction of a 50 km. stretch of highway was awarded to the *Salini* contractors for a price of MAD 280,702,166.84 and JPY 3,122,286,949.50. *Salini*, ¶ 2.

### *Joy v. Egypt (2004)*<sup>9</sup>

• The tribunal in *Joy* indicated that a project must generally have certain elements in order to qualify as an investment under the ICSID Convention. *Joy* listed these elements as:

- (i) certain duration,
- (ii) regularity of profit and return,
- (iii) element of risk,
- (iv) substantial commitment, and
- (v) contribution significantly to the host State's development

*Joy*, ¶ 53.

• In *Joy*, the value of the contract at issue was UK£9,605,228. *Joy*, ¶ 17.

• In answering whether a bank guarantee constituted investment, the tribunal examined the issue of whether the activity or contract to which the bank guarantee related constituted an investment, and it measured the value and role of the bank guarantee in relation to the project as a whole.

• The tribunal concluded that:

- bank guarantees were contingent liabilities and an ordinary feature of sales contracts;
- the contract to which the bank guarantees at issue related was an ordinary sales contract because it was essentially a contract to procure equipment, which was governed by normal [sales] commercial terms, e.g., FOB UK;

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<sup>9</sup> *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11), available at <http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>

- the production and supply of the equipment involved was a normal activity of the company, which did not require a particular development of production that could be assimilated to an investment on behalf of the buyer's demands;
- the duration of the commitment was not particularly significant as the price for the equipment and incidental services was paid in its totality at an early stage;
- there was no regularity of profit and return and that the risk involved was ordinary commercial risk, which does not include enterprise or project risk; and
- that the bank guarantees were only small fraction of the project.

Joy, ¶¶ 44, 45., 54., 55., 56., and 57.

### **LESI-Dipenta v. Algeria<sup>10</sup>**

- In *LESI-Dipenta*, the tribunal listed the following characteristics for an investment:
  - economic value to the state,
  - extend over a certain period, and
  - entail some kind of risk
- According to the tribunal, the investor needs to demonstrate economic value of some sort but need not demonstrate that the activities under the contract promote the state's economic development because it is difficult to establish and implicitly covered by the three elements stated above. *LESI-Dipenta*, 449-453.

### **MHS's activities in connection with the DIANA project meet all applicable requirements for "investment" under the UK/Malaysia BIT as well as the ICSID Convention**

#### **The UK/Malaysia BIT**

- MHS's performance under the Contract gave rise to claims to money or to performance under a contract having a financial value.
  - Under the Contract, MHS is entitled to, *inter alia*, 70% of the value of the items recovered in the process of survey and excavation (defined as "Finds" in clause 1.2 of the Contract).
  - The gravamen of MHS's UK/Malaysia BIT expropriation claim is that Malaysia, in violation of the UK/Malaysia BIT, deprived MHS of its full share of the value of the Finds by expropriation and by having subjected MHS's investment to measures equivalent to expropriation.
  - Furthermore, in violation of the UK/Malaysia BIT, Malaysia has taken intellectual and other property rights belonging to MHS under the Contract, which rights include the first right of refusal granted to MHS's under the Contract with respect to other salvage projects in Malaysia, and also failed to accord MHS fair and equitable treatment.

#### **The ICSID Convention**

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<sup>10</sup> *LESI-Dipenta v. Algeria*, ICSID Case No. ARB/03/08, Award on Jurisdiction of 10 January 2005 in French, Volume 19, No. 2 issue of ICSID Review—Foreign Investment Law Journal (2004), available at: <http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf>

- It is undisputed that:

MHS, *inter alia*,

- (i) contributed and utilized its unique expertise and know-how to the DIANA project,
  - (ii) provided all the necessary specialized equipment and qualified personnel for the location of the DIANA wreck and the accomplishment of the salvage operations,
  - (iii) set up camp and located marine vessels near and at the wreck site,
  - (iv) obtained and contributed financial capital enabling MHS to finance the purchases necessary to carry out the salvage operation and to pay the salaries of the experts and the workforce, and
  - (v) issued, at its own expense, a performance bond in favor of the Malaysian government guaranteeing MHS's performance under the Contract, which performance bond was released by Malaysia upon the completion of MHS's performance under the Contract without any drawdown.
- The DIANA project was realized and it succeeded.
  - MHS made all the investment required for the DIANA project.
  - The successful location, survey, salvage, restoration, cataloging, and sale of the valuable cargo/treasure of the DIANA would not have occurred but for MHS's investment in the enterprise.
  - MHS invested and expended its financial capital and other resources, and assumed all risks, including but not limited to, contractual/commercial risk, financial/enterprise risk, political risk, currency risk, risk of life and limb, in connection with locating the submerged wreck of the DIANA in Malaysian waters and salvaging and selling her valuable cargo.
  - MHS financed the entire salvage operation and all of its investment in the DIANA project was at risk.
  - MHS performed its duties under the Contract on a "no finds-no pay" basis – meaning that all expenses of and investment with respect to the search and salvage operation and the attendant risk of the project not succeeding would be borne by MHS.
  - MHS's return of and return (profit) on investment was wholly contingent upon the success of the project (as well as Malaysia's compliance with the Contract and applicable laws).
  - If the DIANA wreck were not found, the recovered items were not sufficiently valuable, or the salvage was otherwise unsuccessful, MHS alone would have borne a substantial loss.
  - The investment made by MHS in the DIANA project falls within the objective meaning of investment.
  - It cannot be seriously questioned that MHS's performance under the Contract constitutes "investment" as that term/concept is objectively defined and commonly understood.
  - If jurisdiction were defined solely on the basis of the amount or value of investment, such basis would have to be articulated in the UK/Malaysia BIT and the ICSID Convention.

- There is nothing in the ICSID Convention that requires a minimum amount for an investment. There is no minimum jurisdictional requirement in the ICSID Convention for the amount of investment.
- No ICSID tribunal has decided or ventured to decide that it does not have jurisdiction solely on the basis of the amount of investment.

### ICSID Decisions

- The tribunal in *Salini*, supra, noted that the mentioned elements may be interdependent, and that the risks of the transaction may depend on the contributions and the duration of performance of the contract. *Salini*, ¶ 52.

*As a result, these criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here. Salini, id.*

- One or more of the criteria mentioned in *Salini* and *Joy* do not always and necessarily have to apply in order to arrive at a determination with respect to investment. As recognized by *Joy*, supra:

*To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case (emphasis added).*

*Joy*, ¶ 53.

*The Tribunal is aware of the many ICSID and other arbitral decisions noted above and the fact that they have progressively given a broader meaning to the concept of investment. But in all those cases there was a specific connection to ICSID, either because the activity in question was beyond doubt an investment or because there was an arbitration clause involved.*

*Joy*, ¶ 59.

- Very few ICSID cases have been decided by resort to or application of the criteria mentioned in *Salini* and *Joy*.
- Under *Joy* and the facts of this case, the activity in question is beyond doubt an investment.
- Unlike in *Joy*, the Tribunal in this case is not being asked to decide whether bank guarantees or the sale of equipment constitute an investment.
- Unlike *Joy*, MHS's activities, as set forth below, meet the applicable criteria listed in *Joy*.
- The activities at issue in this case involve the provision of services (not equipment) which depend on the accumulation, possession and utilization of particularized and detailed knowledge unique to the DIANA project as opposed to the off-the-shelf mining equipment at issue in *Joy* that could be used in many mining projects. MHS's activities and services in connection with the DIANA project cannot be commoditized or resold. MHS activities, which lasted for several years, were specifically-tailored for and unique to the DIANA project.
- The fact that MHS's services were on a non-finds-no-pay basis and that such basis of payment or remuneration is common in salvage contracts is not relevant. Tr. 81:24-25; 82-83; 84:1-15.

- In *Joy*, the tribunal mentioned this issue only for the purpose of illustrating that the payment method/basis involved (FOB US, FOB UK) was common in the sale of goods.
- In *Salini*, the tribunal concluded that activities in connection with the construction of a highway qualified as an investment. *SGS v. Pakistan*, *infra*, included within the concept of investment pre-shipment inspection activities and other services. *Atlantic Triton*, accepted as an investment the conversion of equipment of fishing vessels. *See, Joy*, ¶ 51.
- As described below, MHS activities in connection with the DIANA project are analogous to the activities undertaken in *Salini* and in the other ICSID cases cited above where the tribunals held that the activity in question constituted an investment (within the meaning of the ICSID Convention). Tr. 59: 5-8; 72:17-24.
- Although not controlling or dispositive on the issue of “investment,” MHS’s activity in connection with the DIANA project satisfies all the criteria for investment mentioned in *Salini*, *Joy* and *LESI-Dipenta*, to the extent such criteria apply in this case. Tr.. 78:5-25; 79-80; 81:1-23.

