

*Date of dispatch to the parties: March 15, 2002*

## AWARD

RENDERED BY ICSID ARBITRAL TRIBUNAL

IN THE CASE OF

MIHALY INTERNATIONAL CORPORATION

V.

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

(ICSID CASE NO. ARB/00/2)

THE TRIBUNAL COMPOSED OF

Sompong SUCHARITKUL	President
Hon. Andrew ROGERS	Member
and David SURATGAR	Member
Alejandro A. ESCOBAR	Secretary

## I. PROCEDURAL HISTORY

### A. REQUEST FOR ARBITRATION

1. On 29 July 1999, the Centre received a request for arbitration dated 22 July 1999 (the request) from Mihaly International Corporation (Mihaly USA or the Claimant), a company established under the laws of the United States of America, against the Democratic Socialist Republic of Sri Lanka (Sri Lanka or the Respondent). The request invoked the provisions of the 20 September 1991 Treaty between the United States of America and Sri Lanka concerning Encouragement and Reciprocal Protection of Investment (the US - Sri Lanka BIT). The request was submitted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Both Sri Lanka and the United States of America are Contracting States to the ICSID Convention.

2. On 21 December 1999, further information having been requested by the Centre, Mihaly USA submitted a supplemental information concerning its request.

### B. REGISTRATION OF REQUEST

3. On 11 January 2000, the Secretary-General of ICSID registered the request and notified the Parties of the registration in accordance with Article 36(3) of the ICSID Convention.

### C. APPOINTMENT OF ARBITRATORS

4. Following exchanges of proposals between the Parties, on 6 April 2000 the Respondent chose the formula set forth in Article 37(2)(b) of the Convention regarding the number of arbitrators and the method of their appointment. Accordingly, on 7 April 2000, the Centre notified the Parties that the Tribunal was to consist of three arbitrators, one appointed by each party and the third arbitrator, who was to be President of the Tribunal, to be appointed by agreement of the Parties. The Claimant appointed Mr. David SURATGAR, a British national, as an arbitrator. The Respondent appointed the Hon. Andrew J. ROGERS, Q.C., an Australian national, as an arbitrator. The Parties, by agreement, appointed Professor Sompong SUCHARITKUL, a national of Thailand, as the arbitrator to serve as President of the Tribunal. By letter of 5 June 2000, the Acting

Secretary-General of ICSID notified the Parties that all the arbitrators had accepted their appointment and that the Arbitral Tribunal was therefore deemed to have been constituted, and the proceedings deemed to have begun, on that date.

#### **D. FIRST SESSION OF THE TRIBUNAL WITH THE PARTIES**

5. On 19 July 2000, the Tribunal held its first session with the Parties in London, United Kingdom. At the first session, the Respondent confirmed that it was raising objections to jurisdiction. Following consultations between the Tribunal and the Parties, it was agreed that the Respondent would submit a written statement of its objections to jurisdiction. The Claimant would then submit a memorial on jurisdiction with a statement of relevant facts, to be followed by the submission by the Respondent of a counter-memorial on jurisdiction, a reply by the Claimant and a rejoinder by the Respondent.

#### **E. EXCHANGE OF WRITTEN PLEADINGS ON OBJECTIONS TO THE JURISDICTION**

6. In due course, following some adjustment of the original schedule, the Claimant's memorial on the objections to jurisdiction was submitted on 16 November 2000; the Respondent's counter-memorial on jurisdiction was submitted on 16 February 2000; the Claimant's reply was submitted on 28 February 2001; and the Respondent's rejoinder on jurisdiction was submitted on 28 March 2001. In addition, the Claimant submitted without objection, on 9 March 2001, supplementary documentation inadvertently omitted from its memorial on jurisdiction.

#### **F. HEARING ON JURISDICTION**

7. As has been agreed at the Tribunal's first session, the Tribunal held a hearing on jurisdiction in Washington, D.C. on 30 April and 1 May 2001. During the hearing, both Parties submitted demonstrative exhibits in support of their respective presentations to the Tribunal. In addition, the Claimant submitted a memorandum on the law of the State of California, USA, applicable to partnerships. At the hearing, the following appearances were made on behalf of the Parties. Appearing on behalf of the Claimant were: Mr. Brian T. BECK, Mr. David R. HAIGH, Q.C., Mr. Eugene B.

