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

In the matter between

MALAYSIAN HISTORICAL SALVORS SDN BHD
(Applicant)

and

THE GOVERNMENT OF MALAYSIA
(Respondent)

(ICSID Case No. ARB/05/10)

DECISION ON THE APPLICATION FOR ANNULMENT

Members of the Ad Hoc Committee

Judge Stephen M. Schwebel (President)
Judge Mohamed Shahabuddeen
Judge Peter Tomka

Secretary of the Ad Hoc Committee

Ms. Aïssatou Diop

Representing the Applicant

Mr. Emmanuel Gaillard
Mr. John Savage
Mr. Yu-Jin Tay
Shearman & Sterling LLP

Representing the Respondent

Tan Sri Abdul Gani Patail
Datuk Azailiza Mohd. Ahad
Ms. Aliza Sulaiman
Mr. Osman Affendi Mohd. Shalleh
Attorney General's Chamber of Malaysia

Dato' Cecil Abraham
Mr. Sunil Abraham
Zul Rafique & Partners

Mr. Robert Volterra
Mr. Stephen Fietta
Latham & Watkins LLP

Date of Dispatch to Parties: April 16, 2009

TABLE OF CONTENTS

A. BACKGROUND

1. The question in this case is whether the Award on Jurisdiction of 17 May 2007 in *Malaysian Historical Salvors v. Malaysia*[1] should be annulled on the sole ground invoked by Malaysian Historical Salvors Sdn., Bhd. (the "Applicant" or the "Salvor"), namely, that the Tribunal manifestly exceeded its powers by failing to exercise a jurisdiction over the dispute with which it was endowed under the Convention on the Settlement of International Disputes between States and Nationals of Other States[2] (the "ICSID Convention") and by the terms of 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 (the "Agreement" or "BIT"). A particular question under the ICSID Convention is whether the resources spent by a company that contracted with the Government of Malaysia to salvage a shipwreck constitute an investment in that State within the meaning of Article 25(1) of the ICSID Convention. Monetarily, the case is a small one, but, as will be seen, it involves larger issues.

2. The matter arises in this way. In 1817, a British vessel named the *Diana* sank in waters which now form part of the territorial waters of Malaysia. It was carrying a large cargo of antique Chinese porcelain. The Applicant is a marine salvage company incorporated under the laws of Malaysia, the majority of whose shares are owned by a British national (whether that was the case when the dispute arose is in dispute). Under a contract dated 3 August 1991[3] (the "Contract"), the Applicant and the Government of Malaysia (the "Respondent") agreed that the Applicant would find the wreck and salvage the cargo of the *Diana* for the Respondent. The Applicant by the title and provision of the Contract agreed "to survey, identify, classify, research, restore, preserve, appraise, market, sell/auction and carry out a scientific survey and salvage of the wreck and contents . . .

---

[1] *Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007 ("Award").

[2] 14 October 1966.

[3] Contract No. IPL3/1991 dated 3 August 1991 between the Government of Malaysia and Malaysian Historical Salvors Sdn., Bhd. (with Variation Order No. 1/1993 dated 12 April 1993 and Extension of Contract dated 12 July 1994) ("Contract").

believed to be the Wreck 'DIANA.'"[4] The Contract provides that the foregoing "[w]orks is for the sole purpose of archeological interest and the study of historical heritage."[5] The Government and the Salvor "shall have ownerships of publication and intellectual rights. … However the GOVERNMENT shall not commercially exploit such rights except in so far as to propagate education, tourism, museums, culture and history."[6] The Salvor "shall ensure that at least 50% from its total personnel comprise Malaysian personnel for the purpose of carrying out the Works."[7]

3. The Contract was on a "'No Finds No Pay' basis,"[8] a well established practice in marine salvage, which meant that all the costs of the search and salvage operation and its risks would be borne by the Applicant but the finds (if any) would belong to the Respondent, against payment by the Respondent to the Applicant of a portion of the value of any finds.

4. Accordingly, title to the recovered cargo was to belong to the Respondent. Out of the value of the recovered cargo, a "Service Fee" was to be paid by the Respondent to the Applicant, in accordance with a formula set out in the Contract.[9] Under a subsequent contract,[10] the Applicant was to arrange for the auction of the recovered items in Europe by the international auction firm, Christie's. The Respondent reserved the right to withdraw salvaged items from the sale "which are of interest to the National Museum for study and exhibition"[11] provided that the Applicant was paid its share of the best attainable value for these withdrawn items. The Applicant was then entitled to the

[4] Contract, Preamble.

[5] *Id*.

[6] *Id*., Clause 15.1.

[7] *Id.,* Clause 26.1.

[8] *Id*., Clause 2.2.

[9] *See id*., Clause 4.

[10] Agreement No. PERB/PK/116/1994 dated 22 September 1994 between the Government of Malaysia, Malaysian Historical Salvors and Christie's Amsterdam B.V. ("Agreement 116/1994").

[11] *Id*., Clause 2.2.

"Service Fee" comprising 70% of the combined total of the proceeds from auction plus the appraised value of those items not auctioned.[12]

5. After an extended search and salvage operation of almost four years, the Applicant found the wreck and recovered approximately 24,000 pieces of porcelain from it. Some items were withheld from sale by the Respondent; the remainder were auctioned in March 1995 at Christie's in Amsterdam for approximately USD 2.98 million. A number of pieces of antique Chinese porcelain so salvaged have been placed in the Malaysian National Museum.

6. The Applicant in the original arbitration proceeding alleged that, while being contractually entitled to 70% of the amount realised from Christie's auction, it received only USD 1.2 million, or 40% of the amount realised. The Applicant also alleged that the Respondent withheld from sale salvaged items valued at over USD 400,000 and did not pay the Applicant its share of the best attainable value of these items.

7. On 30 September 2004, the Applicant submitted a request for arbitration to ICSID, invoking the consent to ICSID arbitration contained in the Agreement. On 17 May 2007, the Tribunal's Award dismissing the Applicant's claims in their entirety for want of jurisdiction was dispatched to the parties.

8. The Tribunal consisted of Mr. Michael Hwang, S.C., as the Sole Arbitrator. It is the Award rendered by that distinguished arbitrator which is the subject of this annulment proceeding. It may be noted that the ICSID Secretariat, in exercise of its screening function, put a number of questions to the Applicant, and received its replies, before registering the Request as supplemented by those replies.[13]

9. The Applicant argued that its performance under the Contract fell within the meaning of "investment" as defined under the Agreement,[14] and that the Respondent

[12] Contract, Clause 4.1.1.

[13] *See* Award, paras. 18 – 25.

[14] Article 1 of the BIT provides, in part: "[f]or the purposes of the Agreement, (1)(a) 'investment' means every kind of asset and in particular, though not exclusively, includes: … (iii) claims to money or to any

violated Article 2 (Protection of Investment), Article 4 (Expropriation), Article 5 (Repatriation of Investment) and Article 7 (Consent to ICSID arbitration) of the Agreement. Whether the Agreement applied was not determined by the Tribunal because the Respondent objected to the proceedings on the ground that ICSID had no jurisdiction over the dispute under the ICSID Convention, which, in the event, was the sole question addressed by the Sole Arbitrator.

B. THE AWARD

10. After the hearing, the Sole Arbitrator requested counsel to comment on several ICSID cases which had not been discussed by the parties in their earlier submissions but which he identified as being of interest for the matter under his consideration. On 17 May 2007, the Tribunal rendered its Award on Jurisdiction (the "Award"). The Tribunal concluded that the Centre had no jurisdiction over the dispute submitted, and that the Tribunal lacked the competence to consider the claims made by the Applicant.[15]

11. The Tribunal stated that ICSID jurisprudence, cited by the parties, requires the adoption of a two-stage approach to determine whether the Tribunal has jurisdiction over a dispute. The Applicant must show that the Contract is an "investment" within the meaning Article 25(1) of the ICSID Convention;[16] if it succeeds in showing that, it must then go on to show that the Contract also falls within the definition of an 'investment' as set out in the relevant bilateral investment treaty.

