

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

**MALAYSIAN HISTORICAL SALVORS SDN, BHD  
(CLAIMANT)**

**v**

**THE GOVERNMENT OF MALAYSIA  
(RESPONDENT)**

(ICSID Case No. ARB/05/10)

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**AWARD ON JURISDICTION**

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*Tribunal*

Mr. Michael Hwang, S.C.  
(Sole Arbitrator)

*Secretary of the Tribunal*

Mr. Ucheora Onwuamaegbu

*Representing the Claimant:*

Mr. Hal C. Eren  
Mr. Bruno A. Ristau  
The Eren Law Firm  
Washington, D.C.

*Representing the Respondent:*

The Right Honourable Tan Sri Abdul Gani Patail  
Dato' Umi Kalthum Bte Abd. Majid  
Dato' Mary Lim Thiam Suan  
Mr. Kamaludin Bin Md. Said  
Mr. Mohammad Al-Saifi Bin Haji Hashim  
Mrs. Chandra Devi a/p Letchumanan  
Mr. Md. Taufik Bin Md. Yusoff  
Mrs. Mahiran Bte Md. Isa  
Mrs. Aliza Bte Sulaiman  
Attorney-General's Chambers of Malaysia

Dato' K.C. Vohrah  
Lee Hishamuddin Allen & Gledhill  
Kuala Lumpur, Malaysia

Dato' Cecil Abraham  
Mr. Sunil Abraham  
Shearn Delamore  
Kuala Lumpur, Malaysia

Date of Dispatch to the Parties: May 17, 2007

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## **I. RELEVANT FACTS REGARDING JURISDICTION**

1. The factual background of this arbitration is being summarized hereunder to the extent necessary to rule on the jurisdictional issues arising out of the Respondent's objections to jurisdiction.

### **A. The Parties**

#### **(i) The Claimant**

2. The Claimant is Malaysian Historical Salvors Sdn Bhd, a company incorporated under the laws of Malaysia.

3. The Claimant is a marine salvage company.

4. The Claimant is represented by Mr. Hal C. Eren and Mr. Bruno A. Ristau of the Eren Law Firm, Washington, D.C., U.S.A.

#### **(ii) The Respondent**

5. The Respondent is the Government of Malaysia.

6. The Respondent is represented by Tan Sri Abdul Gani Patail, Dato' Umi Kalthum Bte Abd. Majid, Dato' Mary Lim Thiam Suan, Mr. Kamaludin Bin Md. Said, Mrs. Mahiran Bte Md Isa, Mr. Mohammad Al-Saifi Bin Haji Hashim, Mrs. Chandra Devi a/p Letchumanan, Mr. Md. Taufik Bin Md. Yusoff and Mrs. Aliza Bte Sulaiman, all of the Attorney General's Chambers, Putrajaya, Malaysia. The Respondent is also represented by co-counsel Dato' K.C. Vohrah of Lee Hishamuddin Allen & Gledhill, Kuala Lumpur, Malaysia and Dato' Cecil Abraham (assisted by Mr. Sunil Abraham) of Shearn Delamore, Kuala Lumpur, Malaysia.

## **B. The Background Facts**

### **(i) The Contract**

7. The Claimant entered into a contract dated August 3, 1991 with the Respondent which called for, *inter alia*, the Claimant's location and salvage of the cargo of the "DIANA," a British vessel that sank off the coast of Malacca in 1817 (the "**Contract**").

8. Under the Contract, the Claimant was required, among other things, to utilize its expertise, labour and equipment to carry out the salvage operation, and to invest and expend its own financial and other resources, and assume all risks of the salvage operation, financial and otherwise. The Claimant was also obligated, among other things, to clean, restore and catalogue the recovered items. Under a later contract, the Claimant was obligated to (and did) arrange for the auction of the recovered items in Europe by the international auction firm, Christie's.

9. In particular, the Claimant was to:

- a. provide the salvage vessel, crew and equipment;
- b. utilise its expertise and skills;
- c. finance the salvage operation in its entirety;
- d. search for, locate and secure the wreck on the sea floor;
- e. bring the cargo to the surface;
- f. clean, restore, inventorise and photograph the salvaged items;
- g. provide for the safe keeping of the salvaged items;
- h. provide for adequate insurance; and
- i. arrange for the sale of the salvaged porcelain and other valuable items.

10. The Contract was on a "no finds-no pay" basis, which is a well established practice in marine salvage and, meant that all the costs of the search and salvage operation (and its attendant risks) would be borne exclusively by the Claimant. It also meant that the Claimant would recover its expenditure and make a profit only if both the salvage operation and the subsequent sale of the recovered items were successful.

11. The Contract provided for the Respondent to receive the sale proceeds of the recovered items, and thereafter to disburse to the Claimant the portion of the sale

proceeds belonging and due to the Claimant. If the appraised sum of the unsold artefacts and auction value of recovered items sold came to less than US\$10 million (“**the Aggregate**”), the Claimant was entitled to 70% of the proceeds. If the Aggregate came to between US\$10 million and US\$20 million, the Claimant’s share would be 60% of the proceeds. If the Aggregate exceeded US\$20 million, the Claimant would receive 50% of the proceeds. The Respondent also reserved to itself the right to withdraw salvaged items from sale, provided that the Claimant was paid its share of the best attainable value for such items.

12. Although not provided for under the Contract, the Claimant claimed that the Respondent assumed oversight of all aspects of the Claimant’s performance under the contract through a committee (the “**Salvage Committee**”). The Salvage Committee comprised a fluctuating number of about 20 often-changing representatives from the Malaysian Marine Police, the Marine Department, the National Museum, the National Archives, the Ministry of Finance, the Ministry of Culture and Tourism, and the Ministry of Transport. According to the Claimant, the Salvage Committee took all decisions on behalf of the Respondent in connection with the Contract. While not disputing these facts, the Respondent contends that nothing turns on this.

13. The Claimant’s survey and salvage efforts took almost four years, and the recoverable cargo numbered 24,000 pieces in all. Items which were not withheld from sale were auctioned in March 1995 in Amsterdam by Christie’s for approximately US\$2.98 million.

14. The Claimant claims that, under the Contract, it was entitled to 70% of the amount realized at the auction. The Claimant alleges that it was only paid U\$1.2 million (or 40% of the amount realised from the sale at Christie’s). The Claimant further alleges that the Respondent withheld from sale salvaged items of Chinese origin valued at over US\$400,000 and did not pay the Claimant its share of the best attainable value of such items.

**(ii) The Arbitration and Court Proceedings in Malaysia**

15. The Claimant commenced arbitration proceedings against the Respondent in July 1995. Clause 32.1 of the Contract provides that:

Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia. The venue of the arbitration shall be Kuala Lumpur.

16. The arbitrator<sup>1</sup> who was appointed to hear the dispute between the Parties issued an award (“the Award”)<sup>2</sup> dismissing the Claimant’s claim. The Claimant’s efforts to challenge the Award in the Kuala Lumpur Regional Centre for Arbitration and in the Malaysian High Court failed. The Claimant alleged that, in these proceedings, the Judge hearing the case, Justice Dato’ Abdul Azmel bin Haji Ma’amor, dismissed the Claimant’s petition to challenge the Award without reviewing or even looking at the Claimant’s petition. The Claimant has argued that it was denied fundamental and rudimentary due process in the Malaysian courts.

**(iii) The Review of the Malaysian Arbitration Award by the Chartered Institute of Arbitrators**

17. The Claimant then applied to the Chartered Institute of Arbitrators for an internal review of the Award in December 2000. The Claimant alleges that it was denied an opportunity to be heard on this matter before its application was dismissed by the Chartered Institute of Arbitrators in January 2001.

## **II. PROCEDURAL HISTORY**

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<sup>1</sup> The arbitrator, Mr. Richard Talalla, was appointed by the Kuala Lumpur Regional Centre of Arbitration (“KLRCA”) after a Consent Order was made on May 27, 1996, by the High Court of Malaysia granting the right of appointment to the KLRCA. The dispute reached the High Court after the Claimant made an application in that Court to compel the Respondent to answer its Request for Arbitration.

<sup>2</sup> The hearing before Mr. Richard Tallala took 21 days. Award at 3.

**A. Registration of the Request for Arbitration**

18. The International Centre for Settlement of Investment Disputes (“**ICSID**” or “the **Centre**”) received a Request for Arbitration from the Claimant against the Respondent dated September 30, 2004. The Request invoked the ICSID arbitration provisions in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, which came into force on October 21, 1988 (the “**Treaty**” or “**BIT**”).

19. On the same day, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“**Institution Rules**”), acknowledged receipt of the request, and transmitted copies to the Government of Malaysia and to the Embassy of Malaysia in Washington, D.C.

20. By letter dated November 1, 2004, the Centre requested further information from the Claimant with regard to:

- a) the investment of MHS (for purposes of the ICSID Convention and the Malaysia/UK BIT);
- b) the classification of the investment as envisaged in Article 1(b)(ii) of the BIT; and
- c) the dispute between the parties and, in particular, what violation of the Malaysia/UK BIT was alleged.

The Claimant filed a response on November 30, 2004.

21. The Centre, by letter dated December 30, 2004, inquired of the Claimant whether there had been any attempt to reach agreement on the dispute through pursuit of local remedies as envisaged by Article 7(1) of the BIT, and the response of the Claimant was contained in a letter dated January 26, 2005, advising that it had done so by:

- (a) lodging a complaint with the British High Commissioner and the Minister of Special Functions in the Malaysian Prime Minister’s Office; and

(b) writing to the Malaysian Prime Minister's Office, various Malaysian ministries, the Malaysian International Chamber of Commerce, the Malaysian Bar Council as well as the Chartered Institute of Arbitrators.

22. By letter dated February 18, 2005, the Claimant was again invited by the Centre to address the issue of the classification of the investment as envisaged in Article 1(b)(ii) of the BIT as an "approved project," especially in view of the tribunal's award in *Philippe Gruslin v Malaysia* (ICSID Case No. ARB/99/3) ("*Gruslin*"). The Claimant's response was by letter dated March 4, 2005. The Claimant sought to distinguish *Gruslin* on the facts and the law. The Claimant argued that the claimant in *Gruslin* did not enter into a contract with the Government of Malaysia, whereas the present Contract was entered into between the Claimant and the Government of Malaysia itself. The Claimant pointed out that the Contract was subject to the Malaysian Government's supervision. The Claimant also contended that its performance under the Contract was never stopped by the Respondent, nor did the Respondent refuse to accept the benefits of the Contract as evidence that the Contract was an "approved project."

