

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

MALAYSIAN HISTORICAL SALVORS SDN BHD,

Claimant/Investor,

and

THE GOVERNMENT OF MALAYSIA,

Respondent.

ICSID Case No. ARB/05/10

**CLAIMANT MALAYSIAN HISTORICAL SALVORS SDN BHD'S
SUPPLEMENTAL COMMENTS ON THE ISSUE OF "INVESTMENT"**

Sole Arbitrator

The Honorable Michael Hwang, S.C.

Secretary of the Tribunal

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December 17, 2006

Introduction

This submission constitutes Claimant, Malaysian Historical Salvors Sdn Bhd ("MHS")'s response to the Tribunal's request for comments on the issue of "investment," within the meaning of Article 25(1) of the ICSID Convention, as addressed by the Tribunals in:

Bayindir Insaat Turizm Ticaret ve Sanayi, A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction (November 14, 2005) ["Bayindir"];

Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic (ICSID Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction (May 24, 1999) ["CSOB"]; and

Patrick Mitchell v. Democratic Republic of Congo (ICSID Case No. ARB/99/7), Decision on the Application for the Annulment of the Award (November 1, 2006) ["Mitchell"].

In this submission, MHS discusses and establishes how the law and principles governing the decisions in the above-mentioned cases, when applied to the facts of MHS's present case against Malaysia, provide further support for the conclusion that MHS has made an investment within the meaning of Article 25 of the ICSID Convention.¹

Bayindir

Bayindir dealt with disputes arising out of a motorway construction project in Pakistan undertaken by a Turkish construction company, Bayindir Insaat Turizm Ticaret ve Sanayi, A.S. ("Bayindir Insaat").

The Tribunal here examined whether Bayindir Insaat, in constructing a motorway in Pakistan, made an investment within the meaning of the bilateral investment treaty ("BIT") between Pakistan and Turkey and Article 25 of the ICSID Convention.

Investment - the Pakistan-Turkey BIT

The Tribunal noted that the Pakistan-Turkey BIT defined investment as including "every kind of asset." Bayindir Insaat, quoting an UNCTAD publication, contended that "every kind of asset" embraced everything of economic value, virtually without limitation. The *Bayindir* Tribunal agreed with Bayindir Insaat that the Pakistan-Turkey BIT defined investment very broadly, and noted the suggestion made by N. Rubins, that the reference to "every kind of asset" is possibly the broadest among similar general definitions contained in BITs.

Bayindir Insaat submitted that its contributions in terms of know-how, equipment and personnel and financing qualified as an investment under the Pakistan-Turkey BIT. Bayindir Insaat alleged that it had trained approximately 63 engineers, and provided significant equipment and personnel to the motorway project.

¹ Some of the capitalized terms used in this submission have the same meaning ascribed to such terms in MHS's previous submissions to this Tribunal.

The *Bayindir* Tribunal found that Bayindir Insaat's contribution in terms of know-how, equipment and personnel were clearly of economic value and that such contributions fell within the meaning of "every kind of asset" according to the Pakistan-Turkey BIT.

Pakistan contended that no investment was made due to the advance payment Bayindir Insaat received for work on the motorway project, and that, as a result, Bayindir Insaat took minimal risk. Rejecting Pakistan's arguments, the *Bayindir* Tribunal concluded that Bayindir Insaat made a substantial financial contribution to the motorway project. The Tribunal concluded that the fact that a part of Bayindir Insaat's price was paid in advance had no bearing on the existence of a financial contribution, and that, in any event, Pakistan's contentions had overlooked the fact that Bayindir Insaat had provided bank guarantees equivalent to the amount of advance payments it received. Furthermore, the Tribunal noted that Pakistan did not dispute Bayindir Insaat's allegation that the bank guarantees had cost Bayindir Insaat US \$11 million.

Considering Bayindir Insaat's contribution both in terms of know-how, equipment and personnel and in terms of injection of funds, the Tribunal concluded that Bayindir Insaat contributed "assets" within the meaning of the general definition of investment set forth in the Pakistan-Turkey BIT.

Investment - Article 25 of the ICSID Convention

In examining the existence of investment under the ICSID Convention, the Tribunal rejected Pakistan's argument that, in the absence of express wording, a straightforward highway construction contract does not constitute an investment under Article 25 of the ICSID Convention. The *Bayindir* Tribunal determined that "the construction of a highway is more than construction in the traditional sense."² The *Bayindir* Tribunal cited *Aucoven*, which found that the construction of a highway clearly qualified as an investment under Article 25 of the ICSID Convention because such activity implies substantial resources during significant periods of time.

