

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

MALAYSIAN HISTORICAL SALVORS SDN BHD,

Claimant/Investor,

and

THE GOVERNMENT OF MALAYSIA,

Respondent.

ICSID Case No. ARB/05/10

**CLAIMANT MALAYSIAN HISTORICAL SALVORS SDN BHD'S
REPLY MEMORIAL ON JURISDICTION**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	3
II. CLAIMANT'S RESPONSES TO RESPONDENT'S CHALLENGES OF THIS TRIBUNAL'S JURISDCITION	3
1. <i>Locus standi</i>	4
2. "Investment"	8
3. "Approved project"	21
4. Pure Contractual Claim (Cause of Action)	52
5. Denial of Justice	59
6. Exhaustion of Domestic Remedies	60
III. CONCLUSION	64
IV. EXHIBITS – List of Exhibits	68

I. INTRODUCTION

This memorial constitutes Claimant's – Malaysian Historical Salvors Sdn Bhd ("MHS")'s – Reply Memorial on Jurisdiction. This memorial supplements and reinforces the facts presented and arguments made MHS's Memorial on Jurisdiction dated March 15, 2006 (the "First Memorial"). This memorial responds to the objections to jurisdiction raised by the Respondent, the Government of Malaysia (the "Government of Malaysia") in its Memorial on Objections to Jurisdiction dated March 11, 2006, and establishes the Tribunal's jurisdiction over this case.

Unless otherwise indicated, the capitalized terms in this memorial have the meaning ascribed to them in the First Memorial.

II. CLAIMANT'S RESPONSES TO RESPONDENT'S CHALLENGES OF THIS TRIBUNAL'S JURISDICTION

In its memorial challenging the Tribunal's jurisdiction the Government of Malaysia advances six challenges to this Tribunal's jurisdiction. These challenges are:

1. MHS lacks standing to institute these proceedings before ICSID.
(Respondent's Memorial, ("R. M.") pp. 29-31).
2. MHS's claim does not relate to an "investment" within the meaning of Article 25(1) of the ICSID Convention. (R. M. pp. 31-39).
3. MHS's claim does not arise out of an "approved project" pursuant to Article 1(1) (b) of the UK/Malaysia BIT. (R. M. pp. 39-44).
4. MHS's claim is purely contractual in nature. (R. M. pp. 44-51).
5. MHS has not been denied justice in the Malaysian courts. (R. M. pp. 51-75).
6. MHS has not exhausted all remedies in Malaysia prior to instituting the request for arbitration before ICSID. (R. M. 75-80).

We address the foregoing challenges in the order in which Malaysia has presented them.

1. ***Locus standi.*** The Government of Malaysia's argument is based on a misreading of the law. MHS does indeed have *locus standi*. Malaysia's counsel are demonstrably wrong in arguing that a British national must have owned a majority of MHS at the time of the execution of the Contract.

The Government of Malaysia contends that MHS has no *locus standi* to institute ICSID arbitration proceedings pursuant to the UK/Malaysia BIT and the ICSID Convention because MHS was not a national of the United Kingdom within the meaning of the UK/Malaysia BIT and the ICSID Convention at the time of the execution of the Contract on August 3, 1991.

The nationality of the shareholders of MHS at the time of the execution of the Contract is not the correct standard by which to determine whether MHS is a national of the United Kingdom for purposes of the UK/Malaysia BIT and the ICSID Convention, and whether MHS has *locus standi*. The applicable standard is MHS's nationality for purposes of the UK/Malaysia BIT and the ICSID Convention before a dispute arises that can be brought before ICSID.

MHS is a “National of another Contracting State” within the meaning of Article 25(2) (b) of the ICSID Convention. Article 25(2) (b) of the ICSID Convention, in relevant part, defines “National of another Contracting State” as:

any juridical person which had the nationality of the Contracting State party to the dispute on that date and which because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

In the UK/Malaysia BIT, Malaysia and the United Kingdom have agreed that a juridical person, such as MHS, should be treated as a “National of another

Contracting State,” in this case, the United Kingdom. This is so because Article 7 of the UK/Malaysia BIT, states, in relevant part:

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2) (b) of the [ICSID] Convention be treated for the purpose of the Convention as a company of the other Contracting Party (emphasis added).

MHS was incorporated in Malaysia in 1987. *See*, Exhibit B of MHS's September 30, 2004 Request for ICSID Arbitration. There is no dispute that MHS has been and continues to be a company organized under the laws of Malaysia. The United Kingdom is a Contracting Party to the UK/Malaysia BIT. It is undisputed that Mr. Ball has been since his birth a British or United Kingdom national. *See*, Exhibit C of MHS's September 30, 2004 Request for ICSID Arbitration.

As required for *locus standi* under the ICSID Convention and the UK/Malaysia BIT, MHS was majority-owned and controlled by Mr. Ball before the dispute or claims arose that prompted MHS's request for ICSID arbitration.

It is undisputed that Mr. Ball became MHS's majority owner on December 11, 1991, and that his majority ownership of MHS, has continued without interruption until the present. *See*, Exhibit L of the First Memorial, and

R.M. p. 30, ¶ 96. Mr. Ball has owned and continues to own the majority of the shares of MHS, and he has controlled MHS since 1991 and does so to the present.

As noted by the Government of Malaysia in its memorial of March 11, 2006, in a letter dated July 12, 1995, MHS gave notice to the Malaysian Marine Department that a dispute had arisen with respect to the Contract on July 3, 1995. *See*, R. M. p. 9 and annex 11. The Government of Malaysia admits that a dispute between MHS and the Government of Malaysia arose on July 3, 1995. *See*, R.M., p. 31, ¶ 99.

It is undisputed that Mr. Ball owned a majority of MHS's shares on December 11, 1991 and during the entire time before July 3, 1995, when the dispute under the Contract first arose. Mr. Ball also owned the majority of the shares of and controlled MHS at all times through and after the issuance of the the so-called "award" dated July 2, 1998 in the KLRCA arbitration and the subsequent deficient court proceedings which took place in Malaysia.

MHS although incorporated and organized under the laws of Malaysia, falls within the definition of "National of another Contracting State" within the meaning of Article 25(2) (b) of the ICSID Convention because, at all relevant times for purposes of *locus standi* under the UK/Malaysia BIT and the ICSID

Convention, MHS was and has continued to be majority owned and controlled by Mr. Ball, a British national.

The ICSID Convention and the UK/Malaysia BIT require that a British national own a majority of MHS shares before the dispute arose, and not, as the Government of Malaysia contends, at the time of contract. See, R.M. p. 30, ¶ 97.

The Government of Malaysia admits that the dispute between the parties arose on July 3, 1995, and it is undisputed and clear that Mr. Ball, a British national owned a majority of MHS's shares before July 3, 1995.

The Government of Malaysia's contention on the issue of *locus standi* must fail because it is based on an erroneous understanding of the ICSID Convention and the UK/Malaysia BIT. MHS clearly fulfills all the requirements for *locus standi* pursuant to the ICSID Convention and the UK/Malaysia BIT. The Government of Malaysia's claim that MHS lacks standing is demonstrably incorrect.

2. Investment. The Government of Malaysia next questions whether MHS's performance under the Contract constituted an "investment" within the meaning of the UK/Malaysia BIT and the ICSID Convention. The answer is a resounding "yes."

MHS's claims against the Government of Malaysia fall squarely within the definition of "investment" in Article 1(1) (a) of the UK/Malaysia BIT. The definition of "investment" embodied in the UK/Malaysia BIT is consistent with, and satisfies, the objective requirements of Article 25 of the ICSID Convention with respect to the definition of the term "investment."

Under Article 1(1) (a) of the UK/Malaysia BIT, the term "investment" is broadly (and non-exhaustively) defined to include:

every kind of asset and in particular, though not exclusively, [to include]:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares, stock and debentures of companies or interests in the property of such companies;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights and goodwill;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.
(emphasis added)

MHS has had and continues to have a claim against the Government of Malaysia for money as well as a claim to performance under a contract having a financial value under paragraph (iii) of Article 1(1) (a). In the arbitration that took place in Malaysia between MHS and the Government of Malaysia under the auspices of the Kuala Lumpur Regional Center for Arbitration, MHS

claimed money and claimed performance under the Contract, a contract having a financial value.

MHS claimed and continues to claim, *inter alia*, that the Government of Malaysia has paid MHS some but not all of the money that MHS is entitled to under the Contract and related contracts. The Contract and related contracts have financial value and provide for MHS and the Government of Malaysia to share the value of the items recovered from the DIANA, and for the Government of Malaysia to pay MHS its share of this value. The Government of Malaysia has failed to satisfy MHS's claims. It is out these claims or dispute that MHS's UK/Malaysia BIT claims arise.

It is MHS's contention that the Government of Malaysia violated its obligations to MHS under the UK/Malaysia BIT by failing, *inter alia*, to afford MHS's investment or claim for money as well as performance under a contract having a financial value fair and equitable treatment and protection.