MIHALY, Mr. Michael ROBINSON, Q.C. and Mr. John H. WALKER. Appearing on behalf of the Respondent were: Mr. Paul D. FRIEDLAND, Esq., Ms. Siranthani GOPALLAWA, Mr. Robert N. HORNICK, Esq., Mr. Saleem MARSOOF, Mr. Arjuna OBEYSEKERE, Mr. A. Rohan PERERA and Mr. Timothy N. TANNER, Esq.

#### G. EXCHANGE OF POST-HEARING SUPPLEMENTAL WRITTEN PLEADINGS

8. Under directions given by the Tribunal at the hearing on jurisdiction, the Claimant submitted, on 8 May 2001, a supplemental memorandum on the California law of partnerships, the Respondent submitted, on 18 May 2001, its observations on the memoranda on the California law of partnerships submitted by the Claimant, and the Claimant submitted, also on 18 May 2001, a list of references to the evidentiary record in connection with the role of Mihaly USA in the events leading up to the dispute. Also under directions given by the Tribunal at the hearing on jurisdiction, both Parties submitted, on 18 May 2001, their respective statements on the costs incurred by each of them during this stage of the proceeding.

9. On 21 May 2001, the Respondent submitted an objection to the Claimant's above-mentioned list of references to the evidentiary record. On 1 June 2001, the Claimant submitted, by fax, a post-hearing rejoinder to the Respondent's 18 May observations on the memoranda of law, and the Respondent's 21 May objection to the list of references.

### II. OBJECTIONS TO THE JURISDICTION

10. Sri Lanka raised two main objections to the jurisdiction of the Centre as well as that of the Tribunal. For all practical purposes, these objections could be characterized as follows:

- A. OBJECTION TO THE JURISDICTION *RATIONE PERSONAE*;  
and
- B. OBJECTION TO THE JURISDICTION *RATIONE MATERIAE*.

The Tribunal will examine each of these objections in the light of the contentions of the Parties and thereupon will also provide its own analysis and findings on each of these objections to the jurisdiction.

## A. JURISDICTION *RATIONE PERSONAE*

### (1) *NATURE OF SRI LANKA'S OBJECTION RATIONE PERSONAE*

11. SRI LANKA described the case before the Tribunal as “*a claim by a Canadian Company, allegedly assigned to this US Claimant but without Sri Lanka’s consent, for reimbursement of expenditures made pursuing a possible investment in a proposed power project in Sri Lanka that never happened*”. (Respondent’s Counter Memorial on Jurisdiction, paragraph 1)

12. In other words, SRI LANKA alleged that the true and undisguised nationality of the claim in this case as being Canadian. Hence the claim must be dismissed for lack of jurisdiction since Canada is not a party to the ICSID Convention. It follows that the Centre is without jurisdiction to entertain a claim on behalf of a Canadian corporation although filed by a United States corporation. The claim contains an inherent defect, according to Sri Lanka, in that the nationality requirement under Article 25(2) of the ICSID Convention is not satisfied.

### (2) *CONTENTIONS OF THE PARTIES*

13. THE CLAIMANT maintained that it is known by name as Mihaly International Corporation organized under the laws of California in the United States and as such is fully entitled to the protection under Article 25(2) of the ICSID Convention, and that Mihaly International Corporation (USA) *eo nomine* could initiate the proceedings in its own name as well as on behalf of its partner, Mihaly International Corporation organized under the laws of Ontario, Canada. The Claimant based its contentions on two legal theories, namely, partnership and assignment.

14. (i) PARTNERSHIP: the Claimant advanced the theory that under the laws of California where the Claimant was incorporated, the partnership formed between the Claimant and its Canadian counterpart, Mihaly International Corporation organized under the laws of Ontario, Canada, Mihaly International Corporation (USA), the Claimant, was empowered to file a claim on its own behalf as well as on behalf of its other partner, the Canadian counterpart.