In determining the existence of an investment under Article 25 of the ICSID Convention, the *Bayindir* Tribunal examined whether the 4 elements constituting investment set forth in *Salini v. Morocco* were also found in *Bayindir*. Under *Salini* or the "Salini test," investment under Article 25 of the ICSID Convention includes the following 4 elements: (a) a contribution, (b) a certain duration over which the project is implemented, (c) sharing of operational risks, and (d) a contribution to the host state's development. The *Bayindir* Tribunal noted these elements could be closely interrelated and that they should be examined in their totality on a case-by-case basis.³ The *Bayindir* Tribunal also noted that the investment should be significant to the host State's development, and that this condition of significance is already included in the three classical conditions of the Salini test.⁴

The *Bayindir* Tribunal found that all the elements or conditions of *Salini* were met in *Bayindir*. The Tribunal found that Bayindir Insaat made a significant contribution in terms of know-how, equipment and personnel, and in financial terms.

² *Bayindir*, p. 34, ¶ 128.

³ *Bayindir*, p. 35, ¶ 130.

⁴ *Bayindir*, p. 37, ¶ 137.

The *Bayindir* Tribunal, noting that the element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions, also found that the condition dealing with duration was met by virtue of the fact that the contract between Bayindir Insaat and Pakistan had an initial duration of 3 years followed by a defect liability period of 1 year and a maintenance period of 4 years. The Tribunal also noted that Bayindir Insaat was granted a contractual extension of an additional 12 months. In finding that the duration condition was met, the *Bayindir* Tribunal also was guided by the decision in *L.E.S.I. v. Algeria*, in which the Tribunal noted that projects meeting the duration test usually require time extensions, and that the duration of the contractor's guarantee also needs to be taken into account.⁵

The *Bayindir* Tribunal also determined that Bayindir Insaat's participation in the risks of the operation or project were significant based on the inherent risks involved in long-term contracts, a defect liability period of 1 year, a maintenance period of 4 years, and the *Salini* Tribunal's observation that "A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor."⁶

Lastly, the *Bayindir* Tribunal also held that the motorway project was important for the development of Pakistan based on the numerous declarations of its own authorities stressing the importance of the road infrastructure for the development of the country.

The *Bayindir* Tribunal concluded that Bayindir Insaat made an investment under both the Pakistan-Turkey BIT and Article 25 of the ICSID Convention.

The Criteria Applied by the Bayindir Tribunal Supports a Finding of Investment in the Present Case

The UK-Malaysia BIT

The definition of investment under the Pakistan-Turkey BIT is substantially the same as the definition of investment under the UK-Malaysia BIT.

Like Bayindir Insaat's contribution, MHS's contribution in terms of know-how, equipment and personnel, as described in previous submission to this Tribunal and also below, are of substantial economic value and such contribution falls within the meaning of "every kind of asset" pursuant to the UK-Malaysia BIT.

Article 25 of the ICSID Convention

Contribution

Like Bayindir Insaat, MHS made a significant contribution in terms of know-how, equipment and personnel, and in financial terms. In the present case, as explained and substantiated in previous submissions that MHS has made to this Tribunal:

⁵ *Bayindir*, p. 36, ¶ 133.

⁶ *Bayindir*, p. 37, ¶ 135 quoting *Salini*.