Instead of examining the issue of whether MHS made an investment in its performance of the Contract, the Government of Malaysia combines and conditions its discussion of whether MHS made an investment in Malaysia with other elements of jurisdiction such as consent to arbitrate before ICSID, the ownership structure of MHS, the issue of "approved project," and its repeated erroneous understanding of the UK/Malaysia BIT.

The Government of Malaysia also advances an unsupported and conclusory definition of “investment” and engages in circular reasoning to support its argument as to why MHS’s claim does not amount to an investment.

Essentially, the Government of Malaysia asserts that there is no investment dispute which the Government of Malaysia has consented to settle under the ICSID Convention – instead of addressing the issue of investment alone. *See*, R.M. p. 35, ¶ 106. With respect to the issue of investment, the Government of Malaysia repeats its invalid and irrelevant *locus standi* argument. *See*, R.M. p. 35-36, ¶ 107.

The only contention worthy of any consideration and response is the Government of Malaysia’s contention that the contractual relationship between MHS and the Government of Malaysia under the Contract is in the nature strictly of a service or sales contract and not an investment. MHS has already addressed the issue of consent to ICSID jurisdiction in the First Memorial and issue of *locus standi* above.

The Government of Malaysia seeks support of its argument that MHS’s performance under the Contract was a simply an arm’s length service contract that cannot be considered to be an “investment,” under the ICSID Convention and the UK/Malaysia BIT in *Joy Mining Machinery Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/03/11).

Under the Contract, the relationship between MHS and the Government of Malaysia is analogous to the relationship of partners in a joint-venture enterprise. Under the Contract, MHS and the Government of Malaysia each contributed to the DIANA enterprise and each was to achieve and share the financial benefit of the enterprise upon its success – a crucial distinguishing factual difference between *Joy* and this case, in addition to the main distinguishing factual difference that MHS, unlike Joy Mining, is not claiming that a bank guarantee constitutes an “investment.”

The question in *Joy* with respect to the issue of “investment” 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 (the “UK/Egypt BIT”).

Just like in the UK/Malaysia BIT, Article 1 of the UK/Egypt BIT includes in the definition of investment, among other elements, claims to money or to any other performance under contract having a financial value.

The Tribunal held that a bank guarantee did not amount to an investment. *See, Joy*, and R.M. pp. 36-37. In *Joy*, the Tribunal found that a bank guarantee to secure Joy's performance was not an investment but rather a simple

contingent liability, that the underlying contract to which the bank guarantees related was a contract related to the supply of equipment and incidental services that did not amount to an “investment”, and the Tribunal also noted that “. . . the production and supply of the kind of equipment involved in this case is a normal activity of the Company, not having required a particular development of production that could be assimilated to an investment” *Joy*, p. 10, ¶ 4., and p. 13., ¶¶ 55. and 56.

In *Joy*, the Tribunal also noted that Joy Mining had been paid its price in totality at an early stage, that Joy Mining ran no risk except that risk which is involved in any commercial contract, and that the bank guarantees constituted only a small fraction of the relevant project as a whole. *Joy*, pp. 13-14. The Tribunal also found that there had been no drawdown of the bank guarantees and thus no benefit conferred as a result of any drawdown. *Joy*, p. 15.

The instant case is readily distinguishable from *Joy*. MHS, unlike Joy Mining, is not seeking a release from a bank guarantee or any other contingent liability. More importantly, unlike in *Joy*, the Contract here involved is not related to the supply of equipment and incidental services.

Supply contracts of the type in *Joy*, entail the supply, generally, of regularly-produced, supplied, non-particularized, non-customized goods or services for a predetermined and set price, where the time and conditions for

payment of goods and services supplied is fixed, certain, and pre-determined by the parties, and payment depends only on the delivery of the goods or the performance of services.

The mining equipment supplied by Joy Mining to Egypt was not particularized or custom-manufactured for Egypt. *See, Joy*, p. 13, ¶ 56. Additionally, in such a setting, as was the case in *Joy*, buyer pays seller upon the presentation of invoices or loading documents such as bills of lading. In *Joy*, with respect to the sale of the equipment, Joy Mining's delivery of the equipment was specified as FOB/UK/USA Port Basis and the price was established C&F Alexandria Port Basis. *See, Joy*, p. 7, ¶ 31. Such contracts have the risks of normal sales contracts such as collection risk (*e.g.*, buyer takes delivery but fails to pay), but carry no enterprise risk or the risk that a project in which the goods or services will be used or to which they will be dedicated will succeed or fail, which is precisely the kind of risk entailed in the activity of investment and in the investment MHS made in Malaysia with respect to the DIANA project.

Unlike the case in *Joy* where goods, mining machinery, were the predominant or main portion of the contract with Egypt and services were only incident and limited to the installation and proper functioning of the machinery, MHS's contributions, dedication, and investment of effort, expertise,

equipment, money, time, services, and other resources, and the risk of life and limb of its crew, to locate, survey, and salvage the wreck of the DIANA consisted of services and other intangible activities which were unique, particularized, custom-tailored to, and specific only to the facts and circumstances of the wreck of the DIANA. It is this contribution, dedication and investment and its magnitude, and the Government of Malaysia's breach of its obligations under the Contract to, *inter alia*, turn over to MHS all the monies that belong to MHS under the Contract that gives rise to MHS's "claims to money or to any other performance under contract having a financial value."

Unlike the case in *Joy*, MHS was to derive payment or compensation not by presenting invoices to the Government of Malaysia, but rather by receiving a portion of the value of the items recovered as a result of its contributions, dedication and investment of effort, expertise, equipment, money, time, services, and other valuable resources, and even its risk of the life and limb of its crew, to locate, survey, and salvage the wreck of the DIANA – and then only if such effort and expenditure resulted in the success of the DIANA project.

MHS's performance under and its method of getting paid under the Contract (value or revenue sharing) are qualitatively and materially different from the goods and services supplied and the method of payment in *Joy*, letter of credit. And, unlike the equipment and incidental services in *Joy*, MHS's

performance under the Contract entailed services which were particularized and specific to the DIANA.

MHS's return of and profit on investment was wholly dependent on the success of the DIANA salvage enterprise, whereas in *Joy*, the company was paid for the equipment and incidental services it supplied to Egypt under a letter of credit, and it assumed no entrepreneurial or enterprise risk (*e.g.*, as in becoming a partner with Egypt and looking to payment only from the proceeds realized from the sale of phosphates mined and sold as a result of the use of the mining equipment Joy Mining supplied to Egypt or contributed to the Egyptian phosphate mining enterprise).

The Contract was not a contract under the terms of which the Government of Malaysia guaranteed payment to MHS in return for resources and services contributed to the DIANA project. The Government of Malaysia assumed none of the risks of the salvage enterprise. MHS assumed all the enterprise risks under the Contract, including all the responsibility for the financing of all the costs necessary for the entire DIANA location and salvage operation.

An investment is an activity that requires money to be spent up-front in anticipation of some return later. *Black's Law Dictionary* defines investment as, *inter alia*, "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.” *Black’s Law Dictionary*, 6th edition. 1990. p. 825.

MHS spent funds and other resources in anticipation that it would succeed in locating and salvaging the DIANA and, if successful, that it would receive a share of the value of the items recovered from the wreck.

Given the enterprise involved in this case, it is plain that the Tribunal’s decision in *Joy* does not support the Government of Malaysia’s contention that the claims that MHS seeks to arbitrate before ICSID do not extend to a legal dispute arising directly out of an investment. If the Government of Malaysia had contracted with MHS strictly on a definite and pre-determined fee for performance basis without subjecting MHS to any enterprise risk, the Government of Malaysia might have a stronger, but nevertheless still unsuccessful argument that the claims that MHS seeks to arbitrate before this Tribunal do not arise directly out of MHS’s investment in Malaysia.

In addition to the normal contractual risks of dealing with the Government of Malaysia, MHS’s performance and contributions under the Contract constituted investments of time, effort, expertise, and money and carried enterprise risk – the risk that MHS would expend all necessary funds, effort, and other resources, disclose proprietary knowledge, provide services but not receive a penny in return in the event that the wreck of the DIANA was not

found, and the risk that the inherently dangerous to life activities of salvage diving, underwater location, surveying, and salvage would all be for nothing.

As stated in the First Memorial but conveniently omitted by the Government of Malaysia in its memorial, MHS's performance and expectation of payment under the Contract was on a "No Finds No Pay" basis, meaning that MHS would derive a financial return on its investment of time, effort, expertise, and services only upon the success of the entire DIANA enterprise, *viz.*, success in locating the wreck, success in the salvage and recovery of items, and the subsequent valuation of the recovered items for an amount sufficient to cover investment costs and expected profits. If MHS did not succeed, it would receive nothing even though it provided salvage services and expended and dedicated valuable financial and other resources for over two years with respect to the DIANA project.