### **MHS’S INVESTMENT CONTRIBUTIONS/COMMITMENTS/OUTLAYS IN TERMS OF THE *SALINI*, *JOY* AND *LESI-DIPENTA* CRITERIA**

- MHS entered into and performed its obligations under the Contract, which strictly in terms of only the value of the recovered/salvaged items, resulted in an investment worth at least U.S. \$3.8 million. Tr. 186:9-25; 187:1.
- The value of all the items recovered from the DIANA, based on transactional prices at the Christie’s auction and expert appraisals, was worth at least U.S. \$3.8 million (before Christie’s sales commissions). Tr. id.
- The value of MHS’s contributions under the Contract was not limited just to the value of the recovered items.
- MHS’s performance under the Contract, *inter alia*, also yielded the discovery of two other historic shipwrecks, one of which, the KAPAL SULTAN, was valued in the KLRCA arbitration by Mr. Lem Hong Heng, the official expert appraiser of the Malaysian Government, at RM 2,400,000 or U.S. \$941,176.00.
- Considering only the value of the Finds and just the value of only one of the other two discovered shipwrecks, the KAPAL SULTAN, the Contract and the Christie’s contract was worth at least U.S. \$4.74 million.
- MHS bore all the costs associated with the DIANA project and made cash and in-kind contributions to the DIANA project. Tr. 186:9-25; 187. These contributions consisted of, *inter alia*:

### **Research and Expertise**

- Between 1984 and 1988, Mr. Ball expended funds and time traveling to and conducting research with respect to the DIANA at libraries on the East Coast of the United States, in London, in Calcutta, and in Singapore, spending a total of around a year (of the elapsed four years) and accumulated knowledge and data with respect to the DIANA. The fruits of this research and the proprietary knowledge gained from it, coupled with Mr. Ball’s additional years of marine salvage experience, were contributed to and utilized in the DIANA project during the term of the Contract and the term of the contract with Christie’s. Historic



marine salvage is a technical process requiring knowledge of history as well as very specialized skill of the type possessed and utilized by MHS in the DIANA project.

### **Negotiations and Discussions**

- Over the 3 years that the Government of Malaysia was evaluating MHS's application for a contract to salvage the DIANA, Mr. Ball and other MHS representatives made at least 1 trip a month from Singapore to Kuala Lumpur to meet with Government of Malaysia officials or to meet with MHS's chairman. The value of these activities was contributed to the DIANA project during the term of the Contract.

### **Searching for the DIANA**

- After getting the Contract, MHS, utilizing technology, its knowledge about the DIANA and its expert marine salvage skills, spent 2 years searching for the DIANA wreck.
- During these 2 years, MHS prepared and mobilized no less than 12 surveys, paying for survey vessels, crew, fuel, survey equipment, food, travel and data processing. The surveys were organized, led, managed, and in part, performed by Mr. Ball, a highly qualified and knowledgeable salvor.
  - MHS meticulously searched almost 200 square miles of seabed in its effort to locate the DIANA, and when the wreck was detected, Mr. Ball personally dove 34 meters into the water alone at 5 a.m. in the pre-dawn dark to confirm that the DIANA had been found.

### **Salvaging**

- During the salvage period of the project, MHS utilized technology, its knowledge about the DIANA, its expert marine salvage skills, and carefully recovered the DIANA's valuable cargo and artifacts from the bottom of the sea and otherwise successfully salvaged the DIANA.
- In the process of salvage, MHS employed, fed, and housed oilfield divers and other personnel, and provided to the project, among other things, salvage data and maps, a specialized barge, professional diving equipment, decompression chamber, compressors, generators, cranes and commuting vessels.
- After salvage, MHS professionally restored, classified, packaged, stored, transported, insured, and arranged for, promoted, and otherwise facilitated, the sale of the items recovered from the DIANA at Christie's auction house in Europe.

### **Project and Relationship Management**

- During the DIANA project, Mr. Ball managed all aspects of the DIANA project and provided other services to MHS in connection with the project. Mr. Ball also dealt with all the politics associated with and managed the relationship with MHS's counterpart, the Government Salvage Committee consisting of 22 persons. Mr. Ball also managed the relationship with the State Government and Chief Minister of Malacca State, who had made a claim on the DIANA wreck.

### **Promotion**

- Mr. Ball promoted the sale of the DIANA CARGO. Christie's enlisted the services of Mr. Ball as the sole promoter of the DIANA CARGO and for 2 months took him around Europe, the UK, and New York to give talks, appear on TV shows (including CNN), speak on radio, and to talk one-on-one with private collectors.

### **Pioneering Achievement**

- MHS was the first entity to carry out a complete marine salvage contract for the Government of Malaysia. The DIANA was the first historic shipwreck to be professionally and thoroughly researched, surveyed, located, classified, excavated, conserved, promoted and auctioned. No one in Malaysia had proven capable of managing a project of this complexity and duration until MHS came along.