15. (ii) ASSIGNMENT: Mihaly International Corporation (USA) further argued that it is the lawful assignee of all the rights, interests, and

claims of its Canadian partner, Mihaly International Corporation (Canada), and that under the assignment instrument, the Claimant is authorized to bring a claim for all the rights and interests that Mihaly International Corporation (Canada) had against the Respondent. In the Claimant's view, this assignment, which is objectively valid and is recognized in Ontario as well as in California, together with the existence of an international partnership between the Claimant and its Canadian counterpart, provide sufficient legal ground for the Claimant to file a claim which is the subject-matter of the current dispute before the Tribunal.

16. (b) THE RESPONDENT rejected the linkages between the Claimant, Mihaly International Corporation (USA) and its alleged partner, Mihaly International Corporation (Canada), both

- (i) on the theory of partnership for lack of evidence; and
- (ii) on the theory of assignment on the ground that the personal nature of the transactions and negotiations between Mihaly (Canada) and Sri Lanka precluded any possibility of a valid assignment of any claim of rights without the consent of Sri Lanka to Mihaly (USA), the Claimant, which is not privy either to the negotiations or to any agreements with Sri Lanka.

17. In other words, Sri Lanka contended that the Claimant, Mihaly (USA), had no standing before the Tribunal, neither by reason of its partnership with Mihaly (Canada), nor in its capacity as an undisclosed assignee. Sri Lanka denied any awareness of its ever dealing with Mihaly (USA) at any given stage of the negotiations or in any part of the arrangements made with Sri Lanka, let alone its consent, in writing, to submit the dispute, if any, to ICSID Arbitration.

### (3) ANALYSIS AND FINDINGS OF THE TRIBUNAL

18. Having examined the contentions of the Parties, and having heard further precision in the oral arguments presented by the Parties at the Hearing on Jurisdiction on 30 April and 1 May 2001, the Tribunal will now present its own analysis and its own findings on the relevant facts and the pertinent rules of law which will guide the Tribunal to its logical conclusions.

19. The Tribunal maintains that the jurisdiction of the Centre for Settlement of Investment Disputes (ICSID) and of this Tribunal is based

on the ICSID Convention and the rules of general international law. It does not operate under any national law in particular, and certainly not under the law of the State of California or the law of the Province of Ontario.

20. The nationality requirement of a claim before an ICSID Tribunal has in each case to be satisfied before an ICSID proceeding can be initiated or even registered.

21. Regardless of the Parties' subsequent contentions, the request for arbitration submitted by Mihaly (USA) did not appear to contain any information on the basis of which the Secretary-General of ICSID could find the request to be manifestly outside the Centre's jurisdiction, hence the registration of the case under Article 36 of the Convention and the commencement of the proceedings.

22. It was common ground between the Parties that the suggested partnership between Mihaly (USA) and Mihaly (Canada) which did not have a separate juridical personality of its own distinct from its members, neither acquired dual or joint nationality, nor was any of the partners divested of its original US or Canadian nationality. The existence of an international partnership, wherever and however formed, could neither add to, nor subtract from, the capacity of the Claimant, Mihaly (USA), to file a claim against the Respondent for whatever rights or interests it may be able to substantiate on the merits in connection with the proposed power project in Sri Lanka, upon fulfillment of the other requirements of ICSID jurisdiction. The fact remains undisputed that the designated Claimant in the case at bar is unmistakably Mihaly (USA) *eo nomine* and not the Mihaly International or Binational Partnership (USA and Canada).

23. Under Articles 34, 35 and 36 of the Vienna Convention on the Law of Treaties 1969 (United Nations, Treaty Series, Vol. 1155, p. 331), *pacta tertiis nec nocent nec prosunt*. Treaties neither harm nor benefit non-Parties. The ICSID Convention, to which Canada is not a Party, could not be invoked by Canada, nor by a national or company of Canada, such as Mihaly (Canada). This principle was admitted by the Parties at the Hearing.