23. By letter dated April 13, 2005, the Centre invited the Claimant to address the issue of whether there was a specific process in Malaysia for ministries to designate specific projects as "approved projects" as envisaged by Article 1(1)(b)(ii) of the BIT. The Claimant replied by a letter dated April 18, 2005 with reference to the terms of the Contract. The Claimant relied on Clause 1.5 of the Contract, which provides that:

The term "Government" . . . shall mean . . . the Secretary General, Ministry of Finance, the Secretary General, Ministry of Transport, the Secretary General, Ministry of Culture and Tourism, the Director General of Museums, and the Director of Marine, Peninsular Malaysia or their authorised representatives.

24. The Claimant argued that the Respondent's entry into the Contract and the acceptance of the various benefits of the investment:

a) indicated a clear demonstration of the express approval by the Malaysian Government and its ministries of the project in which the Claimant had invested;  
and

b) clearly constituted the requisite classification of the project as an “approved project” in accordance with the Respondent’s legislation and administrative practice.

The Claimant also argued that the Respondent was barred by the principle of estoppel from relying on the lack of ministerial classification of the Contract as an “approved project.”

25. The Request, as supplemented by the Claimant’s letters dated November 30, 2004, March 4, 2005 and April 18, 2005, was registered by the Centre on June 14, 2005, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General, in accordance with Institution Rule 6(1)(a), notified the Parties of the registration, and invited them to proceed to constitute an Arbitral Tribunal as soon as possible, pursuant to Institution Rule 7.

#### **B. Constitution of the Arbitral Tribunal and Commencement of the Proceedings**

26. Following the registration of the Request for Arbitration by the Centre, the Claimant, in a letter dated June 24, 2005, proposed that the Arbitral Tribunal be comprised of a Sole Arbitrator to be agreed upon by the Claimant and the Government of Malaysia, and that the case be heard in Washington, D.C. The Respondent, in a letter dated July 26, 2005, agreed to the proposal of a Sole Arbitrator, but counter-proposed that the arbitration be heard in Bangkok, Thailand. In their subsequent exchange of correspondence, the Parties ultimately agreed on the method of appointment of the sole arbitrator (namely, by the Secretary-General of ICSID) and further agreed that the issue of the venue of the proceeding would be left to be decided by the Tribunal.

27. By letter of October 4, 2005, the Centre notified the parties that the Secretary-General intended to appoint Mr. Michael Hwang S.C., a national of Singapore, as the Sole Arbitrator. The Respondent and the Claimant, by their letters dated October 10, 2005 and October 24, 2005 respectively, expressed agreement with the proposed appointment.

28. Mr. Hwang was appointed by the Secretary-General as Sole Arbitrator and, having accepted his appointment in accordance with ICSID Arbitration Rule 5(3), the Centre, by letter dated November 1, 2005, informed the Parties of the constitution of the Tribunal and that the proceedings were deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6(1). The Parties were also informed of the appointment of Mr. Ucheora Onwuamaegbu, Senior Counsel, ICSID, as the Secretary of the Tribunal.

### **C. Written and Oral Proceedings**

29. There was an extensive exchange of communications between the Parties (through the Centre) over the issue of the venue and date of the first session. On December 7, 2005, the Claimant filed a “Request for Ruling and Order to Compel,” inviting the Tribunal to rule that the first session should be held at The Hague within the time period required under ICSID Arbitration Rule 13(1). The Tribunal’s decision was communicated to the parties in a letter from its Secretary, dated December 7, 2005, and further communications were exchanged by the Parties, culminating in a conclusion on December 24, 2005 that the session would take place in The Hague, Netherlands, on December 29, 2005.

30. On December 23, 2005, the Respondent filed an objection (“the Notice of Objection”) to the jurisdiction of the Centre over the dispute, pursuant to ICSID Arbitration Rule 41, and the proceedings on the merits were thereby suspended, in accordance with Rule 41(3). By letter dated December 25, 2005, the Claimant expressed opposition to the Respondent’s objection to jurisdiction.

31. The first session of the Tribunal was held on December 29, 2005, at the Hotel Le Meridien Des Indes, The Hague, Netherlands. Present at the meeting were:

- 1) the Sole Arbitrator, Mr. Michael Hwang, S.C.;
- 2) the Secretary of the Tribunal, Mr. Ucheora Onwuamaegbu;
- 3) representatives of the Claimant, Mr. Hal C. Eren of the Eren Law Firm, and Mr. Dorian Ball, a Director of the Claimant; and

- 4) representatives of the Respondent, the Honourable Tan Sri Abdul Gani Patail, Attorney General, Malaysia, and Mr. Kamaludin Bin Md. Said.

32. At that meeting, in accordance with Arbitration Rule 41(3), a schedule was agreed for the written and oral proceedings on the Respondent's objection to jurisdiction. Other procedural issues identified in a provisional agenda circulated by the Tribunal's Secretary in advance of the hearing were also discussed and agreed. In addition, the Parties granted full authority to the Centre to publish (on its website) all the pleadings and their supporting documents to be filed in these proceedings, as well as decisions of the Tribunal, including its Award. The Respondent reserved its right to redact its submissions for purposes of deleting sensitive information before publication by the Centre. All the conclusions at the session were reflected in the summary minutes of the session, signed by the Sole Arbitrator and the Secretary of the Tribunal, and provided to the Parties together with CD-Roms of the audio recording of the session.

33. In accordance with the agreed schedule, the Parties simultaneously filed their Memorials on Jurisdiction by the deadline of March 16, 2006, and their Reply Memorials by the April 17, 2006 deadline. The submissions were each filed in hard copy and in electronic format. The electronic submissions were subsequently posted on the Centre's website.

34. In accordance with the agreed schedule, the hearing on jurisdiction was held on May 25, 2006, at the premises of the German Institute of Arbitration, in Frankfurt, Germany. The following persons were present at the hearing on jurisdiction, namely:

- 1) the Sole Arbitrator, Mr. Michael Hwang, S.C.;
- 2) the Secretary of the Tribunal, Mr. Ucheora Onwuamaegbu;
- 3) the legal representatives of the Claimant, Mr. Hal C. Eren and Mr. Bruno Ristau, together with Mr. Dorian Ball, a Director of the Claimant; and
- 4) the legal representatives of the Respondent, the Honourable Tan Sri Abdul Gani Patail, Attorney General of Malaysia, and his colleagues Mrs. Aliza Bte Sulaiman

and Mrs. Chandra Devi a/p Letchumanan together with co-counsel Dato' K.C. Vohrah, Dato' Cecil Abraham and Mr. Sunil Abraham.

35. Verbatim transcripts were made of the hearing and provided to the Parties together with CD-Roms of the audio recording of the hearing. On May 26, 2006, the Tribunal directed both Parties to exchange post-hearing submissions. The post-hearing submissions were exchanged and filed with the Centre on June 26, 2006.

36. Subsequent to the post-hearing submissions, there were some gratuitous submissions made by both Parties, which the Tribunal has not found helpful in its deliberations.

37. Further, by letters of November 21 and 28, 2006 and March 14, 2007 respectively, the Tribunal requested the Parties to file further submissions on certain aspects of various ICSID awards identified by the Tribunal. (See Paragraphs 49–53 below).

### **III. THE PARTIES' POSITIONS**

#### **A. The Claimant's Position**

38. The Claimant argues that its performance under the Contract falls within the meaning of "investment" under Articles 1 (a) (iii) and (v) of the Malaysia/UK BIT which provide as follows:

#### **Article 1 Definition**

For the purposes of this Agreement

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

...

(iii) claims to money or to any performance under contract, having a financial value;

...

(v) business concessions conferred by the law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

39. The Claimant contends that the Contract also falls within the meaning of an “approved project” under Article 1(b)(ii) of the Malaysia/UK BIT because the Contract was entered into directly with the Government of Malaysia itself.

(b) The said term [i.e. investment] shall refer:

...

(ii) in respect of investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an “approved project.”

40. The Claimant further contends that the Respondent has violated Articles 2 (Protection of Investment), Article 4 (Expropriation), Article 5 (Repatriation of Investment) and (to the extent that the Respondent has refused to submit to arbitration at ISCID) Article 7 of the Malaysia/UK BIT.<sup>3</sup>

## **B. The Respondent’s Position**

41. The Respondent’s Notice of Objection objects to jurisdiction over the dispute under the ICSID Convention on the following grounds.

41.1 The alleged dispute between the parties does not concern an “investment” as defined in the Malaysia/UK BIT.

41.2 The alleged dispute does not concern an “approved project” within the meaning of the Malaysia/UK BIT.

41.3 The subject matter of the alleged dispute (*i.e.*, the Contract) is purely contractual.

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<sup>3</sup> Extracts from Articles 2, 4, 5 and 7 of the Malaysia/UK BIT are found in a separate Appendix hereto.

41.4 The dispute arising from the Contract has already been settled by reference to arbitration pursuant to a Malaysian High Court Consent Order dated May 27, 1996. The arbitration led to an Award dated July 2, 1998. The Award was challenged by the Claimant in the High Court of Malaysia on the grounds of alleged misconduct by the Arbitrator under S. 24 of the Malaysian Arbitration Act 1952. The challenge was dismissed on February 4, 1999. The Claimant then filed a complaint concerning the alleged misconduct of the Arbitrator to the Chartered Institute of Arbitrators in London in December 2000. The application was heard by a Disciplinary Tribunal established by the Professional Conduct Committee of the Chartered Institute of Arbitrators and the complaint was dismissed in January 2001.

#### **IV. DISCUSSION**

##### **A. Threshold Issue**

42. Although the Respondent has raised a number of jurisdictional objections, any one of these objections, if upheld, would be sufficient to deny the Claimant's relief. The Tribunal therefore turns to consider the first jurisdictional question raised by the Respondent, namely

*Whether there is an "investment" within the meaning of that term as found in the Malaysia-UK BIT as well as in Article 25(1) of the ICSID Convention.*

##### **B. Preliminary Remarks**

43. For jurisdiction to be established, the Claimant must show that the Contract falls within the definition of "investment" as found under Article 25(1) of the ICSID Convention ("**Article 25(1)**"), as well as the definition of "investment" as contained in

the BIT. This two-stage approach is recognized in the ICISD jurisprudence<sup>4</sup> cited by the Parties in this case.