### **Duration of performance of the contract**

- MHS's performance and investment under the Contract began on August 3, 1991 and ended in June 1995. The Contract was signed and came into force on August 3, 1991. The initial 18 month term of the Contract was extended several times until June 3, 1995.
- MHS performed under the Contract during the 3 years and 10 months during which it was in effect.
- The contract involving Christie's following and related to Contract, to which MHS was a party and under which assumed risks and performed obligations, was signed and came into force on September 21, 1994.
- There is nothing in the ICSID Convention that requires an investment to be made over a certain or minimum period.
- In any event MHS performance under the Contract complies with the minimum length of 2-5 years mentioned in *Salini*. *Salini*, supra, ¶ 54

### **Participation in Risk**

#### **Assumption of All Financial, Political and Other Risks**

- MHS made all the investment and assumed all the risk required for the risky DIANA project.
- MHS assumed the entirety of every conceivable kind of financial, enterprise, political and other risk entailed by the DIANA project.
- There was the risk that MHS might not have found the wreck, the risk that the wreck might have been destroyed over time by the currents and waves, the risk that the cargo might have been damaged or be in poor condition or unsaleable to begin with.

#### **Risk of Life**

- Very few human activities are as dangerous to life and limb as those on and in particular under, the sea. Those who spend their working lives in air-conditioned offices are never obliged to risk their lives in the course of their work and seldom appreciate the personal risk that Mr. Ball and other MHS personnel took in connection with the DIANA project. Marine survey and salvage work commands a premium price for this reason.
- Mr. Ball and his crew risked and could have lost their lives in the inherently dangerous activity of marine survey and salvage.

### **Contribution to the Development of the Host State**

- MHS's activities under the Contract and under the subsequent contract with Christie's:

- provided unique, rare, and valuable services to Malaysia by pioneering historic shipwreck salvage in Malaysia,
- provided Malaysia with exactly what Malaysia bargained for, desired, demanded, and needed in the Contract and the ensuing contract with Christie's,
- yielded over U.S. \$1 million in cash for Malaysia's treasury (without cost or risk to Malaysia),
- provided Malaysia with knowledge of the location of other valuable shipwrecks in Malaysia,
- imparted and transferred valuable information and technical know-how and knowledge to Malaysia regarding the science and process of historical marine salvage and archeology enabling, *inter alia*, Malaysia and its museums to expand their knowledge and establish their own independent historical shipwreck salvage capability, as evidenced, in part, by the presentation given by the Malaysian Director General of Museums at a UNESCO convention held in Bangkok in 2004<sup>11</sup>,
- showed and taught Malaysia exactly how a historic shipwreck could be researched, located, and excavated,
- provided Malaysia with notoriety and positive public relations, raising Malaysia's international profile and drawing wanted attention to Malaysia as a favorable and attractive location or destination for history, treasure, archeology and revenue-generating tourism,
- provided Malaysia with a high-profile and much publicized Christie's auction in Europe with all its attendant positive publicity for Malaysia and Malaysian Government officials and political leaders,
- produced the greatest return that any salvage operation has ever returned to the Government of Malaysia,
- the DIANA salvage is estimated to be the world's 6<sup>th</sup> most valuable in terms of the value of items recovered; and the world's 3<sup>rd</sup> most valuable in terms of the value of porcelain recovered.
- produced a video, and wrote and published book about the DIANA, building public awareness of the history of Malacca and the China trade,
- employed over 40 people in Malaysia,
- employed an entire village and brought wealth and economic activity into what had been a depressed backwater part of rural Malaysia,
- enriched Malaysia's history and historical wealth and cultural heritage,
  - made available to the National Museum in Malaysia 650 of the most valuable porcelain pieces recovered from the DIANA -- the largest single collection of Chinese porcelain the National Museum had ever owned.

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<sup>11</sup> Malaysia's UNESCO presentation is available at:  
[http://www.unescobkk.org/fileadmin/user\\_upload/culture/Underwater/HK\\_presentations/Day%20One%20-%20Adi%20Haji%20Taha.pdf](http://www.unescobkk.org/fileadmin/user_upload/culture/Underwater/HK_presentations/Day%20One%20-%20Adi%20Haji%20Taha.pdf)

- established a DIANA exhibition in Malacca for the edification of the Malaysian people and could have done the same in the National Museum, but for the unlawful actions of Malaysian museum officials,
- educated people in Malaysia by giving talks on the DIANA all over Malaysia to any organization that requested one,
- The value and benefit to Malaysia of MHS's activities cannot be underestimated and is demonstrated by the actions of the Government of Malaysia.
  - Every Malaysian politician including the Prime Minister and Deputy Prime Minister wanted to associate themselves with MHS's success, and press photos of such officials prove this.
  - The Government of Malaysia wrote to the *Guinness Book of Records* to claim the DIANA salvage as a record for Malaysia – as a result the DIANA is mentioned in the Millennium Edition of that publication under "Heroes of the Deep."
  - Twice during the salvage, the DIANA made front page news in the English language, Government of Malaysia -controlled press. In Malaysia, such press coverage happens only with prior Government approval.