12. The Tribunal initially turned to the question whether the Contract was an "investment" within the meaning of Article 25(1) of the ICSID Convention. The Applicant had argued that the Contract was the quintessence of an "investment" because the Applicant had invested its own funds and other financial resources ("outlay") in the

---

performance under contract, having a financial value; … (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

[15] Award, para. 151

[16] Article 25(1) of the ICSID Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State…) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

performance of the Contract, and also assumed the risk for the failure of the salvage operation. The Applicant had also argued that its performance under the Contract had the hallmarks of "investment" identified in previous ICSID cases,[17] and relied on *Alcoa Minerals v. Jamaica*[18] in which the Tribunal recognised that contribution of capital was one type of investment.

13. The Respondent argued in response that the Contract was not an "investment" within the meaning of Article 25(1) of the Convention, as the Contract was "for the sole purpose of archaeological interest and the study of historical heritage."[19] The Respondent submitted that the Applicant's case did not meet the requirements of "investment" as set out in the *Salini v. Morocco* case,[20] and that the Contract had not contributed to the economic development of Malaysia.

14. The Tribunal started its discussion of the meaning of the term "investment" by recalling that Article 31 of the Vienna Convention on the Law of Treaties[21] (the "Vienna Convention") provides that "[a] treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms…." The Tribunal also considered that, taking "a teleological approach" to the ICSID Convention, a tribunal ought to interpret the word "investment" so as to encourage, facilitate and promote cross-border economic cooperation and development. It held that support for this approach could be found, *inter alia*, in the Preamble to the ICSID Convention which speaks of "**[c]onsidering** the need for international cooperation for economic development…."

---

[17] The Applicant relied on *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, an English translation of which is found at 6 ICSID Reports 400 (2004), ("*Salini v. Morocco*"),; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 ("*Joy Mining v. Egypt*"); and *Consorzio Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005 ("*L.E.S.I.- DIPENTA v. Algeria*").

[18] *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2, *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, 6 July 1975 ("*Alcoa v. Jamaica*").

[19] Contract, Preamble.

[20] *See* Award, para. 47.

[21] 23 May 1969, 1155 UNTS 331.

15. The Tribunal considered that there were seven decided cases "of importance" on the issue whether a contract is an "investment" within the meaning of Article 25(1) of the Convention, and that, while "there is no doctrine of *stare decisis* in ICSID jurisprudence,"[22] a review of these cases would "assist in determining"[23] the issue at hand. The Tribunal noted that the language of these cases could be interpreted as defining features as typical characteristics on the one hand (the "Typical Characteristics Approach") or as jurisdictional requirements on the other (the "Jurisdictional Approach"). While the Jurisdictional Approach requires that each of the established hallmarks of an "investment" must be present before a contract can be considered an "investment," the Typical Characteristics Approach would still allow a tribunal to find that there is an "investment," even if one or more of the established hallmarks were missing.[24]

16. The Tribunal then reviewed the seven cases of importance "to discern a broad trend which emerges from ICSID jurisprudence on the 'investment' requirement…."[25] The Tribunal noted that jurisprudence on the meaning of "investment" typically cites *Salini v. Morocco*[26] and *Joy Mining v. Egypt*[27] as authorities for the various defining hallmarks of an "investment," and that the factors considered in *Salini v. Morocco* are widely accepted as a starting point of an ICSID Tribunal's analysis on this point. The Tribunal then cited the *Salini v. Morocco* factors, being: "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction . . . In

[22] Award, para. 56.

[23] *Id*. The seven cases "of importance" were *Salini v. Morocco*; *Joy Mining v. Egypt*; *L.E.S.I.- DIPENTA v. Algeria*; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 ("*Jan de Nul v. Egypt*"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 ("*Bayindir v. Pakistan*"); *Československá obchodní banka, a.s. v. Slovak Republic,* ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 ("*CSOB v. Slovak Republic*"); and *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 9 February 2004 ("*Patrick Mitchell v. DRC*").

[24] Award, para. 70.

[25] *Id.*, para. 104.

[26] *See Salini v. Morocco*, paras. 50 – 58.

[27] *See Joy Mining v. Egypt*, paras. 42 – 63.

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."[28]

17. The Tribunal concluded from its review of the seven cases that the differences between the two approaches are likely to be academic, and in the practice it is unlikely that any difference in juristic analysis would make any significant difference to the ultimate findings of the tribunal. The Tribunal noted that ICSID tribunals tend to adopt "an empirical rather than a doctrinaire approach"[29] to determining whether there is an "investment" within the meaning of Article 25(1) of the ICSID Convention, and summarised the jurisprudence thus:

> (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 (citation omitted).
>
> (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 (citation omitted).
>
> (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 (sic) 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. … In this situation, a tribunal is likely to use language that may be interpreted as advocating a Typical Characteristics Approach (citation omitted).
>
> (d) Alternatively, in the scenario discussed in c), a tribunal may also rely on a Jurisdictional Approach but, in examining whether each of the relevant hallmarks of 'investment' is satisfied, the tribunal

[28] Award, para. 78

[29] *Id*., para. 106.

> may take a broad approach, requiring only relatively marginal evidence to establish a positive finding in favour of assuming ICSID jurisdiction. … In other words, the hallmarks, although essential, are not sufficient to ensure that a contract is an 'investment' (citation omitted).
>
> (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.'[30]

18. The Tribunal then considered to what degree the hallmarks of "investment" had been met in the present case, "adopting a fact-specific and holistic assessment."[31] As to the first hallmark, "Regularity of Profits and Returns" (which the Tribunal noted was cited in *Joy Mining v. Egypt*, but not in *Salini v. Morocco*), the Tribunal held that there was no regularity of profits or returns in the present case. However, it accepted the Applicant's argument that that criterion is not always decisive and has not been held to be an essential characteristic in any of the cited cases.[32]

19. Regarding the second hallmark, "Contributions," the Tribunal held that it was not in dispute that the Applicant expended its own funds, but "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*."[33]

20. As to the third hallmark, "Duration of the Contract," the Tribunal noted that the "Contract took almost four years to complete,"[34] and therefore complied with the minimum length of time discussed in *Salini v. Morocco*. However, due to the nature of the Contract, the Tribunal held that the Applicant only satisfied this factor in a

[30] Award, para. 106.

[31] *Id.*, para. 107.

[32] *Id.*, para. 108.

[33] *Id.*, para. 109.

[34] *Id.*, para. 110.

quantitative sense, but failed to do so in the qualitative sense, given that (a) the time expended in performance of the Contract was dependent, in part, on the element of fortuity (this appears to be a reference to the difficulty in finding the wreck); (b) the Contract did 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."[35]

21. As to the fourth hallmark, "Risks Assumed Under the Contract," the Tribunal noted that it was not disputed that all the risks of the Contract were borne by the Applicant. However, the Tribunal concluded that the fact that salvage contracts are typically on a "no-finds-no-pay" basis was evidence that the risks assumed by the Applicant under the Contract were no more than ordinary commercial risks normally assumed by salvors.[36] Therefore, while the Applicant had satisfied the risk criterion in the quantitative sense, the Tribunal concluded that the quality of the assumed risk was not something which established ICSID practice and jurisprudence would recognise.[37]

22. As regards the fifth hallmark, "Contribution to the Economic Development of the Host State," the Tribunal considered that "the weight of the authorities . . . swings in favour of requiring a significant contribution to be made to the host State's economy."[38] In particular, the Tribunal held that, given "all the circumstances of the factual matrix in this case . . . 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."[39] The Tribunal concluded that the "benefits offered by the Contract to Malaysia were of a different nature to those offered in *CSOB*, *Jan de Nul* and *Bayindir*";[40] in its view, the "benefits flowing from the Contract were no different from the benefits flowing to the place of the performance of

[35] Award., para. 111.