Assumption of enterprise risk is the essence of investment and the element which readily distinguishes between activities considered to be mere sales from those considered to be investments. If the Contract were simply as sales contract, the Government of Malaysia would be obligated to pay MHS for its services and efforts upon the presentation of invoices therefor and irrespective of whether the DIANA wreck was found or the DIANA items were recovered. That clearly is not the case here.

All investments carry some degree of risk and in the case of shipwreck salvage the risk is huge. For this reason, the Government of Malaysia, when awarding the Contract to MHS, refused to put its own money at risk leaving MHS to spend its own money buying equipment, hiring staff and carrying out all the necessary works all at the considerable risk that all of its performance might all be in vain, and that there would be no financial return if the DIANA project did not succeed.

In this case MHS's performance and contributions under the Contract entailed enterprise risk and its recourse to financial reward and return on its investment was contingent upon the complete success of the DIANA project.

MHS assumed the risk of providing all the investment necessary to locate, survey and salvage the items from the wreck, and faced losing its entire investment in doing so in the event it the survey and salvage operation did not succeed, or in the event that the items that were recovered from the wreck were not sufficiently valuable to cover the costs of salvage and recovery, and MHS's expectation of profit from the DIANA enterprise.

In addition to the foregoing enterprise risks, MHS also assumed the contractual risk, which unfortunately, has come to pass, that the Government of Malaysia would fail to pay MHS its share of the value of the salvaged items, as provided for under the Contract.

The Government of Malaysia itself conceded that Pacific Sea Resources Sdn Bhd, the former name of MHS, would bear all the costs and responsibility of finding, surveying, and salvaging the DIANA, and projected that such costs were estimated to be between US \$2 and \$4 million. *See*, R.M., annex 1, ¶ 2.2.

MHS's performance under the Contract giving rise to "claims to money or to any performance under contract having a financial value" has all the hallmarks with respect to "investment" of previous ICSID cases where "investment" was found to exist – even if, *in arguendo*, MHS's performance simply entailed the provision or contribution of services. The DIANA project would not have succeeded but for MHS's investment in it.

In *Alcoa Minerals of Jamaica, Inc. v. Jamaica (ICSID Case No. ARB/74/2)*, the Tribunal recognized that contribution of capital was one type of investment. As indicated in the First Memorial, the Tribunal in *Salini*¹ recognized that services provided in connection with the construction of a highway constituted an investment. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, included within the concept of investment pre-shipment inspection activities and other services. *See, Joy*, p. 12, ¶ 51.

¹ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/04).

In sum, although MHS successfully located, surveyed, and salvaged the wreck of the DIANA, and otherwise fulfilled its obligations under the Contract, it has not realized all the reward and compensation that it is entitled to as a result of the investment that it made under the Contract due to the Government of Malaysia's breach of the Contract and its failure to afford MHS fair and equitable treatment and protection as it is required to do so under the UK/Malaysia BIT.

MHS invested in the DIANA salvage enterprise and performed all of its obligations under the Contract, which resulted in the success of the DIANA project. The claims that MHS now seeks to arbitrate in this proceeding arise directly out of such activity. MHS has had, and continues to have, a claim against the Government of Malaysia for money and a claim to performance under the Contract – a contract having a financial value.

3. “Approved Project” As we noted in the First Memorial with respect to investments in the territory of Malaysia, Article 1(1) (b) (ii) of the UK/Malaysia BIT provides that to qualify as an “investment” within the purview of the UK/Malaysia BIT, an investment must be made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an “approved project.”

The Government of Malaysia's contention that the project to which the Contract relates was not an "approved project" within the meaning of the UK/Malaysia BIT borders on the frivolous.

As explained in the First Memorial, MHS's investment under the Contract resulting in its "claims to money [and/]or to performance under a contract having a financial value" constitutes an investment in an "approved project," as required under the UK/Malaysia BIT. *See*, the First Memorial, pp. 35-48. The Malaysian Marine Department's act of entering into the Contract on behalf of the Government of Malaysia supplies the requisite classification of the project in which MHS invested in pursuant to the Contract as an "approved project." *See*, the Contract, p. 13, p. 2., clause 1.5.

There can be no stronger and more specific manifestation of approval by the Marine Department, a department of the Malaysian Ministry of Transport, of the investment project to which the Contract relates than the act of the Marine Department's execution of the Contract for the Government of Malaysia.

The Marine Department entered into the Contract and thus approved the project to which the Contract relates on behalf of itself and the Malaysian Ministry of Finance, the Ministry of Transport, the Ministry of Culture and Tourism, and the Director General of Museums – all of which were part of the

Committee defined below, and all of which participated in the deliberations and negotiations with respect to the Contract and approved the Contract. *See e.g.*, R.M. annexes 1-3.

The Contract was made on August 3, 1991, between MHS and the Government of Malaysia. The Contract was signed for and on behalf of the Government of Malaysia, by an official of the Government of Malaysia, H.J. Ghazali B. Abu Hassan of the Marine Department in the presence of another Malaysian government official, Rusli Bin Saad. *See*, the Contract, pages 1 and 13.

Under section 1.5 of the Contract, the term "Government" is defined as 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 authorized representatives. *See*, the Contract, clause 1.5, page 2.

Pengarah Laut is the Marine Department that has jurisdiction over marine matters in Malaysia.² The Contract concerns and involves the location, survey, and salvage of the cargo of a shipwreck, a marine matter. The Malaysian Marine Department's execution (signature) of the Contract (and follow-on contracts) on behalf of the Government of Malaysia and the Malaysian

² <http://www.marine.gov.my/service/index.html>

Government's acceptance of the benefits of MHS's investment and performance under the Contract constitute the classification of the salvage project as an "approved project" by the Marine Department, a specialized department of the Ministry of Transport, on behalf of several appropriate ministries.

Further buttressing MHS's position that the Marine Department's was the "appropriate ministry" that approved MHS's investment in the DIANA project is the legislation administered and enforced by the Marine Department – legislation which, in relevant part, relates specifically to the subject of marine/shipwreck salvage, *the Merchant Shipping Ordinance of 1952 (Federation of Malaya Ordinance No.70 of 1952)*, as amended.

Part X "Wreck and Salvage" of the foregoing legislation dealing specifically with the subject of marine wrecks and salvage is at **Exhibit A** hereto.

The words of the UK/Malaysia BIT indicate that there was and is no one single ministry in Malaysia for the approval of foreign investment projects in Malaysia, or alternatively, that the "appropriate ministry" was/is undetermined and that it can vary from situation to situation. Logically and for good reason, the use of the word "appropriate" implies that there is no one single

“appropriate ministry,” but rather one proper ministry from a selection of several depending on the subject matter of the investment.

Nothing in the UK/Malaysia BIT specifies that the Malaysian Ministry of International Trade and Industry (“MITI”) is the only or necessary “appropriate ministry” for purposes of the UK/Malaysia BIT.

Despite its knowledge of the Contract, which is between MHS and the Government of Malaysia, and of the activities of the various ministries in the time running up to, at the time of, and after the execution of the Contract, including the Minister of Finance’s approval of the Contract, the Government of Malaysia contends that the project to which the Contract relates is not an “approved project” within the meaning of the UK/Malaysia BIT because MITI did not issue a written approval for it. Consequently, the Government of Malaysia contends that MHS’s investment cannot benefit from the protections of the UK/Malaysia BIT, and the Government of Malaysia, for this reason, asserts that this Tribunal has no jurisdiction.

The Government of Malaysia attempts to create the impression that MITI is the only ministry that can approve foreign investments in Malaysia and that without such approval investors cannot have the protection of the UK/Malaysia BIT and similar investment protection treaties, which the Government of Malaysia refers to as Investment Guarantee Agreements or IGAs.

The Government of Malaysia states in its memorial, *inter alia*, that “a party seeking to obtain “approved project” status under the IGA [the UK/Malaysia BIT] and similar IGAs is required to comply with certain procedures as exemplified by the following:” R.M. p. 40, ¶ 112. The exemplifying procedures that the Government of Malaysia refers to relate only to MITI approval.

It is important to note that the meaning to be divined from the Government of Malaysia's foregoing statement is that the MITI procedures are only examples and not an exhaustive list of the “certain procedures” referred to by the Government of Malaysia. Exemplify means to illustrate by example.

It is also important to note that nowhere in its memorial does the Government of Malaysia expressly and unequivocally state that MITI is the only ministry that can approve foreign investment projects. Nor does the Malaysian Government point to any Malaysian law to support any such contention. *See*, R.M. annexes 49 & 50. The Government of Malaysia, however, does hope that the Tribunal will infer and jump to the conclusion that MITI approval for the project that MHS invested in was required and that the absence of the same is fatal to MHS's contention that this Tribunal has jurisdiction.

In support of its contention of the necessity of MITI approval, the Government of Malaysia offers: (i) copies of various letters to and from MITI showing MITI approval for various projects, R.M. annexes 42, 44, and 49; and (ii) a document entitled “Investment in Malaysia – Policies and Procedures” published by the Malaysian Industrial Development Authority (“MIDA”), R.M. annex 50; and (iii) nothing more.

The Government of Malaysia attempts to establish or at least give the impression that MITI approval, as matter of administrative practice, was required for all investments in Malaysia seeking the protection of various investment treaties to which Malaysia is a party, including the UK/Malaysia BIT. However, the Government of Malaysia points to no law in support of its half-hearted contention of the necessity of MITI approval to permit foreign investment projects to qualify for protection under the various investment treaties that Malaysia is a party to.

The documents the Government of Malaysia offers in annexes 42, 44, and 49 show instances of MITI approval, but these documents do not establish that MITI approval is the exclusive and indispensable method or ministry of approval for all foreign investments in Malaysia seeking protection under bilateral investment treaties that Malaysia is a party to. The documents submitted by the Government of Malaysia are far from convincing. At best,

they only show MITI administrative practice with respect to certain (not all) MITI approvals for projects under certain (not all) bilateral investment treaties that Malaysia is a party to.

In part of annex 50 to its memorial, the Government of Malaysia presents a document entitled "Investment in Malaysia – Policies and Procedures" published by MIDA. The MIDA Policies and Procedures do not constitute legislation but are merely guidelines; and in any event they are limited to manufacturing. *See*, R.M. annex 50, p. 16 ¶ 1. MIDA, which is a part of MITI, still seems to be an appropriate ministry (or authority) only for projects in the manufacturing sector. On April 20, 2006, the following statement appeared on MIDA's website: ³

About MIDA

MIDA is the first point of contact for investors who intend to set up projects in the manufacturing and its related services sectors in Malaysia. For more information on the functions of MIDA and the services provided by MIDA to investors, please click here: <http://www.mida.gov.my>

MHS's activities under the Contract do not involve manufacturing. The Government of Malaysia's arguments against jurisdiction based on MIDA Policies and Procedures are therefore irrelevant.

³

(<http://www.miti.gov.my/ekpweb/application?origin=portal.jsp&event=bea.portal.framework.internal.refresh&pageid=mida>)

In a further attempt to support of its argument for the necessity of MITI approval, in annex 39 of its memorial, the Malaysian Government proffers a statement of the Auditor General of Malaysia, an individual who represents that he participated in the negotiation, preparation and drafting of the UK/Malaysia BIT.

The Auditor General's statement is infirm and does not support the Government of Malaysia's argument that MITI approval was required for the DIANA project that MHS invested in.

First, the statement is not under oath.

Second, the statement is self-serving. The statement comes from a witness who lacks sufficient independence. The statement was procured in response to questions from a legal officer in the Malaysian Attorney General's Chambers.

Third, MHS has not had the opportunity to cross examine or depose the witness.

Fourth, the statement is limited to practice with respect to investments in Malaysia during the 1970s and the 1980s. *See*, annex 39, p. 3-4, ¶ 3. MHS's investment occurred during the 1990s, *viz.*, after August 3, 1991, the date of the execution of the Contract.

Fifth, the statement speaks in terms of the "appropriate ministry" several

times, the clear implication being that MITI is not the only and exclusive or necessary ministry for “approved projects.” “In order to be afforded protection under the relevant IGAs formal approvals from the appropriate ministry must be sought.” *See e.g.*, R.M. annex 39, ¶ 4. ii.

Sixth, the statement is limited to projects involving investments in labor intensive and other manufacturing industries. The witness states:

Approvals have been given to projects involving investments in labour intensive and other manufacturing industries since MITI was the appropriate ministry to approve these investments as well as those seeking protection under the IGA.

R.M. annex 39, p. 4, ¶ 4 iii.

The meaning of this statement is that MITI was the appropriate ministry, for purposes of the UK/Malaysia BIT, for approving investments in manufacturing. This statement, as it could have, does not state or mean that MITI was the only ministry that was charged with approving all investments seeking protection under the UK/Malaysia BIT.

Seventh, the witness's knowledge may be incomplete. The witness's statement is based on what may have been intended, and it is limited to the period up to July 1979. *See*, R.M. annex 39, p. 2., ¶ 1.i. The UK/Malaysia BIT was signed almost two years later on May 21, 1981, and it came into force some nine years later on October 21, 1988, during which time whatever policy

or administrative practice that may have existed could, as a matter of Malaysia's sovereign prerogative, have changed, especially in relation to marine salvage projects.

Eighth, even if it is the contention of the Auditor General that in the 1970s and the 1980s that it was firmly established as a matter of administrative practice that MITI was the only and exclusive ministry that could approve foreign investment projects seeking protection under bilateral investment treaties, one wonders why the UK/Malaysia BIT, which was signed in 1981 and which came into force in 1988 did not identify MITI as the approving ministry instead of using the words "appropriate ministry"?

Ninth, assuming for argument's sake that as a matter of administrative practice MITI was the only ministry that could approve investment projects for protection under the UK/Malaysia BIT, there is nothing which precluded or prohibited the Government of Malaysia from departing from such administrative practice, especially where, as here, the Government of Malaysia itself, through its Marine Department, which is a part of the Malaysian Ministry of Transport, with the concurrence and approval of the Malaysian Ministry of Finance and several of its other ministries, signed and is bound to the investment project to which the Contract relates, and there are no obstacles whatsoever that preclude such a departure or derogation from administrative

practice. Furthermore, the Government of Malaysia has cited no instance where the Government of Malaysia itself entered into an investment contract, and that contract had to be approved by MITI. We are satisfied that there is no such precedent.

We do not question that MITI, as a matter of administrative practice, plays an important role in approving some or even most foreign investments in several sectors in Malaysia. It is plausible that the investment projects that MITI approves form part of the necessary qualification for some foreign investments to be protected under relevant investment treaties. As its name suggests, it is probably also the case that MITI is the “appropriate ministry” with respect to the approval of foreign investments in Malaysia in the labor intensive and other manufacturing industries. *See*, R.M. annex 39, p. 4, ¶ 4.

iii. However, none of this means, and based on the statements made and the evidence proffered by the Government of Malaysia, it cannot be concluded, that MITI is the only or necessary ministry for the approval of a marine salvage project or that MITI is the only ministry that can qualify foreign investments for investment treaty protection under the UK/Malaysia BIT or other investment treaties.

Contrary to the implicit suggestion by counsel for the Government of Malaysia, the absence of MITI approval does not preclude an investment from

being classified as an “approved project” under the UK/Malaysia BIT, especially where the project in question does not concern manufacturing and it has been approved by other Malaysian ministries that have jurisdiction over antiquities and marine salvage, as is the case here.

The approval of investment projects by ministries other than MITI is conceded by MITI itself. In a November 11, 1999 note to the Malaysian Attorney General's Chambers, MITI states:

In the IGA with Indonesia in 1994 and other countries thereafter (38 IGAs), the explicit requirement for projects to be approved has been removed. The rationale is that it is considered unnecessary to obtain a separate approval from MITI for projects to be covered under the IGA, when the project is already approved under specific legislation or administrative guidelines.

R.M. annex 40, p. 3. of note attached to cover letter, ¶ 3.

The above is a written expression of the policy and administrative practice (of not requiring separate approval from MITI) that was in actuality most probably occurring prior to 1994.

We believe that the Government of Malaysia would be hard pressed to expressly and unequivocally contend that “the absence of written MITI approval for foreign investment projects disqualifies investments in such projects from the protections of relevant investment treaties.”

It is worthy of note that nowhere in its memorial is there a clear and unequivocal statement that MITI is the only and exclusive ministry for the approval of foreign investments.

While attempting to create the illusion of the indispensability of MITI approval, upon careful reading of the Government of Malaysia's memorial, one can readily see how disingenuous the Government of Malaysia's memorial is on this point. Although it claims in vague and imprecise references that MITI is the only appropriate ministry, one cannot divine from the memorial that MITI is specifically designated as the appropriate ministry with respect to investments involving marine salvage or with respect to all investment projects. In fact, the memorial carefully avoids to state categorically that MITI is the only and exclusive agency for all projects in all circumstances. *See*, R.M. pp. 42-44.

As discussed above, the examples of MITI approvals submitted by the Government of Malaysia in its memorial are merely examples of some MITI approvals under some investment treaties, and are not indicative of administrative practice which applies or must apply to every foreign investment seeking protection of an investment treaty that Malaysia is a party to. *See*, R.M. pp. 40-41.

In the array of examples it submits showing MITI approvals, the Government of Malaysia offers no example of MITI approval for investments

in Malaysia that qualify for protection under the UK/Malaysia BIT, strongly and amazingly implying that are no investments in Malaysia that are protected by the UK/Malaysia BIT since its coming into force in 1988.

It stands to reason that the “appropriate ministry” under the UK/Malaysia BIT is the ministry that has expertise and oversight or regulatory authority with respect to the particular area, sector, project, or subject in or with respect to which which an investment in Malaysia is made.

The DIANA, which sank in 1817, is an historic shipwreck. The DIANA and her cargo were found in Malaysian waters and are defined as antiquities under the [Malaysian] Antiquities Act 1976 (the “Antiquities Act”). *See*, § 2. of the Antiquities Act. A copy of the Antiquities Act is contained in **Exhibit B** hereto. The Antiquities Act requires that applications for licenses to excavate antiquities to be approved by the Director General of [Malaysian] Museums. *See*, the Antiquities Act, § 9.

Given the subject matter of the DIANA project and based on the Antiquities Act which governs and specifically relates to the DIANA subject matter, MHS, or as it was known at the time, Pacific Sea Resources Sdn Bhd (“PSR”), approached the Director General of Museums and applied to the Director General for Museums in 1988 for approval to carry out an excavation of the DIANA. Evidence of this application is contained in **Exhibit C** hereto.

This was an obvious course of action and proper first point of approach as the DIANA wreck was an antiquity within the meaning of the Antiquities Act and because of the Department of Museums' jurisdiction over antiquities pursuant to the Antiquities Act. The Department of Museums was and continues to be part of the Malaysian Ministry of Culture, Arts and Heritage.⁴

On April 20, 2006, the following appeared on the Department of Museum's website:

Department of Museums Malaysia is the only government agency entrusted to preserve and protect all National Cultural Heritage. This encompasses the responsibility for preserving, conserving, researching all historical and ancient monuments, sites, and ancient artifacts, as well as the export management as provided for in the Artifact Act No 168/1976. The following laws and regulations must be observed when performing enforcement duties.

1. National Constitution
2. Treasure and Ancient Artifact Ordinance, 1957 (Ordinan Bendapurba dan Harta Karun 1957)
3. Customs Act 1976 (Customs Order) (Prohibition for Export 1998) Akta Kastam, 1976 Perintah Kastam (Larangan Eksport, 1998).
4. Treasure Trove Negeri Johor No.28, 1956.
5. Ancient Items Enactment (Enakmen Barang-barang Kuno No.11/1977.)
6. Preservation and Conservation of Cultural Heritage Enactment,1988 (Malacca).
7. Heritage Foundation of Johor (Enakmen Yayasan Warisan Negeri Johor No.7/1988.)
- 8.Land Acquisition Act 1960.
9. Land Conservation Act 1960.
- 10.Library Submission (Akta Penyerahan Perpustakaan No.331/1986.)
11. National Library Act (Akta Perpustakaan Negara (Pindaan) A

⁴ <http://www.heritage.gov.my/kekwa/index.php?bahan=viewbudaya.php?id=115>

667/1987.)

Work Scope

1. Issue the Ancient Artifact Export License
2. Issue the Ancient Artifact Trading License
3. Issue the Permission License for Digging Ancient Sites
4. Gazetting Old Monuments and Historical Sites.
5. Manage Old Building and Historical Site Renovation
6. Managing compensation payment
7. Coordinate and manage requests for Salvaging and Excavating Underwater Archaeolog

Contact person:

Tuan Haji Mohd Khairuddin bin Mohd Yusof
Curator
Email: khairuddin@jma.gov.my

Postal Address
Chief Director
Department of Museums Malaysia
Jalan Damansara
50566 Kuala Lumpur
(u.p Unit Penguatkuasaan)

Tel : 03 2282 6255 samb. 105/112/109/135
Faks:03 2282 7294

List of Forms that can be downloaded from the portal as follows :

- [1. Ancient Artifact Export License Application Form A \(4\)](#)
- [2. Ancient Artifact Trading License Application Form A \(Kaedah 3\)](#)
- [3. License for Digging Ancient Sites Application Form A \(JM/PK/5\)](#)
- [4. Request for Extension Application Form C \(Kaedah 4\)](#)

It would have been and was somewhat unusual if not wholly incorrect for PSR to have applied to MITI or MIDA for the permission to excavate the wreck of the DIANA. We have no doubt that if PSR would have applied to MITI,

MITI would have declined to take action on the matter and appropriately referred PSR to the Department of Museums.

PSR's application to the Directorate General of [Malaysian] Museums with respect to the DIANA led to the constitution of a committee of Malaysian ministries for the purpose of considering PSR's application and entering into the Contract (the "Committee").

The Committee consisted of representatives of the Malaysian Ministry of Finance (Treasury), the Ministry of Culture and Tourism, the Ministry of Foreign Affairs, the Ministry of Transport, the Attorney General's Chambers, the National Museum Department, the Marine Department, and the Marine Headquarters. The Committee was chaired by the Ministry of Finance (Treasury). *See*, R.M. annexes 1-3 comprising the minutes of several meetings of the Committee. Notably absent from the Committee were representatives of MITI and MIDA. MHS did not participate in the Malaysian Government's decision with respect to the composition of the Committee or in the Committee's internal deliberations.

In its meeting of September 14, 1988, the Committee decided that it would seek the agreement of the Minister of Finance to accept PSR's application and to enter into the Contract. *See*, R.M. annex 1, ¶ 2.3.2. and annex 3, ¶ 2.1.4. On May 5th 1991, in a letter to PSR on which the Ministry of

Finance was copied, the Malaysian Marine Department offered to enter into the Contract. *See*, R.M. annex 4.

In the judgment of the Government of Malaysia, and as demonstrated by the actions of its several ministries, the Committee, chaired by the Ministry of Finance, was the most appropriate collection of Malaysian ministries to approve the project to which the Contract relates, and the Committee did approve the project to which the Contract relates in accordance with legislation applicable to it and its administrative practice.

There is no prohibition against the method utilized by the Committee to approve the project to which the Contract relates, and to the extent any such prohibition or applicable administrative practice existed, it was, as it could be, waived by the Committee and the Malaysian Government.

The Government of Malaysia now contends that no appropriate Malaysian ministry approved the Contract and that therefore, the project to which the Contract relates cannot come under the protection of the UK/Malaysia BIT, even though, as explained in the First Memorial and above, the Government of Malaysia and several of its ministries negotiated, approved, and entered into the Contract, and the Government of Malaysia supervised the entire salvage operation, and benefited from MHS's investment under the Contract.

As the Government of Malaysia itself concedes, beginning in 1988 and continuing up to the time of the execution of the Contract, Malaysian government officials from the Treasury, the Attorney General's Chambers, the Ministry of Foreign Affairs, the Ministry of Culture and Tourism, the National Museum Department, and the Marine Department were all involved in the planning and the negotiation of the Contract. *See*, R.M. annexes 1-3. The Government of Malaysia nevertheless now contends that the DIANA project lacked the requisite Malaysian government approval, and it goes to great lengths to lead one to the conclusion that all investments by United Kingdom nationals in Malaysia must receive written approval by MITI in order to enjoy the protection of Article 1(1) (b) (ii) of the UK/Malaysia BIT.

The Government of Malaysia asserts but does not prove, that a party seeking the protection of the UK/Malaysia BIT and similar agreements, which the Government of Malaysia refers to as IGAs, must apply to MITI requesting classification of its investment as an "approved project" and that such investors must receive MITI's written decision of approval of the party's application for "approved project" status. *See*, R. M. p. 40-41. The Government of Malaysia also asserts, but does not and cannot prove, that the lack of any written notification from MITI approving an investment project disqualifies investments from being covered by the UK/Malaysia BIT.

After setting up the fictitious MITI approval requirement, the Government of Malaysia conveniently contends that the Contract and MHS's performance thereunder were not with respect to an "approved project" within the meaning of the UK/Malaysia BIT because MHS has produced no evidence of or because it lacks written approval therefor from MITI. For all the reasons stated above, the Government of Malaysia's contentions do not withstand scrutiny.

In effect, the Government of Malaysia is implausibly saying that there are two separate types of "approval" for every British investment in Malaysia: one approval for the investment itself, and another separate approval for protection under the UK/Malaysia BIT.

MHS neither applied for nor received any written approval from MITI for its investment under the Contract because MITI approval was not required.

In its memorial, the Government of Malaysia provides examples of correspondence between the Government of Malaysia and foreign companies making investments in Malaysia in support of the proposition that MITI approval is (as a matter of administrative practice) required for all investments seeking the protection of the UK/Malaysia BIT and similar treaties.

The few select examples are just that and without information on all foreign investments in Malaysia these examples cannot and do not constitute

proof of general administrative practice. Moreover, none of the examples of correspondence involve British investors or the UK/Malaysia BIT, and none of the correspondence indicates that the Malaysian Government itself was a party to the contracts involving investments in Malaysia by foreigners. *See*, R.M. annexes 42, 44 and 49. Furthermore, these examples are devoid of any indication that the investments in question were, as is the case in this case, already approved by one or more ministries of the Malaysian Government such as the Ministry of Finance or other members of the Committee.

Contrary to the contention of the Government of Malaysia, MITI approval is not necessary for investments in Malaysia by United Kingdom nationals in accordance with Malaysia's legislation and administrative practice, especially where (i) the Government of Malaysia itself and its several ministries are a party to and have approved a project involving investment by a United Kingdom national, and (ii) a committee comprised of several Malaysian ministries with jurisdiction and oversight function over marine salvage projects and treasure pursuant to specific legislation⁵ participated in the negotiation and

⁵ *See, e.g.*, the Antiquities Act implemented by the Department of Museums and *the Merchant Shipping Ordinance of 1952 (Federation of Malaya Ordinance No.70 of 1952)*, as amended, administered by the Marine Department at **Exhibit B** hereto.

approval of such projects or the contracts to which they relate over a three year period.

As the Government of Malaysia itself admits, it is clear that Article 1(1) (b) (ii) of the UK/Malaysia BIT contemplated and provided for the approval and thus the protection of manufacturing as well as non-manufacturing investments. *See*, R.M. annexes 34-37. MHS's investment under the Contract was a non-manufacturing investment. It is hard to conceive that MITI would be the "appropriate ministry" for approving an investment project related to the location, survey and salvage of a sailing vessel that sank off the coast of Malaysia in 1817.

In sum, as demonstrated above and also in the First Memorial, the Government of Malaysia's conduct, particularly the conduct of its ministries and agencies or departments involved in the subject of a marine salvage, prior to, at the time of the execution of the Contract, and during the performance of the Contract, clearly manifested the approval of the project to which the Contract relates in accordance with Malaysia's legislation and administrative practice. Approval was manifested by the execution of the Contract, the Marine

Department's involvement in the implementation of the Contract,⁶ and the Malaysian Government's receipt of all the benefits flowing from MHS's performance under the Contract. The Contract was approved by the Committee, which included all appropriate ministries given the subject matter of the Contract, marine salvage of a ship that sank in 1817 and treasure.

The Marine Department was not acting alone when it entered into the Contract with MHS. The Marine Department entered into the Contract with the knowledge, consent and direction of, among others, the Malaysian Ministry of Finance, the Ministry of Transport, the Ministry of Culture and Tourism, the Director General of Museums, and the Director of Marine, Peninsular Malaysia, and there is every reason to believe that such an act was in accordance with the Marine Department's authority, legislation, and administrative practice.

MHS's investment under the Contract entered into with the Government of Malaysia was in an "approved project" within the meaning of Article 1(1) (b) (ii) of the UK/Malaysia BIT. No MITI approval is necessary in order for the project to which the Contract relates to be protected by the UK/Malaysia BIT. MITI administrative practice, to the extent it exists or existed, does not apply to MHS's investment. And, even if, as the Government of Malaysia contends,

⁶ At **Exhibit D** hereto are copies of documents evidencing the Marine Department's on-going and intimate involvement in the DIANA project and its supervision over MHS's activities under the Contract.

MITI approval is necessary for MHS's investment to be protected under the UK/Malaysia BIT as matter of administrative practice, the Malaysian Government, as it could perfectly do, waived any such requirement by entering into the Contract and through all its actions in connection with the Contract. It is the Malaysian Government's prerogative and within its discretion to waive or not apply any administrative practice which may have required MITI approval, especially where, as here, the Government itself was a party to the Contract, and by entering and taking steps to enter into the Contract, the Government approved the Contract, and there was therefore no need or reason for a subordinate or additional ministry of the Government of Malaysia such as MITI to separately or again approve or classify MHS's investment in a salvage project as an "approved project."

As explained in the First Memorial, it is apparent that the actions and conduct of the Malaysian Government's several ministries and agencies up to the signature of the Contract, the Marine Department's signature of the Contract, and the Government of Malaysia's conduct and involvement during MHS's performance of the Contract was in accordance with applicable legislation, including but not limited to, *the Antiquities Act, 1976 (Act 168)* (*the Antiquities and Treasure Trove Ordinance, 1957*), and *the Merchant Shipping Ordinance of 1952 (Federation of Malaya Ordinance No.70 of 1952)*, as

amended, as well as administrative practice; and that such actions satisfy any requirement, beyond and in addition to the approval of Contract alone, that may apply with respect to the classification of the salvage project as an “approved project” within the meaning of Article 1(1) (b) (ii) of the UK/Malaysia BIT.

The “appropriate ministries” according to Malaysian legislation and administrative practice” in the DIANA project approval process were, among others, the Ministry of Culture and Tourism (including the Museum Department), the Ministry of Transport (including the Marine Department), and the Ministry of Finance (including Treasury).

* * *

For all of the foregoing reasons, MHS's investment in Malaysia under the Contract and otherwise in connection with the salvage operation that is the subject of the Contract was and is in an approved project within the meaning of Article 1(1) (b) (ii) of the UK/Malaysia BIT.

Negotiations conducted and other acts undertaken prior to the entry into the Contract by the Government of Malaysia and its several ministries, the assent of these ministries to the Contract, and their acceptance of the benefits of the investment made by MHS under the contract:

- a. demonstrate the express and specific approval and ratification by the Malaysian Government and its ministries of the project that MHS invested in; and to the extent required,
- b. constitutes the requisite classification of the project as an “approved project” by the “appropriate ministry” accordance with applicable legislation and administrative practice.

Any pretense or claim raised for the first time now – some 15 years after the Contract was executed by the Government of Malaysia – that MHS's investment was somehow not approved in accordance with the UK/Malaysia BIT is patently absurd.

At no time during MHS's performance of the Contract beginning in 1991 or during anytime thereafter until September 2004 did the Malaysian Government or any of its ministries object to, try to stop or prohibit, or otherwise indicate that the project that MHS invested in was not an “approved project.” Furthermore, the Malaysian ministries comprising the Committee which gave their guidance, assent, and approval to MHS' investment, and which supervised and received the benefits of MHS's investment and work in Malaysia under the Contract were the “appropriate ministries” – and included, as indicated above, ministries whose authority and function, under the relevant legislation cited above, relate specifically and closely to the subject matter of

MHS's investment in Malaysia (marine salvage of antiquities) , viz., the Director General of Museums (the Ministry of Culture, Arts and Heritage), and the Director of Marine, Peninsular Malaysia (the Ministry of Transport). It would have been utterly redundant for these ministries to take any further step to approve or seek additional approval for the DIANA salvage project in light of the Contract that they had already entered into with MHS for the salvage project and their involvement in the Contract, especially after having evaluated and negotiated the Contract for almost three years prior to its signature.

In advancing the necessity of the MITI approval argument, the Government of Malaysia cites no applicable law. The Government of Malaysia's necessity of MITI approval argument is based on administrative practice at best. The evidence proffered by the Government of Malaysia establishes, at best, only MITI administrative practice, which does not and cannot apply to the DIANA project. Even if established and applicable, the Government of Malaysia, in this case, itself waived the necessity of MITI approval or substituted the Committee's approval for that of MITI, as a matter of administrative practice as it has the power to do.

In citing the case of *Philippe Gruslin v. The Government of Malaysia*, ICSID Case No. ARB/99/3, November 28, 2000, with respect to the "approved project" issue, the Government of Malaysia advances the proposition that there

must be approval by the Government of Malaysia in order for investment projects to be covered under the UK/Malaysia BIT. We agree.

The clause in the relevant treaty in *Gruslin* relating to the “approved project” issue is essentially the same as that which appears in the UK/Malaysia BIT. See, R.M. annex 46, p. 3., ¶ e. (i).

In *Gruslin*, the Tribunal was asked to decide whether the purchase of or the investment securities traded on the Kuala Lumpur Stock Exchange (“KLSE”) constituted and investment in an “approved project.” The Tribunal held that Malaysian Government approval for a company to list securities on the KLSE did not constitute an “approved project” under the terms of the relevant treaty, and also that “mere investments in shares in the stock market, which can be traded by anyone, and are not connected to the development of an approved project are not protected.” See, *Gruslin*, ¶ 25.5.

The facts between this case and *Gruslin* are materially different. *Gruslin* does not support the Government of Malaysia’s argument that MHS invested in a project that did not have the appropriate approval.

MHS’s investment in the DIANA project was not an investment by an anonymous party in shares traded on the KLSE. MHS, a Malaysian organized company and its principals were known to the Government of Malaysia and MHS’s investment in the DIANA project was connected and specific only to

the discreet DIANA project. Gruslin, the investor in *Gruslin* was not known to the Government of Malaysia at the time of his investment.

The Government of Malaysia entered into the Contract because it approved the DIANA project, and the Government of Malaysia specifically selected MHS to carry out the DIANA project. *See*, R.M. annex 4, and generally, the Contract.

The Committee, comprised of the Ministry of Finance and other Malaysian ministries with jurisdiction over the subject matter of the DIANA project, specifically evaluated and negotiated (the written) Contract for three years; and subsequently approved not only the DIANA project, but the detailed Contract and related contracts. The Committee also specifically picked MHS to carry out the DIANA project, and the Government of Malaysia itself is a party to the Contract – an unassailable example of not only specific, but also conscious, knowing, and deliberate approval of a specific project by the Government of Malaysia. MHS's performance under the Contract, its interactions with the Marine Department and other Malaysian ministries, and the Government of Malaysia's remittance of some of the millions of dollars due to MHS for its performance under the Contract,⁷ constitute specific and express

⁷ *See, e.g.*, **Exhibit E** containing evidence of sums paid to MHS by the Government of Malaysia.

approval of MHS's investment in an "approved project" by the appropriate ministries in accordance with applicable legislation and administrative practice.

Estoppel

As stated in the First Memorial, the Government of Malaysia is estopped from successfully challenging this Tribunal's jurisdiction on the basis that it did not approve the DIANA project. An estoppel may arise in international law so as to bind a state. *El Salvador v. Honduras*, I.C.J. Rep. 1990, p. 118, ¶ 63.

For a period of more than three years, in the negotiations of the Contract with PSR and later MHS, numerous ministries of Malaysia participated in the negotiation and, once the Contract became binding on them, in the execution of the Contract. At no time did any of the representatives of and attorneys for the Government of Malaysia or the representatives of its various subordinate and constituent ministries and agencies assert, indicate or suggest that the project to which the Contract relates had to be approved by MITI.

Only last year, 14 years after the Contract was signed, and 10 years after the DIANA salvage project was completed did it occur to Malaysia's representatives or attorneys that the Contract did not relate to an "approved project." This lack of approval is now being used by Malaysia's attorneys as a basis for challenging the jurisdiction of this Tribunal.

We resubmit that this defense – if it can be called such – is barred by the long-established principle of estoppel. Having entered into the Contract and accepted and kept the results, benefits, and fruits of MHS's high-risk investment of labor, expertise, time, and money, whether entitled to or not, the Government of Malaysia may not now be heard to argue that the investment made by MHS was not in an "approved project."

4. Purely Contractual Claim (Cause of Action)

The Government of Malaysia further claims that MHS's claims before this Tribunal are simple breach of contract claims and not claims based on the UK/Malaysia BIT and on international law that can be heard by this Tribunal. If this were true, MHS would simply allege a breach of the Contract, and not, as it has already alleged in the First Memorial that: (1) the UK/Malaysia BIT protects MHS's investment in Malaysia; (2) Malaysia has breached its obligations to MHS under the UK/Malaysia BIT and under general international law; and (3) that MHS has suffered loss and damage by reason of Malaysia's breaches.

In the First Memorial and again now, MHS alleges that the Government of Malaysia has violated: (i) Article 2(2) (Protection of Investment, Fair and Equitable Treatment, Unreasonable and Discriminatory Measures, Observance

of Obligations), Article 4(1) (Expropriation), and Article 5 (Repatriation of Investment) of the UK/Malaysia BIT; and (ii) international law (collectively, the “UK/Malaysia BIT - International Law Claims”).

The UK/Malaysia BIT - International Law Claims or causes of action that MHS seeks this Tribunal to hear and decide arise out of and relate to investment made under the Contract, but they are not breach of contract or breach of contract claims or disputes.

The purpose of the UK/Malaysia BIT is generally to promote and protect investments by the nationals or companies of one Contracting Party in the territory of the other Contracting Party. Article 2(2) of the UK/Malaysia BIT provides:

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 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.

One of the means by which Malaysia is obligated to accord nationals of the UK fair and equitable treatment and permit UK nationals to enjoy the full protection and security of their investments in Malaysia without unreasonable

or discriminatory measures is by permitting UK nationals to have access to impartial and properly functioning Malaysian courts and other dispute resolution fora in Malaysia that properly apply applicable law and afford UK nationals fundamental legal protection and due process of law in Malaysia. Malaysian courts and the Malaysian judiciary are part of the Government of Malaysia.

MHS, *inter alia*, alleges that the Government of Malaysia utterly failed to give MHS' investment the protection that comes from affording MHS due process of law and that in doing so it has also, *inter alia*, expropriated MHS's property without required compensation.

Miscarriage and travesty of justice are understatement in describing the treatment that MHS received in the arbitration conducted under the auspices of the KLRCA, and later in the courts of Malaysia, as described in the First Memorial and all the other submissions that MHS has made to ICSID in connection with this case. Absence of justice more aptly describes MHS' experience with the courts of Malaysia. The treatment that MHS received in the arbitration conducted under the auspices of KLRCA, and later in the courts of Malaysia, was manifestly arbitrary and capricious, and otherwise contrary to international law.

The Government of Malaysia violated the UK/Malaysia BIT by denying MHS fair and equitable treatment, and the fundamental and rudimentary due process of law that MHS was entitled to receive pursuant the UK/Malaysia BIT. Additional facts supporting MHS's UK/Malaysia BIT - International Law Claims, which will be elaborated upon in the merits stage of these proceedings, are set forth in pages 6-23 of the First Memorial and are not repeated here.

The behavior that MHS complains of is cognizable only in an international forum such as ICSID and this Tribunal. The Government of Malaysia and its officials are fully well aware of the grievous treatment that MHS received at the hands of its officials. It is an affront to the legal profession to maintain, as is being done here, that MHS advances only a breach of contract claim.

In simple terms, the acts that MHS's chiefly complains of are the failure of Malaysia's judicial system, Malaysia's uncompensated expropriation of MHS's property, and Malaysia's breach of its other international law obligations to MHS – all of which are acts that do not constitute contract causes of action but rather UK/Malaysia BIT and international law claims.

In support of its contention that MHS's claims are purely (or entirely) contractual, the Government of Malaysia incredibly seems to be equating the facts in this case with the facts in *SGS Société Générale de Surveillance S.A. v.*

*Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.*⁸ The Government of Malaysia can derive no benefit from this case.

The issue in *SGS-Pakistan* was whether SGS had alleged claims that were justiciable under the Bilateral Investment Treaty between the Swiss Confederation and the Islamic Republic of Pakistan (the "BIT"). The Tribunal upheld jurisdiction over SGS's claims for breaches of the BIT. However, the Tribunal concluded that it did not have jurisdiction over the investor's claim that Pakistan breached provisions of a pre-shipment inspection contract.

SGS-Pakistan concerned an agreement entered into in 1994 between a Swiss company, SGS and the Government of Pakistan, in which SGS agreed to provide pre-shipment inspection ("PSI") services for goods exported from certain countries to Pakistan (the "PSI Agreement"). The PSI Agreement contained a dispute resolution clause that provided that any disputes which were not settled amicably were to be settled by arbitration in accordance with the Pakistan Arbitration Act, the place of arbitration being Islamabad.

Both parties disputed the other party's compliance with the PSI Agreement. SGS contended that Pakistan wrongfully repudiated the PSI Agreement, and that therefore Pakistan's conduct gave rise both to breaches of the PSI Agreement and breaches of the BIT. Pakistan contended that its acts

⁸ <http://www.worldbank.org/icsid/cases/SGS-decision.pdf>

were lawful and on September 11, 2000, it filed an arbitration claim against SGS pursuant to the arbitration clause in the PSI Agreement (the "PSI Arbitration"). In October 2001, SGS informed Pakistan that it was initiating ICSID arbitration proceedings for violations of the BIT.

In its ICSID claim, SGS alleged that Pakistan failed to promote SGS's investment in violation of Article 3(1) of the BIT, that it failed to protect SGS's investment in violation of Article 4(1) of the BIT, that Pakistan failed to ensure the fair and equitable treatment of SGS's investment in violation of Article 4(2) of the BIT, and that Pakistan had taken measures of expropriation or tantamount to expropriation in violation of Article 6(1) of the BIT.

Pakistan objected to the jurisdiction of the ICSID Tribunal on the grounds, *inter alia*, that SGS's claims were entirely contractual in nature and did not give rise to a breach of the BIT. Pakistan further argued that the only forum capable of resolving the contract claims was the PSI Arbitration tribunal (in Islamabad) and, applying the maxim *generalia specialibus non derogant*, maintained that the PSI Agreement's arbitration clause would take precedence over the ICSID arbitration clause contained in the BIT. Pakistan therefore requested that the ICSID tribunal stay the ICSID proceedings until conclusion of the PSI Arbitration, given that all of SGS's claims would require a prior finding that Pakistan breached sections 10.4 and 10.6 of the PSI Agreement.

The Tribunal disagreed, finding that the right to exercise jurisdiction in this case would not depend upon the findings of the PSI Arbitration. Rather, the Tribunal held that it was under an obligation to consider all facts relevant to the determination of a cause of action under the BIT. It therefore held that SGS would be in the same position as the claimant was in the *Vivendi* case, namely, that the claimant must show that the acts complained of rise to the level of a breach of the BIT.

The Tribunal noted that it was a basic principle consistently applied by ICSID tribunals that "it is a claimant's prerogative to formulate the claims that it is asking the judges to resolve," and that the Tribunal was not in a position at this stage to decide whether SGS's alleged BIT claims were in fact contractual claims as argued by Pakistan, but rather, it was limited to allowing the claim to reach the merits if the facts as asserted by the claimant are capable of constituting breaches of the BIT.

MHS's claims before this Tribunal are the same type of claims that the Tribunal in *SGS-Pakistan* allowed to proceed to the merits. The facts asserted by MHS are capable of constituting the alleged breaches of the UK/Malaysia BIT. MHS's UK/Malaysia BIT - International Law Claims are not purely contractual claims, and in any case, a determination on the issue of whether they are must be, as in *SGS-Pakistan*, be deferred to the merits stage of this

arbitration. Accordingly, just as Pakistan failed in its arguments in *SGS-Pakistan*, so to must the Government of Malaysia fail when it argues that MHS's claims before this Tribunal are purely contractual and justiciable only by arbitration in Malaysia in accordance with Clause 32 of the Contract. The breach of fair and equitable treatment under the UK/Malaysia BIT is not a contract claim. Because MHS's claims before this Tribunal are not contractual, the Government of Malaysia's challenge in this regard also fails.

5. Denial of Justice

In its fifth challenge to the Tribunal's jurisdiction, the Government of Malaysia goes to great lengths to explain why there was no denial of justice (a UK/Malaysia BIT and international law claim and not a contract law claim), as alleged by MHS. As the Government of Malaysia states in its memorial, "the issues that have to be answered is whether there has been, on these facts – (a) a denial of justice; and (b) a failure to exhaust internal remedies."

The question of whether there has been a denial of justice is a question for the merits stage of these proceedings, and not a question that can be decided at the jurisdictional phase of this arbitration. We, accordingly, request that the Tribunal pretermite the Government of Malaysia's fifth challenge to the jurisdiction of this Tribunal. Additionally, the issue of the exhaustion of local

or domestic remedies is the subject of the Government of Malaysia's sixth and final challenge to the jurisdiction of this Tribunal, which challenge is addressed below.

6. Exhaustion of Domestic Remedies

As stated in the First Memorial and stated here again, pursuant to Article 7 of the UK/Malaysia BIT, the parties in dispute are required to have attempted to resolve their dispute within three months through the pursuit of local remedies or otherwise before instituting arbitration or conciliation proceedings under the ICSID Convention. Article 7, in relevant part, states:

If any [investment] 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 . . . arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre
(emphasis added)

To the extent applicable in this case, MHS and the Government of Malaysia have fulfilled the foregoing requirement by pursuing remedies in Malaysia for more than nine years, as described at length in the First Memorial at pp. 10-22.

The standard in the UK/Malaysia BIT for the local resolution of disputes or for the pursuit of domestic remedies is limited to three months, and does not require the exhaustion of all local remedies. Article 7 of the UK/Malaysia BIT. Under this standard, MHS could have invoked the jurisdiction of ICSID after the conclusion of the KLRCA arbitration in 1998 – three years after its dispute with the Government of Malaysia arose, or even much earlier.

As explained in the First Memorial, between March 1995 and September 2004, MHS expended much time, effort, and incurred costs in correspondence, meetings and attempted meetings with various Malaysian Government officials and others, in domestic arbitration and court proceedings, and before the CIARB, in an effort to resolve and settle its claims against and dispute with the Malaysian Government. Finally, on September 30, 2004, some nine years after its dispute with and claims against the Government of Malaysia arose and its claims could not be resolved, MHS filed its request for ICSID arbitration which has led to the constitution of this Tribunal.

The tribunal's decision in *Loewen v. United States of America (2004)*, ICSID Case No. ARB(AF)/98/3 is inapplicable to this case. The UK/Malaysia BIT dictates what a claimant such as MHS must do and how much time must pass before a claim can be brought to ICSID. And, in any event and if *Loewen* applied, the facts recited by MHS clearly demonstrate that MHS exhausted all

available and effective domestic remedies in Malaysia prior to coming to

ICSID. *See*, the First Memorial, pp. 10-22. The Tribunal in *Loewen* held:

No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system (emphasis added).

As and for the reasons stated in the First Memorial, there was misconduct by the arbitrator in the KLRCA arbitration, MHS did not receive due process in the Kuala Lumpur High Court, and MHS was deprived of the ability to appeal the High Court's decision. Even if MHS could have appealed the High Court's decision, there was no reasonable expectation or hope that such an appeal would be effective and adequate given the Malaysian legal system's troubles and inadequacies.

As stated in the First Memorial, all of MHS efforts to negotiate and settle with the Government of Malaysia and to obtain due process from Malaysia's courts took place against the backdrop of a difficult period in the Malaysian legal system. A Straits Times headline of 15 January 2001 stated: "No trust in Malaysian courts; judges." The publication also stated: "foreign investors are reluctant to invest because they perceive there is no level playing field in the Courts." It continued that: "Multinationals don't trust the court system - holding up development; the Chief Justice wants urgent change." On January

8, 2002, the Malaysian Bar Council released its findings: "Lawyers in Malaysia's capital have branded the country's legal system abusive, corrupt and incompetent, in a memorandum submitted to the Government," said the headlines. In an address to the Conference on Arbitration in Kuala Lumpur on 28 February 2003, the Minister of Legal Affairs, Dato Rais Yatim, admitted the many shortcomings of the Malaysian legal system. *See*, the First Memorial, Exhibit I. At **Exhibit F** hereto is MHS's chronicle and description of the ineffectiveness of and corruption within Malaysia's legal system.

Lastly, for good measure, we note that Article 26 of the ICSID Convention states:

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

There is no indication that Malaysia has conditioned its consent to arbitration under the ICSID Convention on the requirement to exhaust local administrative or judicial remedies.

The UK/Malaysia BIT supplies the standard with respect to when MHS can resort to ICSID arbitration. For the reasons stated above, we submit that

MHS meets that standard, and the Government of Malaysia's arguments to the contrary are manifestly flawed.

III. CONCLUSION

For the reasons stated in the First Memorial and elaborated above, and because of the Government of Malaysia's specious challenges to the competence of this Tribunal, this Tribunal should rule that it has jurisdiction to hear MHS's claims against the Government of Malaysia pursuant to the ICSID Convention and the UK/Malaysia BIT.

This Tribunal has jurisdiction because all the following conditions necessary for this Tribunal to have jurisdiction pursuant to the ICSID Convention and the UK/Malaysia BIT are met, and because none of the Government of Malaysia challenges succeed:

1. MHS has alleged claims or disputes which are justiciable under the UK/Malaysia BIT. (Articles 2(2) (Protection of Investment, Fair and Equitable Treatment, Unreasonable and Discriminatory Measures, Observance of Obligations), 4(1) (Expropriation), and 5 (Repatriation of Investment) of the UK/Malaysia BIT).

2. The legal claims or disputes mentioned above arise directly out of an investment. (UK/Malaysia BIT, Article 1(1)).
3. The dispute is between Malaysia or the Government of Malaysia and a national or company of the United Kingdom (MHS) concerning an investment of MHS in Malaysia. (UK/Malaysia BIT Article 7).
4. The parties to the dispute, MHS and the Government of Malaysia, have consented in writing to submit the dispute to the Centre. (ICSID Convention, Article 25, and UK/Malaysia BIT, Article 7(1)).
5. The investment at issue falls within the definition of the term “investment” set forth in the UK/Malaysia BIT. (Article 1).
6. MHS's investment has been approved by the “appropriate ministry” of the Government of Malaysia. (UK/Malaysia BIT, Article 1(1)(b)), and
7. The parties in dispute, *viz.* MHS and the Government of Malaysia, have attempted to resolve their dispute for much longer than the three months required under the UK/Malaysia BIT through the pursuit of remedies in Malaysia or otherwise prior to MHS's institution of

arbitration proceedings under the ICSID Convention against the Government of Malaysia. (UK/Malaysia BIT, Article 7(1)).

With respect to the jurisdictional challenges raised by the Government of Malaysia, MHS submits that:

1. MHS has *locus standi* or standing to prosecute this case.
2. MHS's claim for money or to performance under the Contract constitutes an "investment."
3. The project to which the Contract relates is an "approved project."
4. MHS's claims are justiciable under the UK/Malaysia BIT and they are not contractual claims governed by municipal law.
5. MHS has met and exceeded the required standard related to the issue of the exhaustion of local remedies prior to instituting this arbitration.
6. The Government of Malaysia's claim that there was no denial of justice is not a jurisdictional challenge.

Accordingly, this Tribunal should confirm its jurisdiction to hear and decide MHS's claims against the Government of Malaysia pursuant to the ICSID Convention and the UK/Malaysia BIT, and proceed to the merits stage of these proceedings.

Respectfully submitted,



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IV. EXHIBITS

List of Exhibits

- A.** The Merchant Shipping Ordinance of 1952 (Federation of Malaya Ordinance No.70 of 1952), as amended.

- B.** The Antiquities Act.

- C.** MHS's (fka PSR) application to the Department of Museums.

- D.** Documents evidencing the Marine Department's involvement in the DIANA project.

- E.** Evidence of sums paid to MHS by the Government of Malaysia.

- F.** MHS's chronicle and description of the shortcomings and ineffectiveness of the Malaysian legal system.