### **Regularity of profit and return**

- Regularity of profit and return is an element that generally reduces investment risk.
- Knowing when to expect profits and knowing how much they will be reduces irregularity which is an element of risk.
- In this case, the principle of regularity of profit and return does not apply in order for an activity to be considered an investment.
- Some investments such as investments in bonds or promissory notes have regularity of return (certain date for redemption) and profit (coupon or interest payments on a semi-annual, quarterly or throughout some other predetermined time period). However, other investments such as the purchase of or investment in non-rental estate does not.
  - Profit and return on such real estate investments is realized upon sale or liquidation of the investment (at the end of the project) and the timing of such a sale or liquidation is variable and dependent on market conditions that are favorable to the seller. Such investments may be sold for profit (or loss) in a matter of weeks or months or years, depending on varying market conditions and the seller's circumstances at any given time.
  - A pharmaceutical company's investment in the development of a drug is another example of investment which does not have regularity of profit and return. Before any return or profit on a drug can be realized, the drug would have to be discovered, tested, approved by regulatory authorities, and accepted by the market, a process that can take a few or many years and cost millions. During such time, there is a build-up and accretion of investment but no return on investment.

- The investment made by MHS in the DIANA project is analogous to the foregoing type of investment in real estate and pharmaceuticals.
- Although there was no regularity of profit or return, there was a regular and steady accretion of investment as work progressed on the DIANA project and more and more items were salvaged.

\* \* \*

- For the reasons stated in MHS's memorials on jurisdiction, at the Hearing, and in this submission, MHS's performance and activities under the Contract constitute an investment within the meaning of the UK/Malaysia BIT as well as the ICSID Convention.

## VII. MHS'S CLAIMS

See, Tr. 17:12-20; 53:4-25; 54:1; 55:21-25; 57:18-19; 74:1-17; 98:11-25; 99:1-25; 100:1-16.

### • The Relevant Standard:

The Tribunal must not make findings on the merits of MHS's claims or causes of action, which have yet to be argued, but rather must satisfy itself that if the facts alleged by MHS are ultimately proven true, they would constitute a violation of the UK/Malaysia BIT.

See, *Bayındır İnşaat Turizm v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶¶ 194, 195<sup>12</sup> quoting *Impregilo v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 108.<sup>13</sup>

- MHS claims that Malaysia violated the UK/Malaysia BIT and international law by:
  - (i) expropriating MHS's property and other economic interests, and by subjecting MHS's property and economic interests to measures having effect equivalent to expropriation,
  - (ii) preventing MHS from repatriating its investment,
  - (iii) impairing MHS's investment,
  - (iv) failing to accord MHS fair and equitable treatment, and denying justice to MHS, and
  - (v) by otherwise failing to observe its obligations to MHS.

## Discussion

### (i) Expropriation

- Pursuant to the Contract, in return for its investment in Malaysia, MHS is entitled to, *inter alia*, 70% of the value of the items recovered from the DIANA (defined as "Finds" in clause 1.2 of the Contract), irrespective of whether such Finds were sold or not (the "Property").

<sup>12</sup> Available at <http://www.worldbank.org/icsid/cases/ARB0329Decisionjurisdiction.pdf>

<sup>13</sup> Available at <http://www.worldbank.org/icsid/cases/impregilo-decision.pdf>