[36] *Id.*, para. 112.

[37] *Id.*

[38] *Id.*, para. 123.

[39] *Id.*, para. 130.

[40] *Id.*, para. 144.

any normal service contract. The benefit was not lasting, in the sense envisaged in the public infrastructure or banking infrastructure projects,"[41] which were likely to provide positive economic development to the host State.

23. The Award accordingly concluded that the Applicant's claim failed *in limine* and must be dismissed for lack of jurisdiction.[42] Having concluded that the Contract was not an "investment" within the meaning of Article 25(1) of the ICSID Convention, the Tribunal found it unnecessary to discuss whether the Contract was an "investment" under the Agreement.[43]

C. THE ANNULMENT PROCEEDINGS

24. By an Application for Annulment dated 7 September 2007, the Applicant applied to ICSID for an annulment of the Award pursuant to Article 52(1)(b) of the ICSID Convention. The Application, which was made within the time prescribed by Article 52(2) of the ICSID Convention, was registered by the Secretary-General of ICSID on 17 September 2007.

25. On 30 October 2007, an *ad hoc* committee (the "Committee") was constituted, its members consisting of Judge Stephen M. Schwebel (United States), Judge Mohamed Shahabuddeen (Guyana) and Judge Peter Tomka (Slovak Republic), together the "Committee." The parties were so notified on 30 October 2007 when they were also informed that Mr. Ucheora Onwuamaegbu, Senior Counsel, ICSID, would serve as Secretary of the Committee. On 6 November 2007, the Secretary of the Committee informed the parties that Judge Schwebel had been designated by the other members of the Committee as its President. On 26 September 2008, the Committee and parties were informed that due to a redistribution of the Centre's workload, Ms. Aïssatou Diop, Consultant, ICSID, had been assigned to serve as Secretary of the Committee in replacement of Mr. Onwuamaegbu.

---

[41] Award, para. 144.

[42] *Id*., para. 146.

[43] *Id*., para. 148.

26. The first session of the Committee, originally planned for 3 December 2007, was postponed, due to the delay of the initial advance payment to the Centre by the Applicant. It was held on 31 March 2008 in The Hague. In accordance with the procedural time table set out by the Committee at its first session in consultation with the parties, the Applicant filed its Memorial on Annulment on 30 May 2008. The Respondent filed its Counter-Memorial on 15 September 2008. The Applicant then filed its Reply on 13 October 2008, and the Respondent filed its Rejoinder on 10 November 2008. A hearing took place on 3 December 2008 in The Hague. During the course of the proceedings, the Members of the Committee deliberated by various means of communication, including a meeting in The Hague on 4 December 2008.

D. SUBMISSIONS OF THE PARTIES

(a) Malaysian Historical Salvors Sdn, Bhd

27. The Applicant bases its request for an annulment of the Award on the ground that, in deciding that the Centre had no jurisdiction over the dispute and the Tribunal lacked competence to consider the claims submitted to it, the Tribunal manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.[44] The Applicant relies on *Vivendi v. Argentine Republic*[45] as a basis for its argument that the failure of a tribunal to exercise jurisdiction which it possesses constitutes an excess of powers within the meaning of Article 52(1)(b).[46] It noted that it was common ground between the parties that such failure constitutes an excess of powers.

28. The Applicant presents three main arguments in support of its claim that the Tribunal's decision that it lacked jurisdiction was a manifest excess of powers under Article 52(1)(b). First, the Applicant argues that the Tribunal applied an overly-restrictive

[44] Application for Annulment, para. 8.

[45] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 86: "[i]t is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments."

[46] *See* Applicant's Memorial, paras. 42 – 48.

definition of the term "investment." The Applicant submits that the Tribunal failed to apply the guiding principles set down in the Vienna Convention, and accordingly disregarded the ordinary meaning of the term "investment."[47] The Applicant argues that the drafters of the ICSID Convention rejected restrictions on the meaning of the word "investment" during the Convention negotiations, and concluded that the meaning of the term would be left open. Accordingly, the Applicant argues that the term "investment" under Article 25(1) of the ICSID Convention was intended to be a broad and inclusive concept.[48] The Applicant also submits that the Tribunal failed to take account of the ICSID Convention's *travaux préparatoires*, a supplementary means of interpretation provided for by Article 32 of the Vienna Convention,[49] that were directly relevant to the Tribunal's analysis in this case. In the view of the Applicant, those *travaux préparatoires* contain numerous discussions of the definition of "investment" and confirm the broad ordinary meaning of the term.[50] They establish that the drafters of the ICSID Convention decided against defining the term "investment." They show that they rejected a monetary floor for the value of an investment in order for it to be treated as an investment under Article 25(1). And they indicate that it was accepted that great weight in the definition of investment in the particular case would be given to the intentions of the Parties to the BIT or other instrument that provided for recourse to ICSID.

29. The Applicant's second argument is that the Tribunal elevated characteristic-based tests to the level of jurisdictional conditions. The Applicant submits that the Tribunal identified certain "characteristics" or "hallmarks" of an investment from cases which it termed the "critical cases on investment," considering them to be (i) Regularity of Profits and Returns; (ii) Contributions; (iii) Duration of the Contract; (iv) Risks Assumed under

[47] *See* Applicant's Memorial, paras. 50 – 55.

[48] *See id*., paras. 57 – 67, 74.

[49] Article 32 of the Vienna Convention provides: "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable."

[50] *See* Applicant's Memorial, paras. 50 – 57.

the Contract; and (v) Contribution to the Economic Development of the Host State.[51] The Tribunal's error, according to the Applicant, was to elevate these characteristics to the level of jurisdictional "conditions" of an investment and to conclude that it was "essential" to a claim that these investment characteristics be met.[52] The Applicant argues that these conditions do not originate in the text of the ICSID Convention itself, and are inconsistent with the ordinary meaning of the term "investment" and the ICSID Convention's *travaux préparatoires*.[53] The Applicant contends that the Tribunal effectively narrowed the meaning of the term "investment" in a manner inconsistent with the intention of the Convention drafters and its signatory states.[54]

30. The Applicant makes an additional argument that the Tribunal improperly introduced a further jurisdictional requirement of "contribution to the economic development of the host State," having extrapolated this additional condition from a sentence in the Preamble of the ICSID Convention: "**[c]onsidering** the need for international cooperation for economic development."[55] The Applicant relies on the Award in *Pey Casado v. Chili*[56] to argue that this sentence of the Preamble does not establish a condition for investment, but merely reflects that such "'economic development' would be a desirable and natural *consequence* of investment."[57]

31. Thirdly, and in the alternative, the Applicant argues that, even if the Tribunal was correct to adopt a characteristics-based approach, it erred in introducing an additional requirement that the investment characteristics must not only be present "quantitatively," but that they must also be present "qualitatively" and "to a sufficient degree before an 'investment' can be found."[58] The Applicant argues that despite finding that certain of the

[51] Applicant's Memorial, paras. 31 – 33, citing Award, headings at pp. 35 – 43.

[52] *Id.*, para. 79, citing Award, para. 106(d) and (e).

[53] *Id.*, paras. 32, 77.