- (i) MHS procured, contributed, and committed all the financial, intellectual and other capital required for the DIANA project, which contributions and commitments resulted in the successful salvage of the DIANA and the production of value, strictly in terms of the value of items recovered, amounting to at least U.S. \$4.74 million.
- (ii) MHS financed the entire salvage operation and all of its investment in the DIANA project was at risk. MHS's only recourse for the return of its investment costs, let alone potential profit, was against the sales proceeds of the DIANA cargo.
- (iii) The Government of Malaysia provided no advance payment or security to MHS for the DIANA project.
- (iv) MHS obtained and contributed financial capital enabling MHS to finance all the purchases and expenditures necessary to carry out the salvage operation, including expenditures for the payment of salaries to its experts and workforce. MHS also committed capital in the form of "sweat equity" through the unpaid labor and time devoted to the DIANA project by Mr. Dorian Ball and others working for MHS.
- (v) MHS issued, at its own expense, a performance bond in favor of the Malaysian government guaranteeing MHS's performance under the Contract, as extended several times, which performance bond was released by Malaysia, without any drawdown, upon the completion of MHS's performance under the Contract.
- (vi) MHS provided all the necessary skill and specialized equipment (including but not limited to, survey vessels, DGPS, sidescan sonar, magnetometers, diving equipment, barges, tugs, winches, compressors, generators, decompression chambers, delivery vessels, and shore base equipment), and qualified personnel for the location of the DIANA wreck and for the execution of the salvage operations. MHS set up camp, procured and located marine vessels and all necessary equipment near and at the DIANA wreck site.
- (vii) 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.
- (viii) 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 chambers, compressors, generators, cranes, and commuting vessels.
- (ix) The successful location, survey, salvage, restoration, cataloging, transportation, promotion and sale of the valuable cargo/treasure of the DIANA would not have occurred but for MHS's contributions and commitments to the DIANA project/enterprise.

- (x) 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. 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).
- (xi) 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.
- (xii) Considering only the value of the Finds and just the value of only one of the other two discovered shipwrecks, the KAPAL SULTAN, MHS's performance under the Contract and the Christie's contract was worth and yielded value amounting to at least U.S. \$4.74 million.
- (xiii) MHS utilized its unique expertise, knowledge, experience and know-how on the DIANA project and permitted the Government of Malaysia access to the methods, proprietary knowledge of and know-how utilized by MHS in the salvage of the DIANA, and MHS transferred such know-how to the Government of Malaysia, through periodic reports under the Contract and otherwise.
- (xiv) MHS planned, financed and executed the side scan sonar and magnetometer surveys and diving inspections to locate the DIANA wreck, teaching Malaysian Government personnel how to manage a survey, operate the instruments, and how to identify and interpret located anomalies. MHS provided the Government of Malaysia with detailed periodic reports explaining exactly how these operations had been carried out and what their results were.
- (xv) MHS welcomed Government of Malaysia representatives to the salvage and conservation sites, conducted tours, gave explanations of MHS's activities, and hosted the participation of Malaysian Government Museum officials and experts in the salvage.
- (xvi) MHS planned, financed and carried out all the research with respect to the DIANA in many different libraries around the world, and in April 1994, turned over its research leads and results to Malaysia's National Archives.
- (xvii) 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 Mr. Ball and MHS in the DIANA project.
- (xviii) 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 purpose of these meetings was to explain to the officials of the Malaysian Government how previous salvage operations had been carried out and to assist the Malaysian Government in drawing up a salvage contract. As the Malaysian Government had no prior experience with respect to historic marine salvage operations, MHS imparted valuable knowledge to Malaysia in these meetings. In this regard, MHS provided the Malaysian Government with a contract (the "Marianas Contract") that the Malaysian Government could use as a model and guide in contracting for marine salvage operations. Prior to MHS's explanations and its provision of the Marianas Contract to the Government, Malaysia did not have any knowledge or experience with regard to contracting for marine salvage works. MHS's explanations and its provision of the Marianas Contract to Malaysia educated Malaysian officials and constituted a valuable transfer of legal and business know-how to Malaysia. After entering into the Contract with MHS, Malaysia used the explanations and the Marianas Contract in other salvage projects. The value of these activities contributed to the DIANA project during the term of the Contract and also inured to the benefit of Malaysia beyond the Contract.
 - (xix) After the award of 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.
 - (xx) MHS planned, financed and executed the salvage operation and hosted, at its own expense, the Government of Malaysia's relevant officers on-site, providing such officers with valuable insight into how to successfully conduct marine salvage operations.
 - (xxi) MHS taught the Malaysian salvage and museum officers the techniques of salvage, recording, handling, and artifact conservation.
 - (xxii) Using lessons learned and knowledge gained from MHS, the Malacca Museum set up its own shipwreck and salvage company (PERZIM Salvors).
 - (xxiii) Mr. Sten Sjostrand, the man who has continued locating shipwrecks in Malaysia and whose company Nanhai Archaeology is now the most active in Malaysia, carried out

his first wreck surveys under MHS's employment and tutelage. MHS got Sten Sjostrand started in legitimate historic shipwreck salvage in Malaysia.

- (xxiv) MHS retained Christie's to plan, finance and carry out the Amsterdam auction of the DIANA CARGO. This was the first time Malaysia's officers had ever attended such an international auction, and it was again a huge learning experience for them.
- (xxv) 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.
- (xxvi) During the DIANA project, MHS, through 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.
- (xxvii) 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.
- (xxviii) MHS pioneered legitimate historic shipwreck salvage in Malaysia, being the only company out of the first group of 4 companies who were awarded salvage licenses/contracts by Malaysia to locate and salvage designated shipwrecks. MHS was the only company of these 4 to perform its contract. The others failed to find/salvage their designated wrecks or having found them, asked the Government to finance the salvage, not being willing to incur any risk. MHS thus became the first company to perform its contract and successfully carry out a historic shipwreck salvage operation in Malaysia.
- (xxix) MHS, through 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.
- (xxx) MHS arranged and established a museum exhibition in Malaysia, which documented the DIANA survey and salvage, provided a display of the DIANA recoveries in Malacca, and provided to all museum visitors an enriching education with respect to how the DIANA salvage operation was carried out.
- (xxxi) MHS gave talks and presentations all throughout Malaysia to interested parties who wished to learn more about the DIANA and historic shipwreck salvage.

(xxxii) The nature, quality, magnitude and significance of MHS's contributions and activities in connection with the DIANA project and an interesting part of Malaysian history and patrimony are chronicled in a 175-page book, complete with photographs and illustrations, entitled, *The Diana Adventure*, 1995, authored by Mr. Dorian Ball and published by MHS.

(xxxiii) *The Diana Adventure* is a further contribution made by MHS to the DIANA project which also enriches the history and patrimony of Malaysia.

For all the reasons stated above, like Bayindir Insaat, MHS made a significant contribution in terms of know-how, equipment and personnel, and in financial terms.

Duration

Like Bayindir Insaat, MHS's transactions and activities in connection with the DIANA project meet the *Salini* condition with respect to duration of contract or performance.

MHS's performance and investment under the Contract began on August 3, 1991 and ended in June 1995. The initial 18 month term of the Contract was extended 3 times until June 3, 1995. MHS performed pursuant to the terms of the Contract during the 3 years and 10 months during which it was in effect.

Additionally, the contract involving Christie's subsequent to and related to Contract, to which MHS was a party and under which it assumed risks and performed obligations, was signed and came into force on September 21, 1994. This contract with Christie's continued at least until the auction of items recovered from the DIANA on 6 and 7 March 1995. Furthermore, MHS issued a performance bond in favor of the Malaysian government guaranteeing MHS's performance under the Contract, as extended several times. The performance bond was released by Malaysia upon the completion of MHS's performance under the Contract in June 1995.

For all the reasons stated above, the duration of MHS's activities under the Contract meet the *Salini* condition with respect to duration of contract or performance, as articulated by the *Bayindir* Tribunal.

Participation in Risks

MHS alone 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, legal and other risk associated with 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 unsalvageable and consequently unsalable, or the items found would be of insufficient value.

MHS did not only participate in, but rather made all the investment required for and bore all the risk with respect to the DIANA project. All financial, legal and other risks were borne solely by MHS. The Government of Malaysia assumed absolutely no risk with respect to 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 and contributions to the DIANA project/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, legal risk, as well as risk of life and limb, in connection with locating the submerged wreck of the DIANA in Malaysian waters and successfully 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's only recourse for the return of its investment and potential profit was against the potential sales proceeds of the DIANA cargo.

MHS performed its duties under the Contract on a "no finds-no pay" basis, which means that all expenses of and investment with respect to the search and salvage operation and the attendant risk of the project not succeeding was borne by MHS. If the Project did not succeed, MHS would lose its entire investment but the Government of Malaysia would have no liability to MHS therefor.

MHS's return of and return (profit) on its 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.

MHS also bore qualifying and obvious risk by virtue of the fact that the duration of MHS's contract with the Government of Malaysia is substantially similar to the length of the contract in *Bayindir*, and because MHS's contract with Malaysia for the DIANA project was of a type where the total cost of MHS's performance could not be established with certainty. At the outset MHS had no way of establishing how long the DIANA project would take and how much it would cost, posing an additional risk for MHS. Mr. Ball and other MHS personnel risked their lives on the project, diving in deep, dirty and dangerous waters, in strong currents and far offshore. Malaysia's officers refused to dive on the wreck due to the danger of doing so.

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

MHS also bore the substantial risk that even if the wreck was found, underwater currents might have dispersed and damaged the cargo or other activities (ships dropping anchor, trawling of nets and dynamite-fishing) could have damaged the DIANA cargo, or that the cargo would not be sufficiently valuable to permit recovery of costs, let alone profits on the project.

MHS also bore the risk, which has come to pass, that, even if the wreck were found, and the cargo was recovered, the cargo was valuable, and the recoveries were sold, that Malaysian officials would misappropriate recovered items and/or auction proceeds belonging to MHS.

MHS also took the risk, which has also come to pass, that it would not be able to vindicate its rights under the Contract in the "Malaysian legal system."

Malaysia awarded contracts for marine salvage to 3 other companies besides MHS at the time of the Contract. MHS was the only company of the 4 to perform its contract. The others failed to find/salvage their designated wrecks or having found them, asked the Government to finance the salvage, not being willing to incur any risk. MHS thus became the first company to incur the risk associated with successfully performing a contract to carry out a historic shipwreck salvage operation in Malaysia.

For all the reasons stated above, the risk borne by MHS meets and exceeds the *Salini* condition or element with respect to risk, as articulated in *Bayindir*.

Contribution to the Development of the Host State

MHS's activity under the Contract and under the subsequent contract with Christie's contributed to the significant development of Malaysia. MHS:

- (i) provided unique, rare, and valuable services to Malaysia by pioneering historic shipwreck salvage in Malaysia,
- (ii) provided Malaysia with exactly what Malaysia bargained for, desired, demanded, and needed in the Contract and in the ensuing contract with Christie's,
- (iii) produced over U.S. \$1 million in cash for Malaysia's treasury (without any cost or risk to Malaysia) – the greatest return that any salvage operation has ever produced for the Government of Malaysia,
- (iv) provided artifacts for Malaysia's museums,
- (v) provided Malaysia with knowledge of the location of other valuable shipwrecks in Malaysia,
- (vi) very importantly, imparted and transferred valuable information and technical know-how and knowledge to Malaysia regarding the science and process of historical

- (vii) marine salvage and archeology⁷ enabling, *inter alia*, Malaysia and its museums to expand their knowledge and establish their own independent historical shipwreck salvage capability,
- (viii) in addition to delivering Malaysia the concrete result of the successful salvage of the DIANA, showed and taught Malaysia exactly how a historic shipwreck could be researched, located, and excavated, and, as noted above, educated Malaysia on how to conclude contracts therefor,
- (ix) provided Malaysia with positive public relations, raising Malaysia's international profile and drawing highly-desired attention to Malaysia as a favorable and attractive location or destination for history, treasure, archeology, and revenue-generating employment and tourism,
- (x) 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,
- (xi) produced a video, and wrote and published book about the DIANA, building public awareness of the history of Malacca and the China trade,
- (xii) provided employment for over 40 people in Malaysia,
- (xiii) employed an entire village and brought wealth and economic activity into what had been a depressed backwater part of rural Malaysia,
- (xiv) enriched Malaysia's history and historical wealth and cultural heritage,
- (xv) 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,
- (xvi) 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, and
- (xvii) educated people in Malaysia by giving talks on the DIANA all over Malaysia to any organization that requested one.

The value, importance and benefit to Malaysia of MHS's activities cannot be underestimated and is demonstrated by the actions of the Government of Malaysia.

⁷ MHS provided the Malaysian Government with a complete photographic record of the survey, salvage, conservation and handling activities for their own education and promotional purposes.

The contract for the salvage of the DIANA is a state contract between MHS and the Government of Malaysia, and for a public purpose. The first page of the Contract expressly states: "Whereas the Works is for the sole purpose of archeological interest and the study of historical heritage."

Every Malaysian politician including the Prime Minister and Deputy Prime Minister wanted to associate himself with MHS's success, and press photos and declarations of these officials have been submitted to this Tribunal.

Christie's created a video of the DIANA salvage and aired it at venues around the world, increasing international awareness of Malaysia and promoting potential tourist interest. Malaysia was featured in the auction promotional material. Prior to the auction, to further promote the DIANA and Malaysia's celebrity, brand, and international interest in Malaysia, MHS arranged for a Malaysian cultural troupe to perform traditional Malaysian dances before a large and sophisticated audience of Christie's guests at a formal function in Amsterdam.

The Malaysian authorities withheld from auction and retained 650 of the finest pieces of the DIANA CARGO. The Malaysian Government purchased RM1 million (at the time about U.S. \$400,000.00) worth of DIANA CARGO at auction. The Malaysian Government's two acquisitions of the DIANA CARGO at auction made it possible for Malaysia to have a world-class national collection of Ching dynasty artifacts.

As further evidence of the importance of the DIANA project to Malaysia, 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.

The DIANA salvage is estimated to be the world's 6th most valuable in terms of the value of items recovered; and the world's 3rd most valuable in terms of the value of porcelain recovered. In this regard, solely in terms of the value of the items recovered, MHS's contribution may be small compared to the contributions of electrical utilities, oil exploration companies or highway builders, but it was the biggest within its industry, the historic shipwreck salvage industry in Malaysia, and that is the frame of reference within which MHS's contribution and commitment to the DIANA project, in terms of just the value of items recovered, is to be measured.

MHS published a 175-page book regarding the DIANA project, complete with photographs and illustrations, entitled, *The Diana Adventure*, 1995, authored by Mr. Dorian Ball. The publication of *The Diana Adventure* is a further contribution made by MHS which promotes and enriches Malaysia's history and patrimony.

For all of the foregoing reasons and facts, the salvage of the DIANA constitutes a significant contribution to the development of Malaysia, consistent with the holding of *Bayindir* as it relates to the definition of investment under Article 25(1) of the ICSID Convention.

CSOB

The *CSOB* Tribunal answered the question of whether the Slovak Republic's failure to cover certain losses under the Consolidation Agreement constituted investment within the meaning of Article 25(1) of the ICSID Convention. The *CSOB* Tribunal found that such an obligation and failure to fulfill the obligation, considered in isolation, was not an investment. In *CSOB*, the failure to cover losses under the Consolidation Agreement was related to a loan extended by Ceskoslovenska Obchodni Banka, A.S. ("Banka"), the Claimant. However, the loan was under the Loan Agreement and the obligation to cover losses was under the Consolidation Agreement.⁸ Banka argued that the loan in question was an investment and thus that the dispute was within ICSID's jurisdiction and the competence of the *CSOB* Tribunal.

The Slovak Republic rejected the view that Banka's loan was an investment and contended that the dispute or failure to cover losses did not arise directly out of the Loan Agreement. The Slovak Republic submitted that the dispute was concerned exclusively with the purported obligation of the Slovak Republic to cover the losses of the Slovak Collection Company.

Agreeing with the Tribunal in *Fedax*,⁹ the *CSOB* Tribunal stated that "an investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. According to the *CSOB* Tribunal, a dispute must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not be an investment under the ICSID Convention, provided the particular transaction forms an integral part of an overall operation that qualifies as an investment. *See*, *CSOB*, p. 275, ¶¶ 71.-72.

In *CSOB*, the Tribunal's decision with respect to the existence of an investment was determined by the question of whether there was activity which substantially contributed to a State's economic development.

In *CSOB*, the Tribunal found that the purpose of the Slovak Republic's obligation to cover losses was to allow obligations to Banka to be met under the relevant loan agreement.¹⁰ The *CSOB* Tribunal also determined that loans may contribute substantially to a State's economic development, and that ICSID Tribunals have affirmed their competence to deal with the merits of claims based on loan agreements.¹¹

The *CSOB* Tribunal found that the Slovak Republic's obligation to cover losses under the Consolidation Agreement was closely linked to and an integral part of a larger process, which

⁸ *CSOB*, p. 252, ¶¶ 1.-3.

⁹ *CSOB*, p. 275, ¶ 71.

¹⁰ *CSOB*, p. 276, ¶ 75.

¹¹ *CSOB*, p. 277, ¶ 76.

entailed Banka's banking activities in the Slovak Republic, including the extension of the loan in question, and that such activities constituted Banka's significant contribution to the economic development of the Slovak Republic. *CSOB*, p. 282, ¶ 88. The *CSOB* Tribunal, accordingly, decided that the dispute was within the jurisdiction of ICSID and the competence of the Tribunal.

The Criteria Applied by the CSOB Tribunal Supports a Finding of Investment in the Present Case

Similar to Banka in *CSOB*, MHS, *inter alia*, claims that Malaysia has failed to surrender all monies due to MHS as it is obligated to do under the Contract. Similar to the case in *CSOB*, such obligation and failure on the part of Malaysia while, in and of itself, not an investment, is clearly an integral part of the Contract, which (i) expressly and specifically provides for the surrender of such monies, and (ii) entailed and has resulted in MHS's significant contribution to the economic development of Malaysia, as explained above with respect to *Bayindir* and in previous submissions that MHS has made to this Tribunal.