24. It follows that as neither Canada nor Mihaly (Canada) could bring any claim under the ICSID Convention, whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been

improved by the process of assignment with or without, and especially without, the express consent of Sri Lanka, on the ground that *nemo dat quod non habet* or *nemo potiore potest transfere quam ipse habet*. That is, no one could transfer a better title than what he really has. Thus, if Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)'s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected vis-à-vis ICSID by its assignment to Mihaly (USA). To allow such an assignment to operate in favour of Mihaly (Canada) would defeat the object and purpose of the ICSID Convention and the sanctity of the privity of international agreements not intended to create rights and obligations for non-Parties. Accordingly, a Canadian claim which was not recoverable, nor compensable or indeed capable of being invoked before ICSID could not have been admissible or able to be entertained under the guise of its assignment to the US Claimant. A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action as shares in the stock-exchange market or other types of negotiable instruments, such as promissory notes or letters of credit. The rights of shareholders or entitlements of negotiable instruments holders are given different types of protection which are not an issue in this case before the Tribunal. This finding is without prejudice to the right of Mihaly (Canada) to pursue its claims, if any, before another otherwise competent forum.

25. This proposition is confirmed by ICSID long-standing practice as is amply demonstrated by the decision in *Klöckner v. Cameroon* (ICSID Case No. ARB/81/2), where all the three Klöckner Corporations (Germany: Klöckner Industrie-Anlagen GmbH; Belgium: Klöckner Belge S.A.; and Netherlands: Klöckner Handelsmaatschappij B.V.) were named as co-claimants. Besides, ICSID case-law appears settled in the sense that a US company, such as the American Manufacturing and Trading Company in *AMT v. Zaïre* (ICSID Case No ARB/93/1) could not and did not attempt to recover more than the shares represented by its US shareholders. This does not preclude a State Party to the ICSID Convention from expressly consenting to include under ICSID protection an investment contract it concludes with an international consortium.

26. The Tribunal finds, nonetheless, that Mihaly International Corporation (USA) is entitled to file a claim in its own name against Sri Lanka in respect of the rights and interests it may be able subsequently to establish in the proposed power project.

27. It must be noted, however, that this finding does not *per se* create jurisdiction of the Tribunal. It merely necessitates further proof of the existence of jurisdiction *ratione materiae*. Accordingly, the Tribunal is required to examine the second objection to the jurisdiction *ratione materiae*, even after the finding that the Claimant, Mihaly (USA), may have *locus standi* before the Tribunal, which may find itself without jurisdiction to entertain the subject-matter of the dispute presented to it for determination.

## B. JURISDICTION *RATIONE MATERIAE*

### (1) *NATURE OF THE OBJECTION RATIONE MATERIAE*

28. Throughout its written and oral pleadings, the Claimant relied on the provisions of Article 25 of the ICSID Convention as the basis of the jurisdiction of the Tribunal and of the International Centre for the Settlement of Investment Disputes. In particular, the Claimant cited paragraph (1) which reads:

*“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”*

29. The phrase “*between a Contracting State and a national of another Contracting State*” refers to jurisdiction *ratione personae*, already discussed in the preceding paragraphs 11-27. The opening phrase which describes the coverage and extent of the jurisdiction of the Centre explicitly refers to any legal dispute arising directly out of an investment. This phrase contains the constitutive elements of what may be regarded as the basis for subject-matter jurisdiction or jurisdiction *ratione materiae*.

30. To succeed on the issue of jurisdiction, the Claimant must establish the existence of jurisdiction of the Centre and of the Tribunal both *ratione personae* and *ratione materiae*.

(2) *CONTENTIONS OF THE PARTIES*

31. For the objection to the jurisdiction *ratione materiae*, the Parties presented opposing arguments on each of the elements that establish the legal basis for jurisdiction under Article 25(l) of the ICSID Convention, namely,

- (i) that there was a dispute;
- (ii) that the dispute was a legal one;
- (iii) that the dispute arises directly and not indirectly out of an investment; and
- (iv) that there was an investment out of which a legal dispute has directly arisen.