[54] *Id.*, para. 82.

[55] *Id.*, para. 69.

[56] *Victor Pey Casado et Fondation 'Presidente Allende' c. République du Chili*, ICSID Case No. ARB/98/2, Sentence arbitrale, 8 May 2008.

[57] Applicant's Memorial, para. 71, citing *Pey Casado v. Chili*, para. 232.

[58] *Id.*, para. 39.

investment conditions were met, the Tribunal erroneously held that the Contract did not constitute an "investment" because it found that the investment characteristics or conditions did not exist to a sufficient "qualitative" extent. The Applicant submits that "[t]hese 'qualitative' conditions have no basis in law,"[59] and are "alien to the meaning of 'investment' in the ICSID Convention."[60] The Applicant then proceeds to analyse each of the characteristics of an investment enumerated by the Tribunal, to illustrate the "qualitative" approach which it argues the Tribunal erred in adopting.

32. As regards the first characteristic, "Regularity of Profits and Returns," the Applicant acknowledges that the Tribunal held that this feature is not always critical and accepted that the absence of this element was immaterial to the determination of whether the Contract constitutes an "investment."[61]

33. Concerning the second characteristic, "Contributions," the Applicant argues that the Tribunal erred in considering that "the size of the contributions were in no way comparable to those found in *Salini*, *Bayindir* and *Jan de Nul*…."[62] The Applicant recalls that minimum monetary limits for investments were canvassed during the negotiations of Article 25(1), but were rejected.[63] The Applicant accordingly submits that the fact that its contributions were smaller than those mentioned in the case law surveyed by the Tribunal is of no relevance.[64]

34. As regards the third characteristic, the "Duration of the Contract," the Applicant argues that the Tribunal erred in finding that because the duration of the Contract depended on the element of fortuity, it did not meet the duration criterion "in the qualitative sense envisaged by ICSID jurisprudence."[65] The Applicant contends that there is no legal authority for this additional "qualitative" requirement, and that the Tribunal's

[59] Applicant's Memorial, para. 85.

[60] *Id.*, para. 84.

[61] *Id.*, para. 87, citing Award, para. 108.

[62] *Id.*, para. 90, citing Award, para. 109.

[63] *Id.*, para. 92.

[64] *Id.*, para. 93.

[65] *Id.*, para. 98, citing Award, para. 111.

finding is in contradiction to the ICSID Convention's *travaux préparatoires*, which show that a requirement of a minimum duration of five years for an investment was debated and rejected by the drafters.[66] The Applicant also submits that the Tribunal confused its assessment of whether the element of duration was met with the separate issue of whether the investment would promote the economy and development of the host State.[67]

35. Concerning the fourth characteristic, the "Risks Assumed under the Contract," the Applicant argues that the Tribunal again erred by concluding that "while [the Applicant] 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."[68] The Applicant reiterates its argument that there is no legal justification for this qualitative requirement in the ICSID jurisprudence, and that the Tribunal's approach led it to make a manifest jurisdictional error.[69]

36. The final investment characteristic discussed by the Tribunal is a "Contribution to the Economic Development of the Host State." The Applicant argues that this condition is not supported by the text of the ICSID Convention.[70] However, the Applicant argues that, even if this characteristic were a condition, the Tribunal erred in finding that, although the Contract contributed to Malaysia's economic development, "this benefit is not of the same quality or quantity envisaged in previous ICSID jurisprudence."[71] The Applicant submits that there was no basis for the Tribunal's conclusion that the economic contribution to the host State be "substantial" or "significant,"[72] and argues that "[t]his

[66] *See* Applicant's Memorial, paras. 98 – 101.

[67] *Id*., para. 99.

[68] *Id.*, para. 105, citing Award, para. 112.

[69] *Id*., paras. 106 – 107.

[70] *Id.*, para. 121.

[71] *Id.*, para. 116, citing Award para. 132.

[72] *Id.*, paras. 110 – 113, 121.

additional threshold, arbitrarily imposed by the Tribunal, is manifestly not found in the text of the Preamble, nor in the text of Article 25(1) of the ICSID Convention."[73]

37. The Applicant therefore concludes that the Tribunal's assessment of whether the Contract satisfies the characteristic of an investment suffers from manifest and fundamental flaws arising out of (i) the Tribunal's failure to consider the text of the Convention and its *travaux préparatoires*; (ii) the overriding significance given to the facts found in its selection of ICSID cases, which it effectively elevated to binding precedent; and (iii) its requirement that each of the investment "conditions" should be present to a sufficient "qualitative" degree. The Applicant submits that the Award should be annulled in its entirety in accordance with Article 52(1)(b) of the ICSID Convention.

38. The Applicant also argued that the Tribunal should "have considered the BIT definition of 'investment' because it was expressly defined by the United Kingdom and Malaysia to be extremely broad and encompassing 'every kind of asset,'"[74] the suggestion being that an investment within this broad definition governs the scope of an investment under Article 25(1) of the ICSID Convention.

39. The foregoing derives from the Applicant's Memorial. It was reiterated by the Applicant's Reply. The Reply submitted that Article 52(1)(b) of the ICSID Convention, which restricts annulment to cases in which "the Tribunal has manifestly exceeded its powers," does not visualize a procedure in which the *ad hoc* Committee first determines whether the Tribunal has exceeded its powers and then, if it determines that the Tribunal has exceeded its powers, as a separate stage of the analysis determines whether the excess is manifest. By that procedure, a wrong holding that there is jurisdiction will be allowed to stand unless, as a separate stage of the analysis, it is found that the error was manifest. The Applicant submits that there is a single determination, and that it is concerned with the question whether the Tribunal has exceeded its powers. In this respect, the Applicant argued that a wrong jurisdictional holding is by its nature manifest. (At the oral hearing,

[73] Applicant's Memorial, para. 121.

[74] *Id.*, p. 7, footnote 32.

the Applicant did not rely on the latter argument but rather argued that the errors of the Tribunal were manifest on other grounds, namely those described above.)

40. On the question whether the economic development of the host State is a requirement of an investment, the Applicant submits in its Reply that all the Preamble of the ICSID Convention observes is that contribution to economic development of the host State is a possible consequence but not a condition of investment. In other words, "while the ICSID Convention's Preamble recognises that in protecting 'investments', the Convention encourages development of the host state, this does not mean that the development of the host state is a constitutive *condition* of an 'investment' within the meaning of the Convention."[75]

41. In oral argument before the Committee on 3 December 2008, the Applicant reiterated its contentions, emphasising that the Tribunal did find that, in some respects, the outlay contributed to the economy of the Respondent and submitting that, however small was the contribution, it supported the nature of the outlay as being that of an investment. There was no basis for the Tribunal's treating investment in infrastructure or banking as investment within the meaning of the ICSID Convention while holding that investment in the cultural history and museum content of a host State was outside the meaning of the Convention. The Salvor was required to utilise its expertise, labour and equipment, to invest its own financial and other resources, and assume all risks of the salvage operation, financial and physical. It was required to search for and secure the wreck, bring the cargo to the surface, clean, restore, inventory and photograph the salvaged items, and arrange for their sale. The fact that this was the first salvage contract to be at issue in an ICSID case, and that the contribution to the economy of Malaysia of the contract's implementation was small, hardly supported the conclusions of the Sole Arbitrator that the quality of the assumed risk was not of a kind that ICSID jurisprudence would recognise, and that the undoubted risk must be discounted because it was an ordinary commercial risk that did not entail a significant contribution to the economic development of the host State.

[75] Applicant's Reply, para. 19.