44. Professor Christoph Schreuer in his book *The ICSID Convention: A Commentary* (2001) (“*Schreuer*”) notes that it would not be realistic to attempt a definition of “investment” but he identifies the following as features of “investment” under the ICSID Convention:

But it seems possible to identify certain features that are typical to most of the operations in question: the first such feature is that the projects have a certain duration. Even though some break down at an early stage, the expectation of a longer term relationship is clearly there. The second feature is a certain regularity of profit and return. A one-time lump sum agreement, while not impossible, would be untypical. Even where no profits are ever made, the expectation of return is present. The third feature is the assumption of risk usually by both sides. Risk is in part a function of duration and expectation of profit. The fourth typical feature is that the commitment is substantial. This aspect was very much on the drafters’ mind although it did not find entry into the Convention . . . The fifth feature is the operation’s significance for the host State’s development. This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Directors’ Report . . . suggest that development is part of the Convention’s object and purpose. **These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.**<sup>5</sup> (emphasis added)

45. As elaborated below (at Paragraph 70 below), this is one of two possible ways ICSID jurisprudence may be taken to have approached the issue of determining whether there is an “investment” within the meaning of Article 25(1).

### C. Claimant’s Submissions on the Issue of “Investment”

46. The Claimant advances the following principal arguments on the issue of “investment.”

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<sup>4</sup> See *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, 42 ILM 609 (2003); *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11.

<sup>5</sup> Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at 140.

- a) The Contract is the quintessence of “investment” because the Claimant invested its own funds and other financial resources in the performance of the Contract, and also assumed the risk that the salvage operation would not succeed.
- b) The Claimant relies on the definition of “investment” found in *Black’s Law Dictionary*: “the laying out of money or property in business ventures or real estate so that it may produce revenue or gain (or both) in the future.”
- c) The Claimant also submits that its performance under the Contract giving rise to “claims to money or to any performance under contract having a financial value” has all the hallmarks of “investment” in previous ICSID cases. The Claimant relies on *Alcoa Minerals of Jamaica, Inc v Jamaica* (ICSID Case No. ARB/74/2) (“*Alcoa Minerals*”) where the ICSID Tribunal recognized that contribution of capital was one type of investment.
- d) The Claimant relies on ICSID jurisprudence in *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* (ICSID Case No. ARB/00/4), 42 ILM 609 (“*Salini*”), *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11) (“*Joy Mining*”) and *Consorzio Groupement L.E.S.I.-DIPENTA v People’s Democratic Republic of Algeria* (ICSID Case No. ARB/03/08) (“*L.E.S.I.-DIPENTA*”) and submits that its contributions, commitments and outlays under the Contract fall within the criteria laid down in these three cases.

**D. Respondent’s Submissions on the Issue of “Investment”**

47. The Respondent advances the following principal arguments on the issue of “investment.”

- a) The Respondent argues that the Contract is not an “investment” within the meaning of Article 25(1). The Respondent submits that the purpose of the Contract is “for the sole purpose of archaeological interest and the study of historical heritage.”

- b) The Respondent argues that the Claimant’s case does not meet the requirements of “investment” espoused in the *Salini* case and that the Contract has not contributed to the economic development of Malaysia.

**E. Consideration of the Claimant’s and Respondent’s Submissions on the Issue of “Investment”**

**(i) Cases Relied on by the Parties**

48. The Tribunal now considers the relevant ICSID jurisprudence on the definition of “investment,” within the context of the ICSID Convention, as relied upon by the parties. The Claimant relies mainly on *Alcoa Minerals, Salini* and *L.E.S.I.-DIPENTA*. The Respondent relies mainly on *Joy Mining* as well as *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) (“*Mihaly*”), *Jan de Nul N.V. Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13) (“*Jan de Nul*”) and *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (“*SGS v Pakistan*”).

**(ii) Additional Cases on “Investment”**

49. On November 21, 2006, the Tribunal invited the Parties to provide comments on the respective Decisions on Jurisdiction in the following cases (which had not been discussed in their earlier submissions):

a) *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) (“*Bayindir*”); and

b) *Ceskoslovenska obchodni banka, a.s. v Slovak Republic* (Case No. ARB/97/4) (“*CSOB*”).

50. On November 28, 2006, the Tribunal further requested the Parties to provide comments on the recently issued Decision of the Annulment Committee in the case of

*Patrick Mitchell v The Democratic Republic of Congo* (ICSID Case No. ARB/99/7) (“*Patrick Mitchell*”).

51. The Parties responded with their comments on all three cases. The Respondent replied on December 14, 2006 and the Claimant replied on December 17, 2006.

52. On March 14, 2007, the Tribunal further requested the Parties to provide comments on the Decision on Jurisdiction in *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey* (ICSID Case No. ARB/02/5) (“*PSEG*”).

53. The Parties responded with their comments on *PSEG* on March 22, 2007.

**(iii) “Investment” – An Objective Criterion Under the ICSID Convention**

54. It has been considered in *Salini* that the consensus of legal authors and ISCID case law is that the investment requirement under Article 25(1) is an objective condition of the jurisdiction of the Centre.

55. The methodology employed by the tribunals in *Salini* and in *Joy Mining* requires a claimant in an ISCID arbitration to satisfy the tribunal that:

- a) the dispute between the parties concerns an “investment” within the definition provided under the relevant bilateral investment treaty; and
- b) the objective criterion of an “investment” within the meaning of Article 25(1) has been met.

Under the double-barrelled test, a finding that the Contract satisfied the definition of “investment” under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the objective criterion of an “investment” within the meaning of Article 25. (See Paragraph 148 below). As pointed out in *Joy Mining* (at Paragraph 50):

The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy

the objective requirements of Article 25 of the Convention. Otherwise, Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.

**(iv) The Critical Cases on “Investment”**

56. There are presently in the public domain seven decided cases of importance on the issue whether the Contract is an “investment” within the meaning of Article 25(1). They are *Salini*, *Joy Mining*, *Jan de Nul*, *L.E.S.I.-DIPENTA*, *Bayindir*, *CSOB* and, *Patrick Mitchell*. The ICSID Convention does not provide a definition of “investment”<sup>6</sup> and there is no doctrine of *stare decisis* in ICSID jurisprudence. Nevertheless, an examination of similar cases decided by other ICSID tribunals will assist in determining the correct approach to this question.

**(v) *Mihaly, Alcoa and SGS v Pakistan***

57. Before considering these cases, the Tribunal will discuss some cases cited by the Parties which it has not found of significant assistance in resolving the meaning of what is an “investment” under the ICSID Convention in the present circumstances. The first case is that of *Mihaly*, which was raised by the Respondent in its oral submissions. The issue for consideration in that case was whether pre-contractual expenditure qualified as an “investment” within the meaning of Article 25(1).

58. The majority of the tribunal (the President of the Tribunal, Professor Sompong Sucharitkul and Mr. Andrew Rogers Q.C.)<sup>7</sup> considered that:

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<sup>6</sup> In Paragraph 27 of the Report of the Executive Directors on the Convention of Settlement of Investment Disputes Between States and Nationals of other States (“the Report of the Executive Directors”), dated March 18, 1965, there was express reference to the refusal to provide a definition of investment in the ICSID Convention.

No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre . . . .

<sup>7</sup> The other member of the Tribunal, Mr. David Suratgar, delivered a separate concurring opinion.

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.

59. The majority held that the pre-contractual expenditure incurred by the Claimant did not fall within the meaning of “investment” under the ICSID Convention.

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 not. 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... The Respondent clearly signaled, 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 . . . . 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.

60. The Tribunal finds *Mihaly* of limited utility in resolving the current dispute between the Parties. The majority decision in *Mihaly* was clearly influenced by the great care that Sri Lanka took in ensuring that it did not enter into a contractual relationship with Mihaly for the BOT project. The lack of an intention to create a contractual relationship was decisive in the majority’s conclusion that the pre-contractual expenditure was not an “investment” within the meaning of Article 25(1).

61. The present facts are quite different from those in *Mihaly*. It is undisputed that the Parties had a contractual relationship. The claims of the Claimant are based on a valid contract between the Parties.

62. The Tribunal also does not find *Alcoa Minerals* and *SGS v Pakistan* helpful in determining the present issue.

63. In *Alcoa Minerals*, the ICSID tribunal held that contribution of capital was said to be a kind of “investment,” and the Claimant relies on that holding. However, the tribunal in *Alcoa Minerals* only considered that there would be jurisdiction where “*a private . . . company has invested substantial amounts in a foreign State in reliance upon an agreement with that State.*” In the present case, the Tribunal is not satisfied that the amount invested by the Claimant could be described as “substantial amounts” for the reasons stated at Paragraphs 125–144.

64. In *SGS v Pakistan*, the issue was whether pre-inspection services offered by SGS to the customs authority of Pakistan under the agreement between SGS and Pakistan (the “Agreement”) fell within the meaning of “investment” as defined in the Swiss-Pakistan bilateral investment treaty. *SGS v Pakistan* is not helpful in determining what amounts to an “investment” within the meaning of the ICSID Convention. The focus of the decision in *SGS v Pakistan* was whether the agreement fell within the meaning of “investment” as defined in the Swiss-Pakistan bilateral investment treaty. There was also arguably no substantive discussion by the tribunal in *SGS v Pakistan* on why the agreement was an “investment” within the meaning of the ICSID Convention.

**(vi) Discussion on the Meaning of “Investment”**

**(a) Reliance on Article 31 of the Vienna Convention, the Preamble to the ICSID Convention and the Report of the World Bank Executive Directors in Determining the Meaning of “Investment”**

65. When considering whether the Contract is an “investment” within the meaning of Article 25(1), the Tribunal is guided by the spirit of the ICSID Convention and its

objectives, and is mindful of Article 31 of the Vienna Convention, which 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.

66. The Tribunal considers that, taking a teleological approach to the interpretation of the ICSID Convention, a tribunal ought to interpret the word “investment” so as to encourage, facilitate and to promote cross-border economic cooperation and development. Support for such an approach can be found in the **Preamble to the ICSID Convention** (“*Considering the need for international cooperation for economic development . . .*”) and the Report of the Executive Directors on the Convention on Settlement of Investment Disputes Between States and Nationals of other States (“the Report of the Executive Directors”) dated March 18, 1965, at Paragraph 9, which points out that the idea of ICSID was “*prompted by the desire to strengthen the partnership between countries in the cause of economic development.*” The ICSID Tribunal in *CSOB* considered that the phrase found in the **Preamble to the ICSID Convention** “*permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.*”<sup>8</sup>

67. Paragraph 9 of the Report of the Executive Directors has been interpreted by *Schreuer*<sup>9</sup> to mean that:

*“[T]he Convention’s object and purpose indicate that there should be some positive impact on development.”* (emphasis added)

*Schreuer* cites *CSOB* as a case which led to a positive impact on development.

68. Accordingly, the term “investment” should be interpreted as an activity which promotes some form of positive economic development for the host State.