32. The most crucial and controversial contentions of the Parties were concentrated upon the existence *vel non* of an “investment” for the purpose of Article 25(l) to found the jurisdiction of ICSID Centre and the Tribunal. A *fortiorissime*, without proof of an “investment” under Article 25(l), neither Party need to argue further, for without such an “investment”, there can be no dispute, legal or otherwise, arising directly or indirectly out of it, which could be submitted to the jurisdiction of the Centre and the Tribunal.

33. Neither Party asserted that the ICSID Convention contains any precise *a priori* definition of “investment”. Rather the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.

(a) *Expert Opinions*

34. The Parties did not cite any practice of States to indicate the acceptance of an extended definition of “investment” to include and cover also pre-investment expenditures. The Claimant nevertheless cited the opinion of Mr Per Ljung as saying that “*The expenditures during the development phase typically amount to 2 to 4 percent of the total cost*” and wondered if the expenditures during the development phase should not be considered as constituting investment in the host country. The Claimant contended that the development phase activities are as essential for the successful commercial operation of the BOT project as the physical construction of a plant, and that it is standard practice accepted by host

governments, lenders and other equity investment to include the sponsors' development expenditures in the investment cost.

35. The Respondent did not reject the possibility for accounting purposes of including the sponsors' development expenditures in the investment cost, provided always that there was finally an agreement or consent of the host government to receive or admit the investment in question.

*(b) The LOI, the LOA and the LOE*

36. The Claimant contended that without a precise definition of "investment", it was appropriate to give the term a broad interpretation to encourage a freer flow of capital into developing countries. It submitted that otherwise the free flow of capital investment to developing countries would subside. The Respondent, for its part, contended that developing countries would find it difficult to adhere to the Convention, if, by means of a broad interpretation, the Tribunal were to hold the expenditures in the present case to be an "investment" in the absence of their explicit consent. The Claimant cited three documents as evidence of agreement or authorization or awareness, if not acquiescence and approval, on the part of Sri Lanka for the Claimant to invest in the proposed project. These were: the LOI, the LOA and the LOE.

*(i) The Letter of Intent (LOI)*

37. The Claimant contended that, in the particular circumstance of this case, the date of the Letter of Intent, 15 February 1993, was the date from which interest of the Claimant in being considered for the project was transformed into an "investment". It is the letters exchanged between the Parties that determine whether or not the money, indubitably expended by the Claimant, constitutes an investment within the meaning of the Convention.

38. The Government of Sri Lanka determined that the supply of electricity within the Republic should be improved by the erection of a new power generation facility. It wished this facility to be constructed and operated by private enterprise. Accordingly, in 1992 it called for expressions of interest on a build own transfer (BOT) basis. The Claimant was one of a number of consortia of international investors, financiers and utilities

suppliers to develop, on an exclusive basis, a 300 MW thermal power station on a BOT basis, with the objective of supplying power to the Ceylon Electricity Board (CEB) electrical transmission grid. The expression of interest itself was obviously the product of considerable work and expenditure of money on the part of the Claimant.

39. Originally some 25 groups expressed interest in the project. Of these, five were invited to enter into negotiations, and from that group of five, the Claimant was selected as a recipient of the Letter of Intent.

40. Negotiations ensued and resulted in the issue to the Claimant of a Letter of Intent dated 15 February 1993. In its guidelines for BOT projects published at the same time as the Letter of Intent, the Respondent described the function of such documents. Paragraph 8.2 of the guidelines stated that a Letter of Intent confers “. . . some *degree of exclusivity in relation to a project for a period of time long enough to enable the sponsor to finalize the project proposal.*” The Letter of Intent determines the period of exclusivity, spells out any changes to the original proposal that must be made in order to remain in compliance, and defines what technical inputs are required in order to reach project finalization and negotiation.

41. The Letter of Intent stated that the Government accepted a number of principles on the basis of which matters should proceed. Negotiations were to proceed in an orderly fashion for the project leading to the signing of a contract by the end of the third quarter of 1993. The estimated cost of the project was just under US\$400 million. The document pointed out that “the project and contract details are subject to Cabinet approval.” Most importantly it specified that “*this Letter of Intent constitutes a Statement of Intention and does not constitute an obligation binding on any party.*” (emphasis added) It went on “*however, the Government shall use its best efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper or advisable under applicable laws and regulations to consummate the transactions contemplated hereby as promptly as practicable.*”

42. Following upon the issue of the Letter of Intent, there were further extensive negotiations and indeed the parties had arrived at Draft 5 of the Power Purchase Agreement. Nonetheless, the exclusivity period of six months was coming to an end.

(ii) *The Letter of Agreement (LOA)*

43. Thereupon, a document entitled “Letter of Agreement”, dated 22 September 1993, was executed.

44. The Letter of Agreement stated in part that “*in furtherance of our Letter of Intent to you February 15, 1993, which was issued as a result of your proposal dated 31 December 1992 and the ongoing discussion and negotiations that have taken place since then among your representatives, representatives of the Secretariat for Infrastructure Development & Investment and the Ceylon Electricity Board [CEB], we are pleased to confirm that we are satisfied with the degree of progress that has been made in completing the requirements set forth in the Letter of Intent and hereby issue this Letter of Agreement for the purpose of this Letter of Agreement subject to contract, understanding has been reached between the parties on the following matters.*” One was the understanding on matters such as a take or pay obligation of 70 percent of the rated capacity of the plant, at price of US\$0.06 per kilo watt hour, as of 31 December 1992, with escalation up to the date of plant operations as per the escalation formula in the contract.

45. It was apparent that considerable further sums of money and effort were expended in planning the financial and economic modeling so as to arrive at the basis of understanding mentioned in the Letter. It was significant to note that the term of the operation had moved from 15 years to 20 years, which in itself would have had great impact on the modelling and the cost of it. The document concludes “*this Letter of Agreement is conditional upon CEB agreeing on the contract with SAEC [South Asia Electricity Company, a company formed in Sri Lanka to negotiate and manage the distribution of the supplies of electricity], and all other associated agreement to facilitate the completion of arrangements for your financing the project with various lenders from whom commitments/expressions of interest have been obtained and presented to us so that a financial closing can occur on or about February 15, 1994.*” Once again the Letter specifically recognized that there was no contractual obligations on any party.

(iii) *Letter of Extension (LOE)*

46. The parties entered into a Letter of Extension dated 20 July 1994 in response to a request by the Claimant for reinstatement of exclusivity on the project in the light of the fact that financial closing on 15 February, as

specified in the Letter of Agreement dated 22 September, had not eventuated. The Letter of Extension confirmed *“that exclusivity granted for the negotiations with yourself is extended subject to the conditions laid down hereunder.”* The Letter of Extension imposed the number of obligations on the Claimant, one of them was that if the Claimant failed to achieve any of the milestones by the due date, the Letter of Extension should automatically cease to be operative. There was also provision for an extension of the period of the exclusivity provided for by the Letter of Extension and it again concluded *“this Letter of Extension does not constitute an obligation binding on any party. However, the Government shall use its best efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary or proper or advisable under applicable laws and regulations in Sri Lanka to consummate the transactions contemplated hereby as promptly as practicable.”* (emphasis added)

47. Ultimately, there was never any contract entered into between the Claimant and the Respondent for the building, ownership and operation of the power station.

48. It is in this factual setting that the Tribunal has been asked to consider whether or not, the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted “investment” for the purpose of the Convention. The Tribunal has not been asked to and cannot consider in a vacuum whether or not in other circumstances expenditure of moneys might constitute an “investment”. A crucial and essential feature of what occurred between the Claimant and the Respondent in this case was that first, the Respondent took great care in the documentation relied upon by the Claimant to point out that none of the documents, in conferring exclusivity upon the Claimant, created a contractual obligation for the building, ownership and operation of the power station. Second, the grant of exclusivity never matured into a contract. To put it rhetorically, what else could the Respondent have said to exclude any obligations which might otherwise have attached to interpret the expenditure of the moneys as an admitted investment? The operation of SAEC was contingent upon the final conclusion of the contract with Sri Lanka, thus the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka.