Applying the law and principles which guided the decision in *CSOB*, this Tribunal must reject any argument that MHS's claim does not arise directly out of an investment within the meaning of Article 25 of the ICSID Convention. According to the *CSOB* Tribunal, a dispute must be deemed to arise directly out of an investment even when it is based on a transaction, in this case failure to surrender monies due to MHS, which, standing alone, would not be an investment under the ICSID Convention, provided the particular transaction or obligation forms an integral part of an overall operation that qualifies as an investment. As noted above under the discussion with respect to *Bayindir*, MHS's performance under the Contract has all the elements and hallmarks which qualify such performance as an investment within the meaning of Article 25 of the ICSID Convention, and Malaysia's obligation to surrender monies belonging to MHS is an integral part and provision of the Contract.

Mitchell

In *Mitchell*, the annulment proceedings related to an award rendered by an ICSID Tribunal in favor of Mr. Patrick Mitchell. There, the Democratic Republic of Congo (the "DRC") shut down the law firm of Mitchell & Associates in Congo (the "Firm"), seized the Firm's files and other property, and incarcerated the Firm's lawyers.

The DRC sought annulment of an ICSID award ("Award") on grounds that the Tribunal had manifestly exceeded its powers with respect to its jurisdiction in regard to the definition of investment, *i.e.*, that the original arbitration incorrectly found that an investment existed within the meaning of the ICSID Convention. The DRC maintained, in the original arbitration as well as in the annulment proceeding, that the activity of the Firm did not satisfy the objective requirements of an investment, given the fact such activity did not constitute a long-term operation nor was it materialized by a significant contribution of resources, and that it was not of such importance for the country's economy that it distinguished itself from an ordinary commercial transaction.

The *ad hoc* Committee focused on the content of the services provided by the Firm and found that the Award said nothing about the content of the services of the Firm that would justify qualifying the services as an investment.¹² The *ad hoc* Committee further stated that "as a legal consulting firm is a somewhat uncommon operation from the standpoint of investment, it is necessary for the contribution to the economic development or at least the interests of the State, in this case [the] DRC, to be somehow present in the operation."¹³ The Committee reasoned that qualifying the Firm as an investor and the services provided by it as an investment would be possible if the services contributed to the economic development or at least the interests of DRC. The Committee further reasoned that it was necessary for the Award to indicate that through his know-how, Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors.

The *ad hoc* Committee concluded that the Award failed to state reasons as to how the Firm's overall activities in the DRC met all the conditions or had all the characteristics required for investment within the meaning of Article 25(1) of the ICSID Convention to exist. The Committee concluded that the failure to state reasons mandated the annulment of the Award.

Although the Committee made no determination one way or the other with respect to whether the activities of the Firm were an investment within the meaning of Article 25(1) of the ICSID Convention, the Committee nevertheless articulated rules and principles by which such determinations should be guided.

According to the *ad hoc* Committee, based on ICSID case law, including *Salini*, and commentators, the characteristics or elements required for investment within the meaning of Article 25(1) of the ICSID Convention are:

1. the commitment of the investor, which may be financial or through work;
2. the duration of the project;
3. the economic risk entailed in the sense of uncertainty regarding its successful outcome; and
4. the contribution to the economic development of the host country.

The Committee noted that these elements are interdependent and that they are examined comprehensively

The *ad hoc* Committee, in contrast to several other ICSID tribunals, including the *CSOB* Tribunal, did not posit that the commitment of the investor be substantial or significant.

The *ad hoc* Committee noted that in several ICSID cases, the investor's commitment mainly consisted of its know-how.¹⁴ The *ad hoc* Committee also noted that in the *Salini* case, contribution to the host state was explicitly set as a criterion for an investment, and that the tribunals in *Salini* and *Fedax*, respectively, decided that the construction of a highway and transactions involving promissory notes issued by Venezuela involved a public interest.¹⁵

¹² *Mitchell*, p. 15, ¶ 38.

¹³ *Mitchell*, p. 15, ¶ 39.

¹⁴ *Mitchell*, p. 12, ¶ 27.