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<sup>8</sup> *CSOB*, Award, Para. 64.

<sup>9</sup> *Schreuer* at 125.

(b) **Hallmarks of “Investment” as Typical Characteristics or Jurisdictional Requirements**

(aa) **Introduction**

69. The Tribunal now considers the seven cases referred to in Paragraph 56 above.

70. The language used in some of the cases discussed below may be interpreted to advocate the defining features of “investment” as typical characteristics on the one hand (the “**Typical Characteristics Approach**”), or jurisdictional requirements on the other (the “**Jurisdictional Approach**”). Support for the Typical Characteristics Approach can be seen in the extract from *Schreuer* found above at Paragraph 44 above whereas the language used in *Joy Mining* goes towards supporting the Jurisdictional Approach. On the other hand, the language used in *Salini* can be used to support either of the two approaches. (See Paragraph 83 below). The differences between the Typical Characteristics Approach and the Jurisdictional Approach may only be the expression of the conclusion formed by a tribunal on the strength of the particular facts of a case on the issue of “investment.” While the Jurisdictional Approach, strictly defined, requires that all the established hallmarks of “investment” must be present before a contract can even be considered as an “investment,” the Typical Characteristics Approach does not necessarily mean that a tribunal would find that there is an “investment,” even if one or more of the established hallmarks of “investment” were missing. Where the evidence in support of one or more of the hallmarks of “investment” is weak, a tribunal may approach the issue from a holistic perspective and determine whether there is other evidence in support of the other hallmarks of “investment” which is so strong as to off-set the weakness in the other hallmarks of “investment.” However, even under the Typical Characteristics Approach, it would probably be exceptional for a tribunal to conclude that there was an “investment” where one or more of the hallmarks of “investment” were completely missing.

71. A possible explanation for the apparent dichotomy between the Jurisdictional Approach and the Typical Characteristics Approach is as follows.

- a) Where the agreed hallmarks of “investment” are clearly in evidence (or clearly absent), a tribunal is more likely to use language which may be interpreted as support for the Jurisdictional Approach because it can more easily rationalize its decision on the grounds of clear compliance (or lack thereof), with such hallmarks.
- b) Conversely, if the agreed hallmarks of “investment,” while present, are not so clearly evident (either in nature or extent), a tribunal, if it finds that it has jurisdiction, is more likely to use language which may be interpreted as support for the Typical Characteristics Approach.

In other words, whichever approach is adopted depends on the view of a tribunal on how the facts of the case at hand measure up against the established hallmarks of “investment.” (See Paragraphs 70 and 106).

72. The approach of ICSID tribunals towards the issue of “investment” within the meaning of Article 25(1) tends more towards an empirical rather than a doctrinaire analysis. The Typical Characteristics Approach seeks to identify the established hallmarks of “investment,” but cautions against casting them as prerequisites, no doubt to guard against the infinite variety of cases that would arise before ICSID tribunals that may deserve to be categorised as an “investment” notwithstanding the absence, whether qualitatively or quantitatively, of a particular hallmark of “investment” since these hallmarks of “investment” may be interdependent. Similarly, the Jurisdictional Approach seeks to identify these established hallmarks of “investment” but is expressed in such language as to lead to the conclusion that the failure to satisfy one or more of the hallmarks of “investment” may be fatal to an investor’s claim. However, within the Jurisdictional Approach, ICSID tribunals often remark that these hallmarks may be interrelated, and must be examined in relation to other hallmarks as well as in relation to the circumstances of the case. In other words, it may be that a particular hallmark of “investment” may not be present when it is viewed in isolation; yet, when examined in the light of other hallmarks of “investment” or taking into account the circumstances of the case, a tribunal may still find jurisdiction for the Centre. (See Paragraph 106 below). An empirical approach is also consistent with interpreting the ICSID Convention in light

of the intention of its drafters because the empirical approach seeks to determine the different scenarios that may meet the standard of “investment” which the drafters of the ICSID Convention had in mind.

**(bb) The Seven Cases Discussed**

73. ICSID jurisprudence on the meaning of “investment” within the meaning of Article 25(1) typically cites *Salini* and *Joy Mining* as authorities for the various defining hallmarks of “investment.”

74. The factors considered in *Salini* are widely accepted as the starting point of an ICSID tribunal’s analysis of whether there is an “investment” within the meaning of Article 25(1).

75. In *Salini*, the issue was whether a construction contract could be considered as an “investment” within the meaning of Article 25(1). The Société Nationale des Autoroutes du Maroc (“ADM”) was a Moroccan company which built, maintained and operated highways and various road-works, in accordance with a concession agreement (the “**Concession Agreement**”) concluded with the Minister of Infrastructure and Professional & Executive Training, acting on behalf of Morocco. Within the context of the Concession Agreement, ADM issued an international invitation to tender for the construction of a highway joining Rabat to Fes. The two claimants, Salini Costruttori S.p.A and Italstrade S.p.A, submitted a joint tender for the construction of a 50 km section of this highway. The joint tender was accepted, which led to a contract (the “**Construction Contract**”) between the two claimants and ADM. The two claimants took 36 months to complete the works, four months longer than stipulated in the Construction Contract.

76. When ADM rejected the claims of the two claimants, the latter sent a memorandum relating to the final account to the Minister of Infrastructure, in accordance with Article 51 of the *Cahier des Clauses Administratives Generales* (Book of General Administrative Clauses). When the two claimants did not receive any reply, they filed a

Request for Arbitration against Morocco with ICSID, claiming Italian lira 132,639,617,409 as compensation for damage suffered.

77. One of the issues in dispute was whether the Construction Contract concluded between ADM and the two claimants was an “investment” within the meaning of the Bilateral Investment Treaty between Italy and Morocco as well as under the ICSID Convention. The tribunal (comprising Dr Robert Briner as President, Dr Bernardo Cremades and Professor Ibrahim Fadlallah as co-arbitrators) ruled in favour of the two claimants, holding that the Construction Contract was an “investment” within the meaning of the Italian-Morocco treaty as well as under the ICSID Convention.

78. The tribunal reiterated that the “investment” requirement under the ICSID Convention is an objective condition that cannot be diluted by the consent of the parties. The tribunal held that:

The doctrine **generally** considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction . . . . In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various **criteria** should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.” (emphasis added)

79. Of the contributions made by the two claimants, the Tribunal considered that:

It is not disputed that they [i.e. the two claimants] used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then at the end of the tendering process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind, and in industry.

80. As to the duration of the Construction Contract:

Although the total duration for the performance of the contract, in accordance with the [contract], was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years . . . .

81. As to the risks incurred by the two claimants:

[T]he risk associated with the prerogatives of the Owner permitting him to prematurely put to an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law, any accident or damages caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of the other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.

It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total costs cannot be established with certainty in advance, creates an obvious risk for the Contractor.

82. Finally, as to the Construction Contract's contribution to the economic development of the host State, the tribunal said:

In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question shall serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how in relation to the work to be accomplished.

Having undertaken the above analysis, the tribunal in *Salini* concluded that the Construction Contract was an "investment" within the meaning of Article 25(1).

83. The use of the words “*generally considers that investment infers*” in the passage referred to at Paragraph 78 above may indicate that the tribunal in *Salini* supported the view of *Schreuer* (at Paragraph 44 above) (*i.e.*, in support of the Typical Characteristics Approach) that the various hallmarks of “investment” are no more than characteristics.<sup>10</sup> In contrast, the subsequent use of the word “criteria” by the tribunal in *Salini* may also indicate that the tribunal envisaged adopting a Jurisdictional Approach. However, the subsequent acknowledgment by the tribunal that the various hallmarks of “investment” may be interdependent and should be assessed globally indicates that the tribunal was actually approaching the issue of whether there was an “investment” from a fact-specific perspective.

84. In *Joy Mining*, the dispute concerned a contract for the provision of equipment by the claimant to the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt (“IMC”) to be used in a mining site. The total contract price amounted to £13,325,293. Letters of guarantee amounting to £9,605,228 were provided by the claimant to IMC. Disagreement arose between the parties as to the technical aspects of the equipment. Although the claimant was paid the full contract price, the guarantees were not released by IMC. The claimant commenced ICSID arbitration, arguing that the guarantees were an “investment.” In rejecting the claimant’s contention, the tribunal in *Joy Mining* (Professor Francisco Orrego Vicuna as President, Mr. William Laurence Craig and Judge C.G. Weeramantry as co-arbitrators) considered that:

Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s economy. 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)

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<sup>10</sup> Cf. the emphasis placed by the *ad hoc* Committee in *Patrick Mitchell* on the use of the word “criteria” by the tribunal in *Salini*. The emphasis made by the *ad hoc* Committee should be seen as a response to the claimant’s argument in that case that one of the characteristics of “investment” (contribution to the economic development of the host State) was merely a supplementary condition used to justify the broadening of the concept of investment.

85. The tribunal in *Joy Mining* accepted the view in *Salini* that these characteristics should be examined globally, rather than in isolation. However, the earlier part of the passage may be interpreted to advocate a Jurisdictional Approach in its apparent emphasis on the mandatory nature of the hallmarks.

86. The tribunal in *Joy Mining* held that the underlying contract between the parties was a normal sale contract. The tribunal in *Joy Mining* also considered that the duration of the commitment was not particularly significant, as the price of the contract was paid in its totality at an early stage, and there was also no regularity of profit and return. Nor was there any risk apart from those typically associated with a commercial contract. It was also implicit in the Tribunal's ruling that the amount of the bank guarantee<sup>11</sup> (£9,605,228), although relatively substantial, did not constitute a significant contribution to the Egyptian economy.

87. In the course of arriving at its conclusion, the Tribunal also cited the refusal of the former Secretary-General of ICSID, Mr. I.F.I. Shihata, to register a request for arbitration in respect of a dispute arising out of a supply contract for the sale of goods, on the basis that the transaction manifestly could not be considered as an investment.

88. It can be seen that, while there was an agreement that each of the hallmarks of "investment" were present in this case, the degree to which these hallmarks existed was clearly at the lower end of the scale (if at all). The emphatic language of the tribunal at Paragraph 84 above may therefore be taken to reflect its clear view that the claimant had failed to satisfy the test of "investment" and, by emphasizing the need for these hallmarks to be satisfied, the tribunal was able to demonstrate its logic more simply than by going into a lengthy analysis of how the various factual elements of this case interacted with each other and were then assessed globally to see whether they met the ultimate test of "investment."