49. The Tribunal is not unmindful of the need to adapt the Convention to changes in the form of cooperation between investors and host

States. However, these changes have to be considered in the context of the specific obligations which the parties respectively assume in the particular case. The Tribunal repeats that, in other circumstances, similar expenditure may perhaps be described as an investment.

50. Again, if the negotiations during the period of exclusivity, or for that matter, without exclusivity, had come to fruition, it may well have been the case that the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby become part of the investment. By capitalising expenses incurred during the negotiation phase, the parties in a sense may retrospectively sweep those costs within the umbrella of an investment.

51. It is an undoubted feature of modern day commercial activity that huge sums of money may need to be expended in the process of preparing the stage for a final contract. However, the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small. Ultimately, it is always a matter for the parties to determine at what point in their negotiations they wish to engage the provisions of the Convention by entering into an investment. Specifically, the Parties could have agreed that the formation of a South Asia Electricity Company was to be treated as the starting point of the admitted investment, engaging the responsibility of the Respondent for the Claimant's failure to complete other arrangements to achieve the milestones by the due date mentioned in the Letter of Extension. The facts of the case point to the opposite conclusion. The Respondent clearly signalled, in the various documents which are relied upon by the Claimant, that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made. It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, these remedies do not arise because an investment had been made, but rather because the requirements of proper conduct in relation to negotiation for an investment may have been breached. That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention.

(c) *The BIT*

52. The term “investment” is found not only in Article 25 of the Convention as an objective requirement, but also in the BIT as part of the consent of the disputing Parties. The Respondent contended in its Counter Memorial on Jurisdiction, paragraph 65, that the only investment disputes for which a priori consent can exist are those covered by the definition set forth in the United States–Sri Lanka BIT. Sri Lanka maintained that none of the documents hitherto considered (namely, the Letter of Intent, the Letter of Agreement or the Letter of Extension) constituted an “investment agreement” between a US company and Sri Lanka as envisaged in clause (a) of Article VI (1) of the BIT, or “investment authorization granted by Sri Lanka’s foreign investment authority” under clause (b). Therefore the criteria of US–Sri Lanka BIT, Article VI (1)(a) and (b), have not been met, and there is no consent on the part of Sri Lanka. Sri Lanka’s consent is not otherwise created by the purported assignment of claim to the Claimant.

53. The Claimant argued that consent to jurisdiction can be founded in Article VI(1)(c) of the United States–Sri Lanka BIT because there has been an alleged breach of a right conferred or created by this Treaty with respect to an “investment”. The alleged breach in this case, the Claimant added, derives in particular from Article II(2) of the BIT, including the right for “investment” to be accorded “*fair and equitable treatment*” as well as “*full protection and security*” and treatment which in no case shall be “*less than required by international law.*” The Claimant also asserted that academic commentary supports a finding in favour of ICSID jurisdiction on this basis.

54. The Claimant did not advance any argument based on the provisions of Article I of the BIT in connection with the incorporation in Sri Lanka of South Asian Electricity Corporation (Private) Limited, an office company waiting to be activated. In the circumstances, the Tribunal considers it inappropriate to develop that point.

(3) *CONCLUSIONS OF THE TRIBUNAL*

55. The Tribunal notes that the jurisdiction of the Centre, and consequently of the Tribunal established thereunder, is based on the consent of the Parties to the dispute that have previously agreed to submit the dispute in question to the jurisdiction of ICSID and this Tribunal.

56. The Tribunal further observes that the question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined *proprio motu*, i.e., without objection being raised by the Party. *A fortiori*, since the Respondent has raised preliminary objections to the jurisdiction, the existence of consent to the jurisdiction must be closely examined.