¹⁵ *Mitchell*, p. 13, ¶ 30.

The *ad hoc* Committee in *Mitchell* also found that in other ICSID cases, the necessary "contribution to the economic development of the host country" was covered by the very purpose of the contracts in question – all of which were State contracts and had an obvious and unquestioned impact on the development of the host State.¹⁶

Finally, the *ad hoc* Committee held:

that the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.

Mitchell, p. 14., ¶ 33.

The Criteria Applied by the Mitchell Committee Supports a Finding of Investment in the Present Case

The decision of the *ad hoc* Committee in *Mitchell* supports MHS's case. If this Tribunal follows the principles, law, and interpretations which were cited by the Committee in *Mitchell*, this Tribunal will find that MHS's made an investment in the DIANA project within the meaning of the UK/Malaysia BIT and the ICSID Convention.

As noted above, the *Mitchell* Committee cited *Salini* as the main source of guidance as to how to judge whether an investment exists within the meaning of Article 25(1) of the ICSID Convention. As explained with respect to *Bayindir* above, MHS satisfies all the criteria and possess all the elements of *Salini*. In order to qualify as an investment, the Committee also emphasized the need to demonstrate how commitments, contributions, services and activities contribute to the economic development or at least the interests of the host State, and how claimants had concretely assisted the host State, or how the operation contributed in one way or another to the economic development of the host State.

Unlike the facts in *Mitchell* where services were provided to and contracts for representation and advice were entered into with numerous private clients and not the DRC, MHS's services and activities under the Contract were specifically and exclusively provided to, and directly benefited, Malaysia and had a public purpose or interest. MHS's services and activities under the Contract concretely assisted Malaysia and contributed to its economic as well as cultural development. As detailed above, MHS's successful completion of the salvage of the DIANA

¹⁶ *Id.*.

yielded income and valuable artifacts for Malaysia and added to the wealth of Malaysia's patrimony.

Additionally and more importantly, the successful salvage of the DIANA and the sale of its cargo in a respected international auction house, which was arranged and facilitated by MHS, provided Malaysia with free favorable international publicity, raising Malaysia's international profile and generating highly-desired attention for Malaysia as an attractive location or destination for marine salvage, history, treasure, archeology, and revenue and employment generating tourism. The Malaysian Government clearly considered the cultural and political (but less easily quantified) benefits of a successful historic shipwreck salvage to be far more important and valuable than the easily quantified financial/commercial results. These cultural and political benefits consisted of opportunities for Malaysian politicians to be associated with success, increased national pride, increased awareness and knowledge of Malaysian history, an increased inventory of and interest in historic artifacts, as well as increased international awareness of and the promotion for Malaysia on the world stage.

Perhaps most importantly, as detailed above, MHS's transfer of know-how to and its education of Malaysian officials also gave Malaysia an independent marine salvage capability for which Malaysia did not have to pay.

As detailed in the comments with respect to *Bayindir* above, and considering the foregoing comments with respect to *Mitchell*, MHS's activities clearly meet the standards of the *Salini* test with respect to contribution and commitment to the economic development of the host State, and more easily meet the lower standard of *Mitchell* which modified *Salini* and some of its progeny by not requiring that commitments be sizable or successful. MHS's commitments were sizeable, significant and successful.

In the context of *Mitchell*, it bears further emphasis that the contract for the salvage of the DIANA, (as referred to above, the Contract), was a state contract between MHS and the Government of Malaysia, and it was for a public purpose and interest. The first page of the Contract expressly stated: "Whereas the Works is for the sole purpose of archeological interest and the study of historical heritage."

Consistent with *Mitchell*, the "contribution to the economic development of Malaysia" test is met in this case also because the Contract is a state contract, the Contract had a public purpose, and the Contract had an obvious and unquestioned impact on the development of Malaysia, and also most definitely contributed directly and indirectly to the economic development of Malaysia.

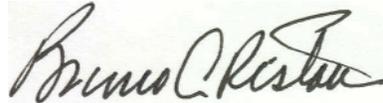
For the foregoing reasons and the reasons stated in all submissions that MHS has made to this Tribunal, this Tribunal should conclude that MHS has made an investment within the meaning of

Article 25(1) of the ICSID Convention and, consistent with the law guiding the decision in *Mitchell*, state the reasons therefor in its award confirming that this case falls within ICSID's jurisdiction.

Respectfully submitted,



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Dated: December 17, 2006