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<sup>11</sup> In *Joy Mining*, the issue was whether bank guarantees issued in support of a project entailing the supply, installation of equipment and the provision of related incidental services for a fixed, pre-determined and certain price constituted an investment within the meaning of the bilateral investment treaty between the United Kingdom and Egypt.

89. Some of the language used in *L.E.S.I.-DIPENTA* may also be interpreted to advocate a Jurisdictional Approach. In *L.E.S.I.-DIPENTA* (where the Tribunal comprised Professor Pierre Tercier as President, Mr. André Faurès and Professor Emmanuel Gaillard as co-arbitrators), the dispute arose out of a concession agreement granted by *Agence Nationale des Barrages* (ANB) to the two claimants (L.E.S.I. and Dipenta) for the construction of a dam. In 2001, ANB terminated the contract on the ground of *force majeure*. The two claimants then commenced an ICSID arbitration. The ICSID tribunal held that:

These decisions [citing amongst others, *CSOB*, *SGS v Pakistan* and *SGS v The Philippines*] do not, however, provide clear guidelines, but seem rather to be based on choices made case-by-case. The Arbitral Tribunal notes that some objective criteria emerge from those cases, sufficient to guarantee a degree of security.

It would seem consistent with the objective of the Convention that a contract, in order to be considered an investment within the meaning of the provision, should fulfill the following three conditions:

- a) the contracting party has made contributions in the host country;
- b) those contributions had a certain duration; and
- c) they involved some risks for the contributor.

On the other hand, it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria. (emphasis added)

90. In a similar vein, the *ad hoc* Committee in *Patrick Mitchell* (comprising Mrs. Antonias Dimolitsa as President, Mr. Robert S.M. Dossou and Professor Andrea Giardina) also used language which may be interpreted to favour the Jurisdictional Approach.<sup>12</sup>

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<sup>12</sup> The Tribunal is aware that *Patrick Mitchell* has been the subject of much criticism over the manner in which the *ad hoc* Committee exercised its powers of annulment. However, the Tribunal will only refer to *Patrick Mitchell* for the views of the *ad hoc* Committee on the concept of "investment." The Tribunal makes no comment, and places no reliance, on the decision of the *ad hoc* Committee to annul the award of the arbitral tribunal.

91. In that case, Mr. Patrick Mitchell of the law firm Mitchell & Associates commenced ICSID arbitration proceedings against the Democratic Republic of Congo (the “**DRC**”) pursuant to a bilateral investment treaty entered into between the United States of America and the DRC (the “**USA-DRC BIT**”). The dispute arose from the decision of the Military Court of the DRC to seal the premises housing Mr. Mitchell’s firm and the consequent seizure of various documents and items in his firm. His employees were also forced to leave the premises. Two of the lawyers in his firm were in fact arrested and subsequently released. Mr. Mitchell alleged that the acts of the DRC amounted to an expropriation in violation of Article III(1) of the USA-DRC BIT. The Arbitral Tribunal hearing the dispute ruled that the dispute fell within the jurisdiction of the Centre and its competence. DRC then applied for annulment of the award on the ground, *inter alia*, that the Arbitral Tribunal had manifestly exceeded its power with regard to its own jurisdiction in respect of the definition of “investment” (*i.e.*, declaring itself to have jurisdiction over the dispute on the basis there was an “investment” when there was none).

92. The *ad hoc* Committee in *Patrick Mitchell* had to deal with the argument made by counsel for the claimant that the “economic development of the host State” characteristic of “investment” was a “*supplementary condition used heretofore in order to justify the broadening of the concept of investment and as somewhat duplicating with the investor’s commitment.*”

93. The arguments between the parties focused on whether the characteristic of “contribution to the economic development of the host State” was an “essential element” of investment (as submitted by DRC), or simply a supplementary condition used to justify the broadening of the concept of “investment” and duplicative of other characteristics of “investment” (as submitted by the claimant).

94. The *ad hoc* Committee in *Patrick Mitchell* rejected the claimant’s argument and stated that the “contribution to the economic development of the host State” characteristic of “investment” is “*an essential - although not sufficient - characteristic or unquestionable criterion of the investment.*” The *ad hoc* Committee cited, *inter alia*, the **Preamble to the ICSID Convention** (see Paragraph 66 above), *Salini, CSOB* (see

Paragraphs 97–98 below) and *Schreuer* before arriving at their conclusion. The *ad hoc* Committee concluded that this particular characteristic of “investment” was an “unquestionable criterion” of “investment” which might be satisfied by showing that the investor’s operation contributed in one way or another to the economic development of the host State.

95. The *ad hoc* Committee in *Patrick Mitchell* stated that the ICSID Tribunal in *CSOB* had observed that “*Under certain circumstances a loan may contribute substantially to a State’s economic development . . . the undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic within the meaning of the Convention*” and also highlighted a statement in *Schreuer* commenting that the “contribution to the economic development of the host State” characteristic of “investment” is “*the only possible indication of an objective meaning of the term ‘investment’.*”

96. Although the *ad hoc* Committee suggested that the “contribution to the economic development of the host State” characteristic of “investment” was an “*essential - although not sufficient characteristic or unquestionable criterion,*” it managed to dilute this strict approach by stating that this would be satisfied where the underlying contract or operation contributed in one way or another to the economic development of the host State. The *ad hoc* Committee also emphasised that the concept of economic development is “*extremely broad but also variable depending on the case.*”

97. In contrast, *CSOB* (where the Tribunal consisted of Professor Thomas Buergenthal as President of the Tribunal, Professor Piero Bernardini and Professor Andreas Bucher as co-arbitrators) may be interpreted as favouring the Typical Characteristics Approach.

98. In *CSOB*, the dispute arose out of a contract called the Consolidation Agreement between the claimant and the Ministries of Finance of the Czech and Slovak Republics. The Consolidation Agreement provided for the assignment by CSOB of certain non-performing receivables to two companies which were specifically created for this purpose (the “Collection Companies”). The Collection Companies were to pay CSOB for these

receivables. To enable these Collection Companies to finance the assignment, they received loans from CSOB. The loans were secured by a guarantee from the Slovak Ministry of Finance. When the Collection Companies in Slovakia defaulted on their payment obligations, CSOB commenced an ICSID arbitration against Slovakia. The tribunal held that:

these elements of the suggested definition,<sup>13</sup> while they tend as a rule to be present in most investments, are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.” (emphasis added)

99. In *Bayindir* (where the tribunal comprised Professor Gabrielle Kaufmann-Kohler as President, Sir Franklin Berman Q.C. and Professor Karl-Heinz Böckstiegel as co-arbitrators), the dispute arose out of a contract to construct a six-lane motorway and ancillary works known as the “Pakistan Islamabad-Peshawar Motorway” between the claimant and the National Highway Authority (a public corporation established under Pakistani laws). In determining whether there was an “investment,” the Tribunal took the view that *Salini*:

held that the notion of investment presupposes the following elements: (a) a contribution, (b) a certain duration over which the project is implemented, (c) sharing of the operational risks, and (d) a contribution to the host State’s development, being understood that these elements may be closely interrelated, should be examined in their totality, and will normally depend on the circumstances of each case. (emphasis added)

100. Although the tribunal in *Bayindir* stated that “*to qualify as an investment,*” the project in question must satisfy the elements identified in the above passage, it is more important to appreciate that the tribunal indicated that these elements “*may be closely interrelated, should be examined in their totality, and will normally depend on the circumstances of each case.*”

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<sup>13</sup> The tribunal relied on the definition used by the respondent (the Slovak Republic), which defined “investment” essentially as the acquisition of property or assets through the expenditure of resources by one party in the territory of a foreign country which was expected to produce a benefit on both sides and to offer a return in the future, subject to the uncertainties of the risk involved.

101. In *Jan de Nul* (Professor Gabrielle Kaufmann-Kohler as President, Professor Pierre Mayer and Professor Brigitte Stern as co-arbitrators), the tribunal, in considering treaty claims arising out of the contract between the two claimants (Jan De Nul N.V. and Dredging International N.V.) and the Suez Canal Authority (a public agency established under Egyptian law) to deepen and widen the Suez Canal), found as follows:

The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called “Salini test.” Such test identifies the following elements as **indicative** of an ‘investment’ for the purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development, being [sic] understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case. (emphasis added)

102. The tribunal in *Jan de Nul*, in applying the so-called “Salini test” emphasised (as did the tribunals in *Salini* and *Bayindir*) that the various elements/or hallmarks of “investment,” must be “*examined in their totality and will normally depend on the circumstances of each case.*”

103. Even in *L.E.S.I.-DIPENTA*, the approach of the tribunal to the various conditions identified which must be satisfied before a contract could be considered as an “investment” under the ICSID Convention suggests that it took a very broad approach to the meaning of “investment.” In other words, the tribunal would not require clear evidence to establish a finding that each of the relevant hallmarks was present. Such an approach may, in practice, dilute the Jurisdictional Approach to such an extent that, in substance, it may not be significantly different from the Typical Characteristics Approach.

104. As mentioned earlier, the purpose of analyzing these cases above is not slavishly to adhere to precedent, but rather to discern a broad trend which emerges from ICSID jurisprudence on the “investment” requirement under the ICSID Convention.

(cc) **Significance of the Dichotomy**

105. In any event, the differences between the two approaches are likely to be academic. In practice, it is unlikely that any difference in juristic analysis would make any significant difference to the ultimate finding of the tribunal. The existence of two possible approaches may be the result of the different emphases placed by the tribunal on each of the factors because the facts (or Counsel’s submissions) in one case may require (or encourage) the tribunal to place a stronger emphasis on a particular factor than in another case. This will happen where, although the requisite hallmarks of “investment” under the ICSID Convention appear to exist, the presence of one or more hallmarks may appear weak, and the tribunal may need to look at the strength of the other hallmarks in arriving at its decision.

106. Furthermore, ICSID tribunals tend to adopt an empirical rather than a doctrinaire approach in determining whether there is an “investment” within Article 25(1). This may be termed a Newtonian rather than a Cartesian approach (*i.e.* moving from the particular to the general rather than *vice versa*).

- a) Where the facts are strongly in favour of a finding in each of the relevant hallmarks of “investment,” a tribunal can confirm its jurisdiction in strong terms emphasizing that the requirements of “investment” are clearly fulfilled. Such strong language may be interpreted in support of a Jurisdictional Approach. However, it may simply indicate the tribunal’s views on the weakness of a respondent’s jurisdictional challenge in that each of the relevant hallmarks of “investment” has clearly been satisfied by the claimant. (See discussion of *Bayindir* at Paragraphs 99–100 above).
- b) Where the facts clearly show that one or more of the relevant hallmarks of “investment” are missing, a tribunal may uphold the jurisdictional challenge of a respondent in strong terms by using language in support of a Jurisdictional Approach in order to demonstrate more clearly why the tribunal is rejecting jurisdiction. (See discussion of *Joy Mining* at Paragraphs 84–88 above).