- Malaysia has failed to perform its duties and taken a portion of the Property in violation of the Contract, the UK/Malaysia BIT, and international law. Specifically, the Government of Malaysia has failed to give MHS its:
  - complete share of the cash proceeds from the sale of the Finds (24,000 items in perfect condition) at the Christie's auction (MHS owns 70% of such proceeds),
  - share of the value of the most valuable Finds that Malaysia withdrew or withheld from the Christie's auction,
  - share of the value of the Finds (armorial porcelain) that were for sale at the Christie's auction but not sold, and
  - share of the value of the broken Finds (shards).
- Pursuant to the Contract, in return for its investment in Malaysia, MHS is entitled to, *inter alia*, (i) a share of the income generated by the Pameran DIANA exhibition (the "Exhibition"), an exhibition designed and organized by MHS in Malacca and opened by Malaysia's Prime Minister on June 3, 1994 (the "Income"), and (ii) ownership of the Exhibition and related intellectual property and merchandising rights.
  - The Government of Malaysia has taken MHS's share of the Income, and by inaction, destroyed MHS's economic interest in the Exhibition and in the related intellectual property and merchandising rights.
- Pursuant to the contract with Christie's to which Malaysia was a party, the Government of Malaysia was to use the finest Finds that it withdrew or withheld from the Christie's auction solely for "the purpose of study and exhibition," and MHS expected to share the income of such exhibition with the Government of Malaysia in return for designing and assisting in the organization of such exhibition.
  - The Government of Malaysia destroyed MHS's income from and other economic interests in this exhibition by failing to take any action toward or in support of the exhibition, despite its contractual commitment to do so, its public statements (*e.g.*, the Muzium Negara testimony in the KLRCA arbitration) that the DIANA was of huge historical and archeological interest to Malaysia, and notwithstanding the fact that the DIANA was twice front page news in Malaysia in 1994.
  - The Government of Malaysia destroyed all public interest in the DIANA project and in doing so deprived MHS of income from exhibition ticket sales as well as income that could have been generated by the sale of DIANA books, catalogues, photos, postcards, music, t-shirts, and other memorabilia via the valuable platform/venue provided by the exhibition.
- In violation of the Contract, the UK/Malaysia BIT, and international law, the Government of Malaysia also:
  - infringed MHS's copyright by releasing to the Malaysian media for broadcast over commercial television, without authorization, the DIANA video created by MHS and Christie's,
  - destroyed MHS's economic interest in two wrecks that MHS had discovered while locating and salvaging the DIANA by divulging the secret and confidential location of these wrecks to the Malaysian Government's Malacca Museums Corporation (PERZIM), wrecks for which MHS enjoyed a first right of refusal under the Contract, and

- destroyed MHS's existing and future business by unlawfully taking MHS's property and maliciously draining MHS by its dishonest defense and abuse of legal proceedings in Malaysia.

- In 1994/1995 following the successful auction of the DIANA CARGO, MHS was the top historic shipwreck salvage company in Malaysia. It had pioneered the industry, outperformed its peers, generated income for itself and the Government of Malaysia, held a world-class auction, made an international publicity splash for Malaysia, delivered a huge selection of porcelain to Malaysian museums, and was the darling of Malaysian politicians. MHS still had two more already-located wrecks to salvage and its commercial future could not have been brighter.

- The foregoing takings and the takings described immediately below, occurred prior to the KLRCA arbitration, and such unlawful takings were subsequently permitted and protected by the KLRCA arbitration and subsequently by Malaysia's courts and its legal system.

**(ii) Expropriation and Failure to Permit Repatriation of Investment**

- Malaysia further took a portion of the Property and prevented MHS from repatriating its return on investment in violation of the Contract, the UK/Malaysia BIT, and international law. Specifically, in this regard, with respect to the share of the Christie's sales proceeds that it ultimately gave to MHS, the Government of Malaysia:

- delayed and otherwise undermined the Christie's auction,
  - gave the auction proceeds to MHS tardily, and
  - to the further detriment of MHS, used the incorrect Dutch Guilder/Ringgit Malaysia exchange rate.

**(iii) Impairment of Investment**

- Through unwarranted delays in cooperating with MHS during the salvage operation, the unlawful actions and omissions described above, defamatory acts injurious to MHS's goodwill, and abuse of legal process in Malaysia, Malaysia impaired, by unreasonable measures, MHS's use, enjoyment and disposal of its investment in and related to the DIANA project and also foreclosed MHS from future business in Malaysia.

- During the Contract, at the same time that MHS was searching for the DIANA, a professional Malaysian marine survey company hired by Petronas (the Malaysian state oil company) to conduct activities in the same concession area where MHS was conducting activities. The marine survey company's activity in connection with a Petronas refinery/oil jetty project interfered with MHS's activities.

**(iv) Denial of Fair and Equitable Treatment, Denial of Full Protection and Security, Denial of Justice**

*See*, Tr. 100:20-25; 101<sup>14</sup>-103; 104:1-2; 110:2-25; 111; 112:1-21.

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<sup>14</sup> On page 101 of and elsewhere in the transcript, Mr. Ristau inadvertently referred to the ICSID Rules and the ICSID Model Statute. These references should have been to the UNCITRAL Rules and the UNCITRAL Model Arbitration Statute.

- KLRCA arbitration:
  - biased, partial, corrupt, unqualified arbitrator
  - misconduct by the arbitrator
  - award manifestly unfair and unjust and not otherwise in accordance with law
  - not in compliance with UNCITRAL rules
- Court challenge of the award in Malaysia:
  - judgment manifestly unfair and unjust and otherwise not in accordance with law
  - biased, partial, corrupt judge
  - denied MHS of the ability to appeal

- Malaysian law:

*See*, Tr. 100:20-25; 101; 102; 103:1-14.<sup>15</sup>

- to the extent it can be established that Malaysian law does not provide for appeal of the KLRCA arbitration, such law constitutes a denial of justice by Malaysia within the meaning of the UK/Malaysia BIT.