42. The Applicant requested the Committee to order the Respondent the reimbursement of all costs and expenses incurred by the Applicant in connection with the annulment proceedings, including the fees and expenses of legal counsel.[76]

(b) The Government of Malaysia

43. The Respondent asks the Committee to reject the Applicant's request for annulment of the Award in its entirety. The Respondent's position is that the Application demonstrates no basis for annulment of the Award under Article 52(1)(b) of the Convention. It urges, *inter alia*, that "investment" under Article 25(1) of the ICSID Convention means an investment for the economic development of the host State, that the Applicant's outlay was not for that purpose, and that the claim is accordingly outside of the jurisdiction of the Tribunal.

44. The Respondent also contends that, in declining jurisdiction, the Tribunal did not "manifestly exceed its powers" as required for an annulment under Article 52(1)(b), and that the Applicant is in effect asking the Committee to annul the Award on the basis that the Committee should take a different view from the Tribunal either on "the Article 25 question *per se*, or on the question of whether or not the individual hallmarks were satisfied in its individual case."[77]

45. The Respondent's argument centers on the nature of an annulment in ICSID proceedings. According to the Respondent, annulment is an "*extraordinary and narrowly circumscribed remedy*"[78] and the mandate of the Committee in an annulment proceeding is "narrow and limited."[79] The Respondent argues that the Applicant's Application "falls well outside of the Committee's mandate."[80] It submits that finality of proceedings is an important component for the integrity of the ICSID process, and annulment is a limited

[76] Applicant's Memorial, para. 129 and Applicant's Reply, para. 77.

[77] Respondent's Counter-Memorial, para. 122.

[78] *Id.*, para. 39.

[79] *Id.*, Title of Section III.

[80] Respondent's Counter-Memorial, para. 36.

exception and must be exercised only in the narrow circumstances mandated by Article 52.[81]

46. The Respondent emphasises the distinction between an annulment and an appeal. It submits that two main distinctions exist: the first relates to the result of the process when an annulment or appeal is successful, the second relates to the legal basis of the challenge to the underlying award.[82] The Respondent relies on ICSID jurisprudence to the effect that annulment is not a remedy against an incorrect decision; in its view, the Applicant's Memorial reveals that at the heart of its Application lies an objection to the correctness of the Tribunal's finding on whether the Contract was an "investment" within the meaning of Article 25(1) of the Convention.[83] That kind of objection, submits the Respondent, is not within the scope of an application for annulment.

47. The Respondent does not agree with the Applicant's proposition that an annulment is warranted because the Tribunal "manifestly exceeded its powers" under Article 52(1)(b) of the Convention. The Respondent contends that the Tribunal did not exceed its powers at all. Rather, in declining jurisdiction on the basis that the Contract was not an "investment" within the meaning of Article 25(1) of the Convention, the Respondent submits that "the Tribunal acted entirely within its powers."[84] The Respondent maintains that, in essence, the Applicant is required by Article 52(1)(b) of the Convention to demonstrate that the conclusions reached in the Award in relation to the investment question were "beyond the scope of reasonable debate [and the Applicant] palpably failed to do so."[85]

48. The Respondent bases this argument on its view that the Tribunal correctly concluded that the Contract was not an "investment" under Article 25(1). It submits that, contrary to the Applicant's assertions, the Tribunal correctly considered that "investment"

[81] Respondent's Counter-Memorial, para. 43.

[82] *See id.*, para. 46.

[83] *Id.*, para. 51.

[84] *Id.*, para. 55.

[85] *Id.*, para. 56.

has an objective meaning under Article 25(1),[86] and the Applicant's argument that the consent of the parties should provide a guiding light when determining whether an "investment" exists would lead to an absurdity, given that Article 25 places an outer limit upon parties' ability to refer disputes to ICSID.[87] The Respondent also disputes the Applicant's assertion that the Tribunal disregarded the Vienna Convention, and argues that not only was the Tribunal mindful of the Convention, but that its approach to interpretation was entirely consistent with the Convention.[88]

49. As regards the "hallmarks" of an investment, the Respondent argues that the Applicant misrepresents the case in saying that (1) the Tribunal adopted strict jurisdictional conditions; (2) the Tribunal found that the hallmarks of an investment were present; and (3) the Tribunal arbitrarily imposed an additional "qualitative" pre-condition for jurisdiction. The Respondent contends that "the Tribunal's identification of five hallmarks of investment under Article 25(1), and its '*fact-specific and holistic*' approach to determine the extent to which those hallmarks were met, are uncontroversial."[89] The Respondent argues that "[t]he Tribunal's approach is entirely consistent with the 'global assessment' employed by previous ICSID tribunals, which requires the hallmarks of investment to be 'examined in their totality' on the facts of any given case."[90] In the Respondent's view, even if the Tribunal had imposed a stricter regime based on the jurisdictional conditions approach, this would not have provided a basis for annulment, given that previous and subsequent tribunals have themselves employed such an approach.[91]

50. In response to the Applicant's argument that the Tribunal effectively elevated characteristics found in the jurisprudence into "binding precedent," the Respondent argues

---

[86] *See* Respondent's Counter-Memorial., paras. 62 – 68.

[87] *Id.*, paras. 65, 68.

[88] *Id.*, para. 70.

[89] *Id.*, para. 85, citation omitted.

[90] *Id.*, para. 85.

[91] *Id.*, para. 86, relying on *L.E.S.I-DIPENTA v. Algeria*, para. 13(iv) and *Pey Casado v. Chili*, paras. 231 – 232.

that the Tribunal legitimately referred to ICSID jurisprudence and leading commentary,[92] and that its extensive citing of ICSID jurisprudence only enhances the legal credibility of the Award and its insusceptibility to annulment. The Respondent points out that the Tribunal "noted that each of the hallmarks of investment that it identified had been recognised and applied by previous ICSID tribunals."[93] In the Respondent's view, the "Tribunal conducted a meticulous analysis of the meaning of 'investment' under Article 25 of the Convention, analysing previous ICSID jurisprudence and leading commentary, and reached a conclusion based on its assessment of the detailed facts of the case. [Accordingly t]he Tribunal . . . did not exceed its powers at all."[94]

51. Even if the Tribunal exceeded its powers (which the Respondent disputes), the Respondent argues that this would not provide any basis for the annulment of the Award, given that, in the view of the Respondent, the Tribunal did not "manifestly" exceed its powers.[95] The Respondent contends that the "manifest" requirement under Article 52(1)(b) sets a high threshold, and cites from an article in which its author takes the view that "*the addition of the word 'manifestly' to the language of paragraph (b) is a serious restriction of the authority of an ad hoc Committee under Article 52*"[96] The Respondent also notes that the concept of "manifest" exists elsewhere in the Convention and Arbitration Rules. The Respondent submits that the interpretation of these other provisions support the view that the concept "*sets a high bar to the application of any provision so conditioned*."[97]

52. Taking the threshold set by the "manifest" concept into account, the Respondent then submits that the Applicant has failed to demonstrate that any excess of powers by the

---

[92] *See* Respondent's Counter-Memorial, paras. 87 – 100.

[93] *Id.*, para. 90.

[94] *Id.*, para. 100.

[95] *See id*., paras. 101 – 123.

[96] *Id.*, para. 106, citing Mark B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REVIEW – F.I.L.J. 101 (1987).

[97] *Id*., para. 112, citing *CDC Group plc v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, 29 June 2005 ("*CDC Group v. Seychelles*")*,* para. 42.

Tribunal authorizes the Committee to annul under Article 52(1)(b).[98] It contends that, to annul the award, the Committee must conclude that the Tribunal's approach is so preposterous that it falls beyond the reasonable scope of the debate on the precise meaning of the term "investment" under Article 25(1). The Respondent argues that this is not the case, and submits that the Committee must reject the Applicant's arguments and "dismiss the Application on the basis that there was no manifest excess of powers by the Tribunal."[99]

53. In its Rejoinder of 10 November 2008, the Respondent emphasizes its argument that the Committee only has competence if an error of the Tribunal was "manifest." It argues that a jurisdictional mistake is not necessarily a manifest excess of powers and that the Applicant has not given appropriate weight to this proposition.

54. In oral argument before the Committee on 3 December 2008, the Respondent reiterated its case, emphasising that, even if the Committee found that there was a manifest excess of jurisdiction, it had the discretion to uphold the Award.

55. The Respondent also asks that the Committee require the Applicant to bear all of the costs and expenses incurred by the Respondent in connection with the annulment proceedings.[100]

E. ANALYSIS OF THE *AD HOC* COMMITTEE

56. This case concerns the interpretation of treaties. The Vienna Convention on the Law of Treaties, a product of the extended codification processes of the International Law Commission of the United Nations led by a succession of exceptionally distinguished Special Rapporteurs, has been widely accepted, 108 States being party. Among the States that have ratified it are Malaysia and the United Kingdom. The Committee notes that the Vienna Convention as such is not applicable to the 1965 Washington Convention nor to the 1981 United Kingdom – Malaysia BIT. The Vienna Convention applies only to

[98] *See* Respondent's Counter-Memorial, paras. 120 – 123.

[99] *Id.*, para. 123.

[100] *Id.*, para. 125 and Respondent's Rejoinder, para. 100.

treaties which are concluded by States after its entry into force with regard to such States. Malaysia became party to the Vienna Convention only in 1994. The non-retroactivity of the Vienna Convention is, however, "[w]ithout prejudice to the application of any rules set [in it] to which treaties would be subject under international law independently of the Convention."[101] The Convention's provisions on the interpretation of treaties, embodied in Articles 31[102] and 32,[103] while contested when adopted, have been accepted by the International Court of Justice[104] and the international community as expressive not only of treaty commitment but of customary international law. The Committee thus considers itself on firm ground in resorting to the customary rules on interpretation of treaties as codified in the Vienna Convention.

57. The "ordinary meaning" of the term "investment" is the commitment of money or other assets for the purpose of providing a return. In its context and in accordance with the object and purpose of the treaty – which is to promote the flow of private investment to contracting countries by provision of a mechanism which, by enabling international settlement of disputes, conduces to the security of such investment – the term

---

[101] Vienna Convention, Article 4.

[102] Article 31 provides:

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[103] See *supra* note 49 for the text of Article 32 of the Vienna Convention.

[104] *See Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 21-22, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1059, para. 18.

"investment" is unqualified. The purpose of the ICSID Convention was described in a draft of the Convention conveyed by the Bank's General Counsel to the Executive Directors of the Bank in these terms: "[t]he purpose of this Convention is to promote the resolution of disputes arising between the Contracting States and nationals of other Contracting States by encouraging and facilitating recourse to international conciliation and arbitration."[105] The meaning of the term "investment" may however be regarded as "ambiguous or obscure" under Article 32 of the Vienna Convention and hence justifying resort to the preparatory work of the Convention "to determine the meaning." As the pleadings in the instant case illustrate, there certainly have been marked differences among ICSID tribunals and among commentators on the meaning of "investment" as that term appears in Article 25(1) of the Convention. Thus the provision may be regarded as ambiguous. In any event, courts and tribunals interpreting treaties regularly review the *travaux préparatoires* whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure.

58. At issue in this case is the meaning of the treaty term "investment" as that term is used in Article 25(1) of the ICSID Convention—but also in Article 1 of 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 because that instrument is the medium through which the Contracting States involved have given their consent to the exercise of jurisdiction of ICSID.

59. Article 1 of that Agreement defines "investment" capaciously.

> For the purpose of this Agreement
>
> (1)(a) 'investment' means every kind of asset and in particular, though not exclusively, includes:

[105] ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES ("HISTORY OF THE ICSID CONVENTION"), Volume I, p. 16 (1968).

> …
>
> (ii) shares, stock and debentures of companies or interests in the property of such companies;
>
> (iii) claims to money or to any performance under contract having a financial value;
>
> (iv) intellectual property rights…;
>
> (v) business concessions conferred . . . under contract….

60. The Contract between the Government of Malaysia and Malaysian Historical Salvors is one of a kind of asset; what is precisely at issue between the Government and the Salvor is a claim to money and to performance under a contract having financial value; the contract involves intellectual property rights; and the right granted to salvage may be treated as a business concession conferred under contract.

61. It follows that, by the terms of the Agreement, and for its purposes, the Contract is an investment. There is no room for another conclusion. The Sole Arbitrator did not reach another considered conclusion in respect of the Agreement. He rather chose to examine, virtually exclusively, the question of whether there was an investment within the meaning of Article 25(1) of the ICSID Convention. Finding that there was not, he found that "it is unnecessary to discuss whether the Contract is an 'investment' under the BIT."[106] Nevertheless the Sole Arbitrator observed that, "while the Contract did provide some benefit to Malaysia," there was not "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."[107] He provided an extensive analysis in support of his conclusion in respect of the ICSID Convention, but none in respect of his conclusion in respect of the BIT. The Committee is unable to see what support the Sole Arbitrator could have mustered to sustain the conclusion that the Contract and its implementation did not constitute an investment within the meaning of that Agreement. On the contrary, (and subject to the consideration noted below in paragraph 81 of this Decision), it is clear

[106] Award, para. 148

[107] *Id*., para. 143

that the Contract and its performance by the Salvor constitute an investment as that term is defined by the Agreement.

62. Under Article 7 of the Agreement, the sole recourse in the event that a legal dispute between the investor and the host State should arise which is not settled by agreement between them through pursuit of local remedies or otherwise is reference to the International Centre for Settlement of Investment Disputes. Unlike some other BITs, no third party dispute settlement options are provided in the alternative to ICSID. It follows that, if jurisdiction is found to be absent under the ICSID Convention, the investor is left without international recourse altogether. That result is difficult to reconcile with the intentions of the Governments of Malaysia and the United Kingdom in concluding their Agreement, as those intentions are reflected by the terms of Article 7 as well as the Agreement's inclusive definition of what is an investment. It cannot be accepted that the Governments of Malaysia and the United Kingdom concluded a treaty providing for arbitration of disputes arising under it in respect of investments so comprehensively described, with the intention that the only arbitral recourse provided between a Contracting State and a national of another Contracting State, that of ICSID, could be rendered nugatory by a restrictive definition of a deliberately undefined term of the ICSID Convention, namely, "investment," as it is found in the provision of Article 25(1). It follows that the Award of the Sole Arbitrator is incompatible with the intentions and specifications of the States immediately concerned, Malaysia and the United Kingdom.

63. What of the intentions of the Parties in concluding the Washington Convention? The term "investment" was deliberately left undefined. But light is shed on the intentions of the Parties in respect of that term by the Convention's *travaux préparatoires* as well as the Convention's interpretation by the Executive Directors of the International Bank for Reconstruction and Development in adopting and opening it for signature.

64. The World Bank staff's initial proposal on "The Jurisdiction of the Center" provided, in Section 1 (1): "The jurisdiction of the Center shall be limited to disputes between Contracting States and nationals of other Contracting States and shall be based

on consent."[108] Section 1 (3) provided: "Except as otherwise agreed between the parties, the Center shall not exercise jurisdiction in respect of disputes involving claims of less than the equivalent of one hundred thousand United States dollars determined as of the time of submission of the dispute."[109] The comment on this proviso reads:

> Paragraph (3) places a monetary limit on claims to be submitted to the Center. Arbitration is a not inexpensive procedure and parties should not be forced to have resort to it if the amount claimed remains below a certain limit which, for purposes of illustration, has been put at the equivalent of U.S. $100,000.[110]

65. The First Draft of what became Article 25(1) of the Convention provided: "(1) The jurisdiction of the Center shall extend to all legal disputes between a Contracting State . . . and a national of another Contracting State, arising out of or in connection with any investment, which the parties to such disputes have consented to submit to it."[111] It further provided that: "(i) 'investment' means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years."[112] A further attempted definition by the Bank's Secretariat reads:

> The term 'investment' means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities.[113]

66. The reaction of States and their representatives to these proposals was mixed. In the event, their specifications were rejected. While they elicited some support, the prevailing view was that there should be no monetary limit on claims submitted and that the contribution of money or other asset of economic value need not be for an indefinite

---

[108] HISTORY OF THE ICSID CONVENTION, Volume II-1, p. 33.

[109] *Id*., Volume II-1, p. 34.

[110] *Id*.

[111] *Id*., Volume I, p. 116.

[112] *Id*.

[113] *Id*., Volume II-2, p. 844.

period or for not less than five years.[114] More than this, a British proposal that omitted any definition of the term "investment," on the ground that a definition would only create jurisdictional difficulties, "was adopted by a large majority in the Legal Committee."[115]

67. That result was consistent with the position of the General Counsel of the Bank, Mr. Broches, who served as chairman of the regional meetings of legal experts of governments and of the Legal Committee. Thus,

> Mr. Broches called attention to the fact that the document did not limit or define the types of disputes which might be submitted to conciliation or arbitration under the auspices of the Center. It was difficult to find a satisfactory definition. There was the danger that recourse to the services of the Center might in a given situation be precluded because the dispute in question did not precisely qualify under the definition of the convention. There was the further danger that a definition might provide a reluctant party with an opportunity to frustrate or delay the proceedings by questioning whether the dispute was encompassed by the definition. These possibilities suggested that it was inadvisable to define narrowly the kinds of disputes that could be submitted. Moreover, Mr. Broches added, a contracting state would be free to announce that it did not intend to use the facilities of the Center for particular kinds of disputes.[116]

68. Mr. Broches elsewhere explained that:

> since the jurisdiction of the Center is limited by the overriding condition of consent, the exclusions desired by the one or the other delegation could be achieved by a refusal of consent in those cases in which in their view there was no proper case for use of the facilities of the Center. Refusal of consent would be an adequate safeguard for host States….
>
> The purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided the parties' consent had been attained. Beyond these outer limits

[114] "In a draft preceding the Working Paper, a lower limit ($100,000) had been fixed for the subject-matter of the dispute. That provision had not been retained . . . because disputes involving small amounts could be important as test cases, whereas there would be other cases in which it would be impossible to place a pecuniary value on the subject-matter of a dispute." HISTORY OF THE ICSID CONVENTION, Volume II-1, p. 567.

[115] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY, p. 123 (2001), citing to HISTORY OF THE ICSID CONVENTION, Volume II-2, p. 826.

[116] HISTORY OF THE ICSID CONVENTION, Volume II-1, p. 54.

> no use could be made of the facilities of the Center even with such consent.[117]

69. However it is important to note that the *travaux préparatoires* do not support the imposition of "outer limits" such as those imposed by the Sole Arbitrator in this case. Little more about the nature of outer limits is indicated in the *travaux* than is contained in Article 25(1), namely that, "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.…" It appears to have been assumed by the Convention's drafters that use of the term "investment" excluded a simple sale and like transient commercial transactions from the jurisdiction of the Centre. Judicial or arbitral construction going further in interpretation of the meaning of "investment" by the establishment of criteria or hallmarks may or may not be regarded as plausible, but the intentions of the draftsmen of the ICSID Convention, as the *travaux* show them to have been, lend those criteria (and still less, conditions) scant support.

70. The Report of the Bank's Executive Directors is similarly illuminating. In the debate over the draft of that Report, Mr. Broches recalled that none of the suggested definitions for the word "investment" had proved acceptable. He suggested that while it might be difficult to define the term, an investment in fact was readily recognizable. He proposed that the Report should say that the Executive Directors did not think it necessary or desirable to attempt a definition. After some further debate, the Report was adopted in the following terms:

> Consent of the parties is the cornerstone of the jurisdiction of the Centre.
>
> While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.
>
> …
>
> 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

[117] HISTORY OF THE ICSID CONVENTION, Volume II-1, p. 566.

> classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).[118]

71. The preparatory work of the Convention as well as the Report of the Executive Directors thus shows that: (a) deliberately no definition of "investment" as that term is found in Article 25(1) was adopted; (b) a floor limit to the value of an investment was rejected; (c) a requirement of indefinite duration of an investment or of a duration of no less than five years was rejected; (d) the critical criterion adopted was the consent of the parties. By the terms of their consent, they could define jurisdiction under the Convention. Paragraph 23 of the Report provides that: "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre…." Paragraph 27 imports that the term "investment" was left undefined "given the essential requirement of consent by the parties." It continues that "States can make known in advance . . . the classes of disputes which they would or would not submit to the Centre," *i.e.*, they could specify particularities of their consent.

72. Does the passage of paragraph 25 that "consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto" indicate that "investment" as used in Article 25(1) has an objective content that cannot be varied by the consent of the parties? Only to the following limited extent. "[T]he nature of the dispute" appears to refer to the dispute being a legal dispute. The reference to "the parties thereto" merely means that for a dispute to be within the Centre's jurisdiction, the parties must be a Contracting State and a national of another Contracting State. These fundaments, and the equally fundamental assumption that the term "investment" does not mean "sale," appear to comprise "the outer limits," the inner content of which is defined by the terms of the consent of the parties to ICSID jurisdiction.

---

[118] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, March 18, 1965 ("Report of the Executive Directors"), paras. 23, 25, 27.

73. While it may not have been foreseen at the time of the adoption of the ICSID Convention, when the number of bilateral investment treaties in force were few, since that date some 2800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms such as those illustrated by the above-quoted Article 1 of the Agreement between Malaysia and the United Kingdom. Some 1700 of those treaties are in force, and the multilateral treaties, particularly the Energy Charter Treaty, which are in force, of themselves endow ICSID with an important jurisdictional reach. It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution.

74. In the light of this history of the preparation of the ICSID Convention and of the foregoing analysis of the Report of the Executive Directors in adopting it, the Committee finds that the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction.

75. Nevertheless, the Committee recognizes that the Sole Arbitrator acted in the train of several prior ICSID arbitral awards which lend a considerable measure of support to his approach. The seminal award is the Decision on Jurisdiction of a distinguished tribunal in *Salini v. Morocco*. The Respondent objected to jurisdiction in respect of the existence of an investment. The Tribunal began with a consideration of the BIT. This consideration was preceded by the following observation:

> However, to the extent that the choice of jurisdiction clause was exercised in favour of ICSID, the rights at stake must equally constitute an investment in the sense of Article 25 of the Washington Agreement. The Arbitration Tribunal is therefore of the view that its jurisdiction depends on the existence of an investment both in the sense of the bilateral Agreement and of the Convention, following the case-law on this point.[119]

[119] *Salini v. Morocco*, para. 44.

It proceeded to find jurisdiction under the BIT. It continued:

> The Tribunal notes that there have been almost no cases where the notion of investment in the sense of Article 25 of the Convention has been raised. However, it would be misguided to consider that the demand of a dispute 'directly related to an investment' can always be equated with the consent of the contracting parties. In fact, the case-law of the ICSID and commentators are consistent in regarding the necessity of an investment as an objective condition for the Centre's jurisdiction to be activated (citation omitted).
>
> With the exception of a decision of the Secretary General of the ICSID refusing to record a claim for arbitration regarding a dispute stemming from a simple sale, the decisions available have only very rarely focused on the concept of an investment (citation omitted).
>
> Academic writings have generally observed that an investment suggests payments, a certain period of execution of the deal and participation in the risks of the transaction. A reading of the preamble of the Convention permits to add to these the criterion of contribution to the economic development of the State receiving the investment (citation omitted).
>
> In truth, these various elements can be interdependent.… It results from this that these various criteria must be appreciated together….[120]

The Tribunal applied these criteria to the contract and concluded that it constituted an investment pursuant to the BIT as well as Article 25 of the Washington Convention.

76. *Salini v. Morocco* is largely consistent with the leading commentary on the ICSID Convention. Professor Christoph Schreuer writes:

> 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*. . . . The second feature is a certain *regularity of profit and return*. . . . The third feature is the assumption of *risk* usually by both sides. The fourth typical feature is that the commitment is *substantial*. . . . 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 Director's Report suggest that development is part of the Convention's object and purpose. These features should not necessarily be understood as

[120] *Salini v. Morocco*, para. 52.

> jurisdictional requirements but merely as typical characteristics of investments under the Convention (citations omitted).[121]

77. It should be noted that Professor Schreuer, unlike the Sole Arbitrator in the instant case, does not treat these characteristics (or "hallmarks" in the usage of the Sole Arbitrator) "as jurisdictional requirements."

78. While this Committee's majority has every respect for the authors of the *Salini v. Morocco* Award and those that have followed it, such as the Award in *Joy Mining v. Egypt*, and for commentators who have adopted a like stance – and, it need hardly add, for its distinguished co-arbitrator who attaches an acute Dissent to this Decision – it gives precedence to awards and analyses[122] that are consistent with its approach, which it finds consonant with the intentions of the Parties to the ICSID Convention.

79. The most recent Award that addresses the issue, of 24 July 2008, is, in the view of this Committee, the most persuasive, *Biwater v. Tanzania*.[123] Its pertinent passages read:

> *The Criteria for an 'Investment'*: An initial point arises as to the relevant test to be applied. In advancing submissions on Article 25 of the ICSID Convention, parties not infrequently begin with the proposition that the term 'investment' is not defined in the ICSID Convention, and then proceed to apply each of the five criteria, or benchmarks, that were originally suggested by the arbitral tribunal in ***Fedax v. Venezuela***, and re-stated (notably) in ***Salini v. Morocco***, namely (i) duration; (ii) regularity of profit and return; (iii) assumption of risk; (iv) substantial commitment; and (v) significance for the host State's development (citations omitted).
>
> …
>
> In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five ***Salini*** criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID

[121] SCHREUER, *supra* note 115, p. 140.

[122] *See* Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, Volume 7, No. 2, 2008, p. 161, and Devavish Krishan, *A Notion of ICSID Investment*, in T. Weiler (ed.), INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (2008).

[123] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("*Biwater v. Tanzania*").

Convention. On the contrary, it is clear from the *travaux préparatoires* of the Convention that several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed. In the end, the term was left intentionally undefined, with the expectation (inter alia) that a definition could be the subject of agreement as between Contracting States. Hence the following oft-quoted passage in the Report of the Executive Directors: … (citations omitted).

Given that the Convention was not drafted with a strict, objective, definition of 'investment', it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes. As noted by one commentator:

> 'There is no multilateral grant of authority over objective interpretation granted to individual tribunals sitting in cases of particular investor-State disputes.' [citing D. Krishan, 'A Notion of ICSID Investment' in INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (T. Weiler, ed. 2008).]

Further, the ***Salini Test*** itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusion of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed, e.g., in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the ***Salini Test***, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.

Equally, the suggestion that the 'special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged' does not, in this Arbitral Tribunal's view, lead to a fixed or autonomous definition of 'investment' which must prevail in all cases, for the 'type of investment' which the Contracting States in fact envisaged was an intentionally undefined one, which was susceptible of agreement (citation omitted).

The Arbitral Tribunal therefore considers that a more flexible and pragmatic approach to the meaning of 'investment' is appropriate, which takes into account the features identified in ***Salini***, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.

> The Arbitral Tribunal notes in this regard that, over the years, many tribunals have approached the issue of the meaning of 'investment' by reference to the parties' agreement, rather than imposing a strict autonomous definition as per the ***Salini Test*** (citation omitted).
>
> To this end, even if the Republic could demonstrate that any, or all, of the ***Salini*** criteria are not satisfied in this case, this would not necessarily be sufficient – in and of itself – to deny jurisdiction.[124]

80. The Committee fully appreciates that the ground for annulment set forth in Article 52(1)(b) of the ICSID Convention specifies that "the Tribunal has manifestly exceeded its powers." It is its considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it "manifestly" did so, for these reasons:

> (a) it altogether failed to take account of and apply the Agreement between Malaysia and the United Kingdom defining "investment" in broad and encompassing terms but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention;
>
> (b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature;
>
> (c) it failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the *travaux* in key respects, notably the decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.

81. The Committee thus is constrained to annul the Award of the Sole Arbitrator. It goes no farther; in particular, the decision as to whether there may be jurisdiction of an

[124] *Biwater v. Tanzania*, paras. 310, 312 – 18.

ICSID Tribunal in respect of the claim despite objections of Malaysia on still other grounds means that jurisdiction may be a matter for a newly constituted ICSID Tribunal to determine, should the Applicant seek its establishment.

82. The parties have submitted their costs and each maintains that the other should be required to meet the whole of them. The Committee takes note of the fact that the practice of virtually all ICSID annulment committees has been to divide the costs of ICSID – including the fees of the committee members and disbursements – equally between the parties, and that fees of counsel have been left to the party incurring them. However in this case the Committee has concluded that it was not the intent of the drafters of the ICSID Convention to exclude claimants advancing claims of minor financial dimension. If such claimants are left to pay not only the costs of their legal representation but half of the ICSID costs as well, the practical result could be to discourage if not debar small claims. In view of that consideration, as well as the fact that the Award stands annulled despite the Respondent's vigorous and comprehensive defence and adoption of it, and that, before the Sole Arbitrator, the Respondent argued (however understandably) for the essential conclusions that the Sole Arbitrator ultimately reached, the Committee holds that the Respondent shall meet all the Centre's costs of this annulment proceeding. The Applicant shall accordingly be reimbursed for those costs, which it has advanced by its deposits. Each party however shall be left to meet the costs of its legal representation and the disbursements flowing from it.

F. DECISION

83. For the foregoing reasons, the Committee DECIDES,

(1) that the Award on Jurisdiction of 17 May 2007 of the Sole Arbitrator in *Malaysian Historical Salvors v. The Government of Malaysia* is annulled;

(2) that the Government of Malaysia shall bear the full costs and expenses incurred by ICSID in connection with this annulment proceeding. Accordingly the Government of Malaysia shall reimburse the Applicant the advances paid by the latter to ICSID;

(3) that each party shall bear its own costs of representation in connection with this annulment proceeding.

84. Judge Shahabuddeen, while he has signed the Decision in authentication of its text, dissents from it. His Dissenting Opinion is appended to the Decision.

[*signed*]

Mohamed Shahabuddeen
Date: [*19*] February 2009

[*signed*]

Peter Tomka
Date: [*20*] February 2009

[*signed*]

Stephen M. Schwebel
Date: [*28*] February 2009

Washington, D.C.