- c) Where the facts are not as clear-cut as in the scenarios envisaged in a) and b) above, a tribunal will have to consider whether there is any evidence in support of each of the relevant hallmarks of “investment.” Where there is some marginal evidence in support of one of the relevant hallmarks of “investment,” but more conclusive evidence in support of the presence of the other relevant hallmarks of “investment,” the tribunal may choose to discount the weakness of the claimant’s case in one of the relevant hallmarks of “investment” by stating that the issue of “investment” should be approached on a holistic basis. Put another way, while it is still necessary to fulfill the formal requirements of “investment” by demonstrating that the facts meet all the established hallmarks of “investment,” weak or superficial compliance with one of the hallmarks of “investment” may be compensated by more compelling evidence in the other hallmarks of “investment” so that, in the global assessment of the various factual elements, a tribunal may still conclude that there is an “investment” because these hallmarks of “investment” are (in the language of *Salini*) interdependent. In this situation, a tribunal is likely to use language that may be interpreted as advocating a Typical Characteristics Approach. (See discussion of *Jan de Nul* at Paragraphs 101–102 above).
- d) Alternatively, in the scenario described in c) above, a tribunal may also rely on a Jurisdictional Approach but, in examining whether each of the relevant hallmarks of “investment” is satisfied, the tribunal may take a broad approach, requiring only relatively marginal evidence to establish a positive finding in favour of assuming ICSID jurisdiction. The tribunal may also state, in its overall assessment of the factual elements that, notwithstanding compliance with all the hallmarks of “investment,” the qualitative manner in which these hallmarks are satisfied are insufficient to satisfy the overall test of “investment.” In other words, the hallmarks, although essential, are not sufficient to ensure that a contract is an “investment.” (See discussion of *Patrick Mitchell* at Paragraphs 90–96 above).

e) The classical *Salini* hallmarks are not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an “investment.” If any of these hallmarks are absent, the tribunal will hesitate (and probably decline) to make a finding of “investment.” However, even if they are all present, a tribunal will still examine the nature and degree of their presence in order to determine whether, on a holistic assessment, it is satisfied that there is an ICSID “investment.” The *ad hoc* Committee’s remarks in *Patrick Mitchell* quoted in Paragraph 94 above (essential but insufficient characteristic or criterion of investment) can reasonably apply, not merely to the requirement of contribution to the host State’s economic development, but to all the *Salini* hallmarks.

**(c) Consideration of the Characteristics of “Investment” Applied to the Present Case**

107. Having completed the legal analysis of the relevant authorities, the Tribunal now turns to consider to what degree the hallmarks of “investment” are met in the present case, adopting a fact-specific and holistic assessment.

**(aa) Lack of Regularity of Profit and Returns is Immaterial in Relation to the Present Facts**

108. The Tribunal first considers a hallmark of “investment” cited in *Joy Mining*, which is that there must be regularity of profits and returns. This particular hallmark did not feature in the so-called *Salini* test, although it is mentioned in *Schreuer*. There is no regularity of profits and returns on the present facts. However, the Tribunal accepts the Claimant’s answer in response, which is that this criterion may not always be decisive. The example of the pharmaceutical company cited by the Claimant in its “Post-Jurisdiction Hearing Notes & Points” is apt,<sup>14</sup> and the Tribunal agrees that this criterion is

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<sup>14</sup> The Claimant cites the example of a pharmaceutical company’s investment in the development of a drug as an example of an investment which does not have regularity of profit and return. The Claimant points out that, before any profit and return could be realized, the drug would have to be discovered, tested,

not always critical. Further, this has not been held to be an essential characteristic or criterion in any other case cited in this Award, and its presence or otherwise may therefore not be determinative of the question of “investment.” The Claimant also points out that, although there was no regularity of profits and returns in this case, there was a regular and steady accretion of “investment” (presumably meaning expenditure) as work progressed on the DIANA Project, and more and more items were salvaged. Accordingly, taking into account that this is not a classical hallmark of “investment” and the submissions of the Claimant, the Tribunal concludes that the absence of this hallmark is immaterial for the reasons stated by the Claimant.

**(bb) Contributions**

109. It is not in dispute that the Claimant has expended its own funds, whether in the form of equipment, know-how or personnel, or in the performance of the Contract in its entirety, without any cash payment or other financial assistance from the Respondent. Accordingly, the Tribunal finds that the Claimant has, like the claimants in *Salini*, made contributions in money, in kind and in industry although, as the Respondent has pointed out in its submissions of December 14 2006, the size of the contributions were in no way comparable to those found in *Salini*, *Bayindir* and *Jan de Nul* or even in *Joy Mining*. Furthermore, the nature of the Claimant’s contributions are largely similar to those which might have been made under a commercial salvage contract (albeit with additional obligations in assisting in the ultimate sale of the salvaged articles).

**(cc) Duration of the Contract**

110. The Contract took almost four years to complete. Accordingly, it complies with the minimum length of time of two to five years, as discussed in *Salini*. However, owing to the nature of the Contract, the Claimant only managed to satisfy this factor in a

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approved by the regulatory authorities, and accepted by the market. This is a costly process that could take several years. The Claimant argues that, during such time, there could be a build-up and accretion of investment, but no return on investment as such.

quantitative sense. The original stipulated duration of the Contract was only for 18 months, which was extended by mutual consent. One might well argue that the Contract was only able to meet the minimum length of time of two years because of the element of fortuity (since the duration of the Contract depended largely on how long the Claimant would take to find and salvage the DIANA). The nature of the project meant that the Claimant could have completed it within a shorter period than two years and was in fact contractually required to do so within 18 months.

111. The ICSID tribunals in *L.E.S.I.-DIPENTA* and *Bayindir* considered that, in the context of construction contracts, one could take into consideration the time extensions that would often be required in determining whether a contract was an “investment” within the meaning of Article 25(1). In the Tribunal’s view, the key reason for in allowing time extensions to be considered was motivated by the fact that, in *L.E.S.I.-DIPENTA*, the tribunal suggested that an assessment of the criterion of duration was linked to whether the contract was for an operation that promoted the economy and the development of the host State.<sup>15</sup> Presumably, the longer the duration, the greater the economic commitment. Where the underlying contract does not promote the economy and development of the host State, there may be less justification to factor in the extensions granted under the Contract. The Tribunal, therefore, considers that:

- a) since the duration of the Contract was dependent, in part, on the element of fortuity, and
- b) for the reasons stated at Paragraphs 113–145 below, this Contract does not appear to be a contract that would promote the economy and development of the host State as the criterion of duration is not satisfied in the qualitative sense envisaged by ICSID jurisprudence.

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<sup>15</sup> The reason why the tribunal in *L.E.S.I.-DIPENTA* did not consider the feature of significant contribution to the host State to be a separate feature was because this particular feature is, according to the tribunal, implicitly covered by the three so-called classical *Salini* characteristics/criteria (*i.e.*, contribution, duration and risk). In contrast, the tribunal in *Salini* and *Joy Mining* also took into consideration the fourth characteristic/criteria (*i.e.*, contribution to the economic development of the host State). Schreuer mentions a fifth characteristic/criterion (*i.e.*, regularity of profit and return).

Thus, the Tribunal concludes that, although the Claimant satisfies the duration characteristic or criterion in the quantitative sense, it fails to do so in the qualitative sense. However, such failure does not, by itself, mean that the project was not an “investment” within the meaning of Article 25(1) since a holistic assessment of all the hallmarks still needs to be made.

**(dd) Risks Assumed Under the Contract**

112. It is not in dispute that all the risks of the Contract were borne by the Claimant. The fact that these risks were not in any way borne by the Respondent would appear to afford a stronger reason to hold that the activity is an “investment” within the meaning of Article 25(1) as compared to an investment where the risks were shared. However, it has been conceded by counsel for the Claimant that salvage contracts are often on a “no-finds-no-pay” basis. This would not necessarily mean that all salvage contracts would be an “investment” within the meaning of Article 25(1), assuming this feature of investment to be the only factor in doubt. This is because the characteristics of “investment” identified by the tribunals in ICSID jurisprudence must be considered globally. The fact that the risks under these contracts would be assumed by the salvor does not necessarily lead to the inevitable conclusion that the salvage contract must be considered as an “investment” under the ICSID Convention. The nature of a salvage contract would mean that the assumption of risk by the salvor would be inherent in the transaction, rather than a special feature of the Contract which affected the salvor’s decision to undertake the project in question. The fact that salvage contracts are typically on a “no-finds-no-pay” basis is evidence that the risks assumed under the Contract were no more than ordinary commercial risks assumed by many salvors in a salvage contract. The Claimant has not provided any convincing reasons why the risks assumed under the Contract were anything other than normal commercial risks. It is clear under ICSID practice and jurisprudence that an ordinary commercial contract cannot be considered as an

“investment.”<sup>16</sup> While the Claimant may have satisfied the risk characteristic or criterion in a quantitative sense (*i.e.*, that there was inherent risk assumed under the Contract), the quality of the assumed risk was not something which established ICSID practice and jurisprudence would recognize. Accordingly, since the Claimant can only superficially satisfy the so-called classical *Salini* features of investment, in the qualitative sense envisaged under established ICSID practice and jurisprudence, consideration of the remaining hallmarks of “investment” will assume greater significance on the particular facts of the case.

**(ee) Economic Development of Host State**

113. Finally, the Tribunal has to consider whether the Contract contributed to the economic development of Malaysia. There appears to be a difference in ICSID jurisprudence as to whether there is a need for a contract to make a significant contribution to the economic development of the host State. The tribunal in *Salini* considered that there should be a contribution to such economic development without stressing that it must be “significant.” However, on the facts of that case, it was likely that the tribunal would have formed the view that the contribution was significant. The tribunal in *L.E.S.I.-DIPENTA* took the view that this requirement need not even be considered, because it was implicitly covered in the previous three characteristics of an “investment.”

114. On the other hand, the tribunal in *Joy Mining* took the view that, to qualify as an “investment,” the contribution to the economic development of the host State must be “significant.”