57. In the case under review, the fact of the registration of this case as ICSID Case No ARB/00/2 constituted an indication that, on the basis of the information contained in the request for arbitration, the dispute was not manifestly outside the jurisdiction of the Centre. Such registration is naturally without prejudice to the further examination of arguments of evidence presented by the Parties on issues of jurisdiction. The Tribunal is competent to determine the limits of its own competence.

58. In the absence of a generally accepted definition of investment for the purpose of the ICSID Convention, the Tribunal must examine the current and past practice of ICSID and the practice of States as evidenced in multilateral and bilateral treaties and agreements binding on States, notably the United States–Sri Lanka BIT. It is for the Tribunal to determine the meaning or definition of “investment” for this purpose as a question of law. Opinions of experts on the theory and practice of multinational corporations are not to be identified with the teachings of the most highly qualified publicists of the various nations, which as such constitute subsidiary means for the determination of rules of law. Only subject to Article 59 of the Statute of the International Court of Justice are judicial decisions to be considered as such subsidiary sources of law.

59. The Tribunal concludes in regard to the three Letters of Intent, of Agreement and of Extension successively issued by and on behalf of the Government of Sri Lanka in the course of 1993 and 1994 that none of these Letters contains any binding obligation either on Sri Lanka or on the Claimant. As the Tribunal has already stated, in the circumstances of this case, they are not to be treated in any way as signifying acceptance by the host State, Sri Lanka, of such expenditures as constituting an investment within the sense of the Convention. There is no evidence which could

contradict the contingent and non-binding character of the three Letters of Intent, of Agreement and of Extension.

60. The Tribunal is of the view that *de lege ferenda* the sources of international law on the extended meaning or definition of investment will have to be found in conventional law or in customary law. The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as “investment” in the absence of the consent of the host State to the implementation of the project. It should be observed that while the US-Sri Lanka BIT contains provisions regarding the definition of investment and conditions for its admission, they recognize the Parties’ prerogative in this respect.

61. The Tribunal is consequently unable to accept as a valid denomination of “investment”, the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment. The only reference made by the Claimant to the BIT, in particular, Article II(2), is not to any extended definition of investment but to existing “investment” or investment *in esse* or in being, which is to be accorded “fair and equitable treatment”. In the case under review, the Tribunal finds that the Claimant has not provided evidence of such an investment in being which qualifies for “full protection and security.” Failing to provide evidence of admission of such an investment, the Claimant’s request for initiation of a proceeding to settle an investment dispute is, to say the least, premature. However, in finding the request to be unfounded, the Tribunal does not say that it is frivolous, vexatious or malicious. Nor does the Tribunal’s determination that the subject-matter of the dispute, if any, falls outside the jurisdiction of ICSID and beyond the competence of the Tribunal preclude whatever recourse the Claimant may have at its disposal to pursue its claim arising out of a commercial, financial or other types of dispute. The Tribunal’s conclusions are declared to be without prejudice to any rights of action which may be available before other instances, national or international, with the consent of the Parties, if required.

## III. DECISION

62. For reasons specified in the foregoing paragraphs, the Tribunal decides with unanimity:

- (a) With regard to the preliminary objection *ratione personae* that, subject to paragraph b) below, the objection must be dismissed;
- (b) With regard to the preliminary objection *ratione materiae* that the objection is sustained in the absence of any proof of admission of an “investment” in being out of which a legal dispute could possibly have arisen; and
- (c) Accordingly, that the Tribunal is without jurisdiction to entertain the question submitted to it either in part or in whole.

63. The Tribunal further decides that

- (a) The costs of the proceedings including the fees and expenses of the Arbitrators and the Secretariat shall be shared by the Parties in equal portion; and that
- (b) Each Party shall bear its own costs and expenses in respect of legal fees for counsels and their respective costs for the preparation of the written and the oral proceedings.

*Sompong SUCHARITKUL*  
*President*

*Hon. Andrew ROGERS*  
*Member*

*David SURATGAR*  
*Member*

Attached to this Award is an individual opinion by Mr. David Suratgar.