- Malaysia contends that the KLRCA arbitration was a domestic arbitration and that no Malaysian law barred the appeal of such award, and
- Malaysia also contends that the KLRCA arbitration was an international arbitration and thus barred by Malaysian law from being appealed in Malaysia.

- Malaysian judiciary/judicial system:
  - quality of justice below the international minimum standard, Tr. 172:1-21.
  - corrupt, biased, partial legal system that operates outside the rule of law
  - politicized by the executive branch and other parts of the Malaysian government
  - grossly deficient in the administration of the judicial or remedial process, Tr. 171:12-25.
  - fails to provide those guarantees which are generally considered indispensable to the proper administration of justice
  - backlogged, unwarranted delays in accessing properly functioning courts, Tr. Id.
  - complicit in Malaysia's unlawful expropriation of MHS's property and economic interests
- Even if there were no bar to the appeal of the KLRCA arbitration as a matter of Malaysian law, such appeal would have been futile.
- In denying justice to MHS, the Malaysian judicial system sanctioned, ensured and protected the unlawful expropriation of MHS's property by the Malaysian Government.

**(v) Failure to Observe Obligations**

**a. Failure to Comply with Malaysian Law**

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<sup>15</sup> Id.



- Observance of and compliance with Malaysian laws is an obligation the Government of Malaysia which was owed to MHS and expected by MHS.
- Malaysia failed to observe its obligations to MHS by violating Malaysian law.
  - Certain Malaysian Government officials involved in the DIANA project unlawfully took property and economic interests belonging to MHS, a crime under Malaysian law.
  - Arbitrator Tallala's "award," the Government of Malaysia's defense of the KLRCA arbitration and the court action in Malaysia and the deficient court proceedings in Malaysia are contrary to Malaysian law and they also constitute a refusal to acknowledge the reality of crime and corruption at the highest levels of the Malaysian Government.
  - Malaysia's defense in this ICSID proceeding is a further cover-up of corruption of crime by certain Malaysian officials and a further manifestation of the Malaysian legal system's failure to adhere to Malaysian law as well as with international law.

See Tr. 159-160; 161:1-7; 171; 172-173.

**b. Umbrella Clause Claims**

See Tr. 53:4-25; 54:2-6; 68:14-25; 74:10-14; 97:12-25; 98:1-8, 25; 99:1-25; 99:19-15; 100: 1-16.

- MHS reliance on the "umbrella clause" provides MHS with treaty-based claims and causes of action in addition to those recited above.
- 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 (emphasis added).*

- The UK/Malaysia BIT contains the foregoing "observance of undertakings/obligations clause" or "umbrella clause," which commits Malaysia to comply with its contractual commitments and elevates contractual obligations, in this case, some of those assumed by Malaysia in the Contract and related Christie's contract, to international obligations justiciable under the UK/Malaysia BIT.
- MHS's view of "umbrella clauses" and their effect is supported by the recent decision in *LESI-Dipenta v. Algeria*, supra.

*Certain treaties indeed contain provisions known as observance of undertakings clauses or 'umbrella clauses.' The effect of such clauses is to transform breaches of the State's contractual commitments into violations of that provision*

*of the treaty and, accordingly, to endow the arbitral tribunal constituted in accordance with the treaty with jurisdiction [over such breaches].*

*LESI-Dipenta*, ¶ 25.

- MHS's position on "umbrella clauses" is also supported by the decision in *Eureko v. Poland*,<sup>16</sup> an arbitration pursuant to the Dutch-Polish BIT where the tribunal found that contractual commitments of the host state were subject to the jurisdiction of the tribunal in light of the observance of undertakings clause.
- Other cases dealing with the issue of "umbrella clauses" also support MHS's position:
  - *Salini*, *supra*, and *Impregilo*, *supra*, - broad dispute resolution clause extends to contractual claims that arise out of a "breach of contract that binds the State directly." *Salini*, ¶ 59, *Impregilo*, ¶ 214.
  - The Contract and the Christie's contract bind the Government of Malaysia directly.
  - *Vivendi v. Argentina*<sup>17</sup> - "read literally, the requirements for [...] jurisdiction [...] do not necessitate that the claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT."
  - *SGS v. Philippines*<sup>18</sup> - tribunal had jurisdiction over contractual claims but decided not to exercise jurisdiction given the non-exhaustion of the contractual dispute resolution clause contained in the contract.
  - *SGS v. Pakistan*,<sup>19</sup> " [...] the Tribunal has no jurisdiction with respect to claims [...] based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT."
  - MHS submits that the tribunal in *El Paso Energy v. Argentina*<sup>20</sup> analyzed the issue correctly and that this decision provides the best guidance with respect to "umbrella clauses." The tribunal found, in relevant part:

*it is necessary to distinguish the State as a merchant from the State as a sovereign*, ¶ 79.

*the view that it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration is confirmed ... [i.e.,] in an agreement in which the State appears as a sovereign* ¶ 80.

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<sup>16</sup> *Eureko v. Poland*, partial award of August 19, 2005, available at: <http://www.investmentclaims.com/decisions/Eureko-Poland-LiabilityAward.pdf>

<sup>17</sup> *Vivendi v. Argentina*, Decision of July 3, 2002, 41 *ILM* 1135 (2002), ¶ 55.

<sup>18</sup> *SGS v. Philippines*, (ICSID Case No. ARB/02/6), available at: <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>

<sup>19</sup> *SGS v. Pakistan*, Volume 18, No. 1 issue of *ICSID Review—Foreign Investment Law Journal* (2003), available at: <http://www.worldbank.org/icsid/cases/SGS-decision.pdf>

<sup>20</sup> *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, 2006, available at: <http://www.worldbank.org/icsid/cases/ARB0315-DOJ-E.pdf>

*This umbrella clause does not extend jurisdiction over any contract claims... stemming solely from the breach of a contract (emphasis added), ¶ 84.*

*However, there is no doubt that if the State interferes with contractual rights by a unilateral act, whether these rights stem from a contract entered into by a foreign investor with a private party, a State autonomous entity or the State itself, in such a way that the State's action can be analysed as a violation of the standards of protection embodied in a BIT, the treaty-based arbitration tribunal has jurisdiction over all claims of the foreign investor, including the claims arising from a violation of its contractual rights. Id.*

*The Tribunal ... has jurisdiction over treaty claims and cannot entertain purely contractual claims, which do not amount to a violation of the standards of protection of the BIT. It adds that [under the BIT], [...] a violation of an investment agreement entered into by a State as a sovereign and a national or company of the United States is deemed to be also a violation of the Treaty and can thus give rise to a treaty claim. ¶ 85.*

**Summary of Malaysia's contractual duties/obligations/covenants, which MHS claims Malaysia has breached (and the UK/Malaysia BIT claim that such breaches constitute):**

- the duty to give MHS all the monies belonging and due to MHS under the Contract and the ensuing contract with Christie's (expropriation),
  - the duty to act as fiduciary/trustee (expropriation),
  - the duty of honesty, good faith and fair dealing (expropriation, fair and equitable treatment),
  - the duty to maintain confidentiality (expropriation),
  - the duty not to infringe copyright (expropriation),
  - the duty not to compete (expropriation),
  - the duty not to tortuously interfere with and impair MHS's investment (expropriation, impairment of investment),
  - the duty not to destroy MHS's future business or business prospects (expropriation, impairment of investment)
  - the to comply with all applicable laws (observance of obligations)
- MHS is pursuing its remedies before this Tribunal on the basis that Malaysia breached the UK/Malaysia BIT.
- Guided by the recent decision in *El Paso*, the rule of decision with respect to "umbrella clauses" is that only certain (not all) contract claims can constitute treaty claims.
- MHS's statements at the Hearing which are or which could be construed to be inconsistent with this view are hereby modified to be consistent with this view. Tr. 99:19-25; 100:1-16.

- MHS claims that breaches of the Contract and the Christie's contract must also constitute or amount to breaches of the substantive standards of the UK/Malaysia BIT.
- In light of the fact that the Government Malaysia is bound by the Contract and by the subsequent contract with Christie's, MHS claims that Malaysia's breaches of the Contract and the subsequent contract with Christie's, as outlined above, also constitute breaches of the substantive provisions of the UK/Malaysia BIT.
- Accordingly, MHS claims "umbrella clause" breaches by Malaysia based on the contract breaches outlined above to the extent that such breaches are not already covered by and they are separate and distinct from the traditional breaches of the UK/Malaysia BIT that MHS otherwise claims in paragraphs (i) – (v)(a) above.

\* \* \*

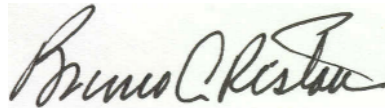
For the reasons stated by MHS above, and the reasons stated in MHS's request for arbitration of September 2004 and ensuing submissions, in its memorials, and by MHS at the Hearing, MHS requests the Tribunal to adjudge and declare that it has jurisdiction in this case.

Respectfully submitted,



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