115. The *Bayindir* tribunal cited *Joy Mining* in saying that an “investment” should be significant to the host State’s development. The tribunal in *Bayindir* then cited *L.E.S.I.-DIPENTA* to assert that this condition was often already included in the other three criteria of “investment.” On the facts, the *Bayindir* tribunal considered that the

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<sup>16</sup> See the decision of the former Secretary-General of ICSID Mr. I.F.I. Shihata not to register a request for arbitration in respect of a dispute arising out of a ordinary sale of goods contract; *Joy Mining* where the tribunal, in arriving at its conclusion that there was no jurisdiction, considered that risk inherent in a normal commercial contract would not be sufficient.

respondent did not dispute that a road infrastructure project would be important to the development of the country. The *Bayindir* tribunal’s interpretation of *L.E.S.I.-DIPENTA* suggests that it considered the possibility that, while this hallmark would usually be subsumed within the previous three hallmarks of “investment,” there might be situations where it would not be so subsumed. It also endorsed the general view that a contribution had to be significant to the host State’s development.

116. The tribunal in *Jan de Nul*, citing *Salini*, *Bayindir* and *L.E.S.I.-DIPENTA*, stated that a contribution to the host State’s development would be indicative of an “investment” within the meaning of Article 25(1). The tribunal took the view that, on the facts, the contract was of “*paramount significance*” to the host State’s economy and development. (See Para 92 of the Award).

117. In *CSOB*, the tribunal also made a finding that the contract made a significant contribution to the economic development of the host State.

118. In *Patrick Mitchell*, the *ad hoc* Committee departed from *L.E.S.I.-DIPENTA*, and considered this hallmark of “investment” as “*an essential - although not sufficient - characteristic or unquestionable criterion*” of “investment.” (See Paragraph 94 above). However, the *ad hoc* Committee added that this “*does not mean that this contribution must always be sizable or successful . . .*” The *ad hoc* Committee also stated that 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.*”

119. In contrast, the tribunal in *PSEG* (comprising Professor Francisco Orrego Vicuña as President, Mr. Yves Fortier Q.C. and Professor Gabrielle Kaufmann-Kohler as co-arbitrators) did not appear, at first blush, to consider it important for an “investment” to contribute significantly to the economy of the host State. In *PSEG*, a Concession Contract was signed between the Claimant and the Republic of Turkey to construct a power plant on a Build-Operate-Transfer model (“BOT Model”). The tribunal (see Paragraphs 80–90 of the Decision on Jurisdiction) appeared to conclude that it had jurisdiction over the dispute simply because the Concession Contract was signed by the

parties. Hence it appears to suggest that the existence of a valid contract would lead to the assumption of jurisdiction by the tribunal. The tribunal did not discuss how the Concession Contract amounted to an “investment” within Article 25, nor did it cite the *Salini* criteria in arriving at its conclusion. The summary of the Republic of Turkey’s arguments in *PSEG* provided in the tribunal’s decision does not indicate that it had placed emphasis on the application of the *Salini* criteria. In this Tribunal’s view, the main reason why the *PSEG* tribunal did not discuss the *Salini* criteria was because the investment in question was a “readily recognizable investment.” The concept of “readily recognizable investment” was cited in *Schreuer* and credited to Dr. Aron Broches who, during the debate over the draft of the Executive Directors’ Report, “*recalled that none of the suggested definitions for the word ‘investment’ had proved acceptable . . . . [W]hile it might be difficult to define the term, an investment was in fact readily recognizable.*”

120. The following facts were present in *PSEG*.

- a) The original amount of investment envisaged in the Concession Contract amounted to US\$804.8 million. The claimant had issued a performance bond worth US\$8.848 million pursuant to the Concession Contract (although the performance bond was not subsequently renewed when it expired). These two facts would have satisfied the characteristic/criterion of contribution under the *Salini* test.
- b) Although the Concession Contract provided for economic adjustments under Article 8, paragraph 3 of the Concession Contract, there would still be risks for the claimant in that any costs expended would not be recovered if the respondent rejected the claimant’s revision of the tariffs that it could charge under the Concession Contract “*on the basis of reasonable grounds.*” In such a situation, if the claimant “*abandons the project prior to the construction start date, the [claimant] and the [respondent] shall have no claim against one another.*” If the claimant had expended costs discharging its obligations under the Concession Contract after its execution, there would obviously have been risk assumed by the claimant. Furthermore, the fact that the Contract did not contain any specific

- provision on dispute settlement would also contain a certain amount of risk for the claimant, especially from the view of securing financing for the project.
- c) Although the Decision on Jurisdiction in *PSEG* did not specify the duration needed to build the power plant, it would be reasonable to assume that, in view of the complex scale of the project, which envisaged the power plant to run for 38 years and the total investment to run up to US\$804.8 million, the duration needed for the construction of the power plant would meet the duration characteristic/criterion stated in ICSID jurisprudence of two to five years. (See Paragraph 110 above).
  - d) The Concession Contract was for the construction of a power plant which, on any account, must have been of benefit to the economy of the Republic of Turkey. This would satisfy the characteristic/criterion of economic development to the host State.
  - e) As the project was envisaged to be a BOT Model, it would also satisfy the final characteristic/criterion of regularity of profits and returns since the claimant would be allowed to operate the power plant for a number of years and charge an appropriate tariff for the sale of the electricity generated.

121. Against that background, it is easily understandable why the tribunal in *PSEG* assumed jurisdiction over the dispute. The *Salini* test was so obviously satisfied in *PSEG* that a detailed discussion of its application was unnecessary.<sup>17</sup>

122. In fact, the Tribunal is inclined to agree with the Respondent's analysis of *PSEG* that the Concession Contract must, by its nature, constitute a paramount significance to the economic development of the host State and, therefore, satisfying the requirement of contributing to the economy of the host State on the facts in *PSEG* because the power plant project in the *PSEG* case "was of 'such magnitude and complexity' and involved a risk to the extent that the operation of the project constitutes a paramount significance in

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<sup>17</sup> It is inconceivable that the tribunal in *PSEG* was not intending to apply the *Salini* test when the decision in *Joy Mining* was made by Professor Francisco Orrego Vicuna as the presiding arbitrator and the decisions in *Bayindir* and *Jan de Nul* were made by Professor Gabrielle Kaufmann-Kohler as presiding arbitrator.

*the economy and development of the country.”*<sup>18</sup>

123. The Tribunal considers that the weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State’s economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an “investment.” It also bears noting that in *Joy Mining*, the value of the bank guarantee had a value of GBP 9.6 million and yet did not qualify as a contribution to the economy of Egypt. Taking into account the entire factual matrix of the case, this feature may be of considerable, even decisive, importance. This is due in part to the Tribunal’s findings that the other features of “investment,” such as risk and duration of contract, only appear to be superficially satisfied on the facts of this case, and not in the qualitative sense envisaged under ICSID practice and jurisprudence. The Tribunal is therefore left only with the contributions made by the Claimant, and has to determine whether these contributions would represent a significant contribution to the host State’s economic development.

124. In unusual situations such as the present case, where many of the typical hallmarks of “investment” are not decisive or appear to be only superficially satisfied, the analysis of the remaining relevant hallmarks of “investment” will assume considerable importance. The Tribunal therefore considers that, on the present facts, for it to constitute an “investment” under the ICSID Convention, the Contract must have made a significant contribution to the economic development of the Respondent.

**(ff) Whether There Was Economic Contribution to Malaysia’s Economic Development Under the Contract**

125. Any contract would have made some economic contribution to the place where it is performed. However, that does not automatically make a contract an “investment” within the meaning of Article 25(1). As stated by *Schreuer*, there must be positive impact on a host State’s development. *Schreuer* cites *CSOB* in concluding that an “investment” must have a positive impact on a host State and, in *CSOB*, the tribunal stated that there must be significant contributions to the host State’s economic development.

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<sup>18</sup> *PSEG* (quoting Para. 13 of the Respondent’s Comments dated March 22, 2007).

126. The approach of *Schreuer* and *CSOB* can be contrasted with the decision of the *ad hoc* Committee in *Patrick Mitchell*, which endorsed a broader approach, simply requiring some form of contribution to the economy of the host State in one way or another.

127. In that case (see Paragraphs 90–96 above), the *ad hoc* Committee observed that the case at hand did not involve a “readily recognizable” “investment” and it was the first time such a claim was brought before the Centre.

128. The *ad hoc* Committee also considered that a law firm is an uncommon operation from the standpoint of the concept of “investment.” Accordingly, the *ad hoc* Committee indicated that it was necessary for the contribution to the economic development (or at least the interests of the host State DRC) to be somehow present in the operation of the law firm. The *ad hoc* Committee also stated that it would be necessary for the award to show how Mr. Mitchell, through his know-how, concretely assisted the DRC by providing legal services in a regular manner by specifically bringing investors into the DRC. The *ad hoc* Committee held that the award failed to show all these elements. According to the *ad hoc* Committee, the vague references in the award to, *inter alia*, declarations made by former clients of the law firm, agreements and the loss of such clients failed to fill the gaps created in the award. The *ad hoc* Committee also criticized the tribunal for failing to explain in its award why the relationship between the law firm and the DRC should be regarded as an “investment.” The *ad hoc* Committee was at pains to emphasize that inadequate reasoning in the award might open the door for genuine abuse to the extent that it would grant the qualification of “investor” to any law firm established in a foreign country and enable the law firm to take advantage of the special arbitration system of ICSID.

129. In the present case, the Contract is not a “readily recognizable” “investment.” This is also the first time a marine salvage claim has been brought before the Centre.

130. Viewing all the circumstances of the factual matrix in this case, the Tribunal finds that the question of contribution to the host State’s economic development assumes significant importance because the other typical hallmarks of “investment” are either not decisive or appear only to be superficially satisfied. (See Paragraph 124 above).

131. Unlike the Construction Contract in *Salini* which, when completed, constituted an infrastructure that would benefit the Moroccan economy and serve the Moroccan public interest, the Tribunal finds that the Contract did not benefit the Malaysian public interest in a material way or serve to benefit the Malaysian economy in the sense developed by ICSID jurisprudence, namely that the contributions were significant.

132. In the oral proceedings, the Claimant attempted to show that the Contract did provide some form of benefit to the Malaysian economy, when it was indicated during a presentation by Mr. Dorian Ball, the Director of the Claimant, that local residents were employed by the Claimant to “wash, pack, inventorise and photograph the porcelains” (see page 181, at line 21–23, of the transcripts of the hearing of May 25, 2006) salvaged from the DIANA. To the extent that the Claimant had provided gainful employment to these Malaysians, the Tribunal accepts that the Contract did benefit the Malaysian public interest and economy to some extent. However, this benefit is not of the same quality or quantity envisaged in previous ICSID jurisprudence. The benefits which the Contract brought to the Respondent are largely cultural and historical. These benefits, and any other direct financial benefits to the Respondent, have not been shown to have led to significant contributions to the Respondent’s economy in the sense envisaged in ICSID jurisprudence.

133. The oral submissions were subsequently elaborated upon in the post-hearing submissions where the Claimant submitted, *inter alia*, that it had employed over 40 people in Malaysia, as well as a village of local residents, imparted valuable know-how and knowledge on the science and process of historical marine salvage, which would ultimately benefit Malaysian museums, and its performance under the Contract had raised Malaysia’s international profile and drew welcome attention to Malaysia as a favourable and attractive location or destination for history, treasure, archaeology and revenue-generating tourism. The Claimant also argued that the Contract had contributed over US\$1 million in cash to the Malaysian treasury.

134. The Claimant also elaborated on the Contract’s “contribution” to the development of the host State in its submissions of December 17, 2006. It also listed some 27 categories of contributions to the Respondent’s development. The Claimant submits that, while its contributions may be small compared to the contributions of electrical utilities,

oil exploration companies or highway builders, the contribution from the Contract was the largest within the salvage industry (at least US\$3.8 million), and it is in that particular frame of reference within which its contributions and commitments must be measured.<sup>19</sup>

135. The Tribunal cannot accept the Claimant's submission of December 17, 2006, that its contribution must be measured in the context of the fact that it was the largest in the industry. The frame of reference for the purposes of determining whether the Contract is an "investment" under the ICSID Convention cannot depend on whether the Contract is the largest ever made within its particular industry. To determine whether the Contract is an "investment," the litmus test must be its overall contribution to the economy of the host State, Malaysia.

136. The Claimant also observes (in its submissions of December 17, 2006) that, in *Patrick Mitchell*, the *ad hoc* Committee stated that the reason why, in some cases, the characteristic of economic development of the host State had not been expressly mentioned was because the facts in question in those cases concerned state contracts, which would have had an obvious and unquestioned impact on the development of the host State. The Claimant seeks to apply this argument to the present facts. The Claimant argues that the Contract was specifically and exclusively provided to the Respondent, and the Contract directly benefited the Respondent, and had a public purpose or interest. The Claimant submits that the Contract concretely assisted the Respondent and contributed to its economic as well as cultural development. The Claimant also points out that the successful salvage of the DIANA raised the Respondent's profile and generated highly-desired attention to the Respondent. The Claimant says that the Respondent clearly considered the cultural and political benefits of the successful salvage of the DIANA to be more important and valuable than financial or commercial results. The Claimant also says that the most important consideration of all is the transfer of know-how by it to the officials of the Respondent which imparted an independent marine salvage capability to the Respondent.

137. On the other hand, the Respondent submits (in its submissions of December 14, 2006) that the salvage operation did not involve any or any significant contribution to its

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<sup>19</sup> Compare this to the GBP 9.6 million value of the bank guarantees in *Joy Mining* which was deemed insufficient by the tribunal in that case.

economic development. The Respondent submits that the Contract was merely concerned with the recovery of the DIANA and (as expressed in the Preamble to the Contract) was for the sole purpose of archaeological interest and the study of historical heritage. The Respondent submits that the financial spending and outlays of resources by the claimants in *Salini* and *Bayindir* were in response to the need for development of the infrastructure in the host State whereas, on the present facts, the Contract merely envisaged a recovery of artefacts from the sea, and such a venture was merely a contract for services and did not contribute significantly to Malaysia's economic development. The Respondent cites Clause 15.1 of the Contract which provides that the Respondent "*shall not commercially exploit such rights in relation to the finds except in so far as to propagate education, tourism, museums, culture and history*" as further proof that there was no significant contribution to the economic development of the Respondent. The Respondent also argues that there was no transfer of know-how or technology to it; and that the Contract is merely a standard salvage contract and not an "investment" in any sense of the word. The Respondent also emphasizes the distinction between it entering into a contract as a "merchant" and as a "sovereign."

138. Not every contract entered into with a sovereign state will have a positive impact on the economic development of the host State in the sense envisaged under the ICSID Convention. Although the Contract was directly entered into by the Claimant with the Respondent, that does not *ipso facto* make the Contract an "investment" within the ICSID Convention. The economic impact of the benefits of the Contract must be assessed to determine whether there was an "investment." Accordingly, the Tribunal must reject any perceived political or cultural benefits arising from the Contract in assessing whether it constituted an "investment" except where such benefits would have had a significant impact on the Respondent's economic development. Stripped of all political and cultural benefits arising from the Contract, the Tribunal must assess whether the benefits arising from the Contract were simply a commercial benefit arising from the Contract or whether the Contract provided a significant contribution to the Respondent's economy.

139. It should not be thought that investments of relatively small cash sums can never amount to an "investment." Investments can be valued in ways other than pure cash, *e.g.*

as human capital or intellectual property rights. So long as the putative investor has committed to making a contribution which results in some form of positive economic development, this *Salini* hallmark can be fulfilled, although subject always to the balancing exercise described in Paragraphs 106(c) and (d) above.

140. The Tribunal now turns to examine previous ICSID jurisprudence to determine what kind of contributions have been held by ICSID tribunals to constitute a significant contribution to the economy of the host State.

141. As explained by *Schreuer*<sup>20</sup> and *CSOB*, the contract which the claimant had with the Collection Company in *CSOB* was instrumental to the development of the host State's banking infrastructure.

142. In *Jan de Nul* and *Bayindir*, the substantial contributions manifested themselves in the form of public infrastructure projects which were of permanent value, and they provided tangible benefits to the host State's economic development.

143. The Tribunal finds that, even accepting the evidence of the Claimant as raised in its oral submissions, the post-hearing submissions and its submissions of December 17, 2006, the Contract did not make any significant contributions to the economic development of Malaysia. The Tribunal considers that these factors indicate that, while the Contract did provide some benefit to Malaysia, they did not make a sufficient contribution to Malaysia's economic development to qualify as an "investment" for the purposes of Article 25(1) or Article 1(a) of the BIT. While the Tribunal is aware of the comment in *Mihaly* that "*the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or not,*" the Tribunal concludes that there was no substantial contribution because the nature of the benefits that the Contract offered to Malaysia did not provide substantial benefits in the sense envisaged in previous ICISD jurisprudence such as *CSOB*, *Jan de Nul* and *Bayindir*.<sup>21</sup>

144. The benefits offered by the Contract to Malaysia were of a different nature to those offered in *CSOB*, *Jan de Nul* and *Bayindir*. The benefits flowing from the Contract

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<sup>20</sup> Schreuer at 121.

<sup>21</sup> *Cf. Joy Mining* where the ICSID Tribunal ruled that a bank guarantee for over GBP9.6 million did not contribute a significant contribution to the Egyptian economy.

were no different from the benefits flowing to the place of the performance of any normal service contract. The benefit was not lasting, in the sense envisaged in the public infrastructure or banking infrastructure projects. The submission that historical marine salvage contracts could lead to a thriving tourism industry appears speculative. In contrast, it is highly likely that a public infrastructure or banking infrastructure project such as those in *CSOB*, *Jan de Nul* and *Bayindir* could provide positive economic development to the host State.

145. While the evidence adduced by the Claimant at the oral hearing referred to in Paragraphs 132–133 above was objected to by the Respondents on the ground of late introduction, the Tribunal has referred to it to show that, even on the Claimant’s best case, it could not establish its claim to have made an “investment.” It has therefore not been necessary to call for any rebuttal evidence from the Respondent.

**(d) Conclusion**

146. Accordingly, the Tribunal concludes that the Contract is not an “investment” within the meaning of Article 25(1) of the ICSID Convention. The Claimant’s claim therefore fails *in limine* and must be dismissed for want of jurisdiction.

**(vii) Discussion on the Meaning of “Investment” Within the BIT**

147. As stated at Paragraph 55 above, the Claimant must establish that the Contract:

- a) falls within the definition of investment as provided under the BIT; and
- b) is an “investment” within the meaning of Article 25(1) of the ICSID Convention.

148. Having concluded that the Contract is not an “investment” within the meaning of Article 25(1) of the ICSID Convention, the Tribunal is impelled to find that it lacks jurisdiction in the present case. Accordingly, it is unnecessary to discuss whether the Contract is an “investment” under the BIT.

## **V. OTHER ISSUES**

149. In view of the above findings, the Tribunal need not consider the other issues raised by the Respondent in support of its challenge to jurisdiction.

## **VI. COSTS**

150. The Tribunal has a discretion as to how the arbitration costs and the legal costs of the case are to be borne. The Tribunal is aware that, while it can order the losing party to pay all costs, it is common ICSID practice for each party to bear its own legal costs and for the arbitration costs to be divided equally regardless of the outcome of the arbitration. In this case, the dispute between the Parties has gone on for so long that the Tribunal does not consider it appropriate for it to be extended any longer. Accordingly, the Tribunal has decided to adopt the common ICSID practice described above.

## **VII. DECISION**

151. ACCORDINGLY, THE TRIBUNAL DECLARES AND ORDERS as follows:

- (a) The Centre has no jurisdiction over the dispute submitted to it in this arbitration and the Tribunal lacks competence to consider the claims made by the Claimant.
- (b) Each Party shall bear one half of the arbitration costs.
- (c) Each Party shall bear its own legal costs.

*[Signed]*

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MICHAEL HWANG, S.C.

SOLE ARBITRATOR

Dated this 10<sup>th</sup> day of May 2007

## **APPENDIX**

**(Articles 2, 4, 5 and 7 of the Malaysia/UK BIT)**

## **Articles 2, 4, 5 and 7 of the Malaysia/UK BIT**

### **Article 2. Promotion and Protection of Investment**

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) 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.

### **Article 4. Expropriation**

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge and shall be freely transferable. The legality of any such expropriation and the amount of compensation shall be determined by due process of

law in the territory of the Contracting Party in which the investment has been expropriated.

- (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the laws in force in any part of its own territory, and in which nationals or companies of the other Contracting Party owns shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary in respect of the shareholders of such a company.

#### **Article 5. Repatriation of Investment**

Each Contracting Party shall, in respect of investments, allow nationals or companies of the other Contracting Party free transfer of their capital and of the returns from it. Nevertheless, each Contracting Party shall have the right to restrict in exceptional circumstances for balance of payments needs the transfer of such proceeds in a manner consistent with its rights and obligations as a member of the International Monetary Fund.

#### **Article 7. References to International Centre for Settlement of Investment Disputes**

- (1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as 'the Centre') for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 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. 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 Convention be treated for the purpose of the Convention as a company of the other Contracting Party. If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Article 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

- (2) Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the Centre unless
  - (a) The Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre.
  - (b) The other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal.