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International Arbitration Case Law

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MALAYSIAN HISTORICAL SALVORS, SDN, BHD V. THE GOVERNMENT OF MALAYSIA (ICSID CASE NO. ARB/05/10) DECISION ON THE APPLICATION FOR ANNULMENT

Case Report by Gao Xi & Lin Deyu**
Edited by Mark Feldman ***

An Annulment Decision rendered on April 16, 2009 pursuant to Article 52 of the ICSID Convention in the arbitration proceedings between Malaysian Historical Salvors, SDN, BHD and the Government of Malaysia (ICSID Case No. ARB/05/10).

Tribunal:	Judge Stephen M. Schwebel (President), Judge Mohamed Shahabuddeen, Judge Peter Tomka.
Applicant's counsel:	Mr. Emmanuel Gaillard, Mr. John Savage, and Mr. Yu-Jin Tay, Shearman & Sterling LLP.
Respondent's Counsel:	Tan Sri Abdul Gani Patail, Datuk Azailiza Mohd. Ahad, Ms. Aliza Sulaiman, and Mr. Osman Affendi Mohd. Shalleh, Attorney General's Chamber of Malaysia; Dato' Cecil Abraham and Mr. Sunil Abraham, Zul Rafique & Partners; and Mr. Robert Volterra and Mr. Stephen Fietta, Latham & Watkins LLP.

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1. Facts of the Case (¶¶ 1-9)

On 7 September 2007, Malaysian Historical Salvors Sdn., Bhd. (the "Applicant") filed with ICSID an application (the "Application") requesting the annulment of an award dated 17 May 2007 ("the "Award") rendered by the tribunal (the "Tribunal") in the arbitration between the Applicant and the Republic of Malaysia (the "Respondent") (ICSID Case No. ARB/05/10).

The dispute arose out of a contract dated 3 August 1991 between the Applicant and the Respondent (the "Contract"). In the Contract, both parties agreed that the Applicant would find for the Respondent the wreck and salvage the cargo of a British vessel carrying a large cargo of antique Chinese porcelain which sank in the territorial waters of Malaysia, and the Respondent would pay a "Service Fee" to the Applicant out of the value of the recovered cargo. Under a subsequent contract, the Applicant was to arrange for the auction of the recovered items in Europe; the Respondent reserved the right to withdraw salvaged items from the sale provided that the Applicant was paid its share of the best attainable value for the withdrawn items. The Applicant was then entitled to the 'Service Fee" comprising 70% of the combined total of the proceeds from the auction plus the appraised value of items not auctioned.[1]

After the salvage operation of almost four years, the Applicant found the wreck and recovered 24,000 pieces of porcelain from it. Some items were withheld from sale by the Respondent; the remainder were auctioned in March 1995 for approximately USD 2.98 million. The Applicant in the original arbitration proceeding alleged that, while being contractually entitled to 70% of the auction proceeds, it received only 40%, and the Respondent did not pay the Applicant its share of the best attainable value of the withheld items, which were valued at over USD 400,000.[2]

On 30 September 2004, the Applicant submitted a request for arbitration to ICSID, invoking the consent to ICSID arbitration contained in the Contract. On 17 May 2007, the Tribunal issued the Award, dismissing the Applicant's claims in their entirety. The Applicant subsequently filed its Application, seeking annulment of the Award under Article 52(1) of the ICSID Convention.[3]

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[1] Decision on the Application for Annulment ("Decision") ¶¶ 2, 3, 4.
[2] Decision ¶¶ 5, 6.
[3] Decision ¶¶ 7.

2. *Legal Issues Discussed in the Decision*

(a) Submissions of the Parties

1. The Applicant's Position (¶¶ 27-42)

In its application, the Applicant sought annulment on the sole ground that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction over the dispute. The Applicant relied on *Vivendi v. Argentine Republic* as a basis for its argument that a tribunal's failure to exercise jurisdiction which it possesses constitutes an excess of powers under Article 52(1)(b).[4] Three main arguments were made by the Applicant to support its contention. First, the Applicant argued that the Tribunal applied an overly-restrictive definition of the term "investment", failing to apply Vienna Convention principles and failing to consider the ICSID Convention's travaux préparatoires.[5]

The Applicant's second argument was that the Tribunal elevated characteristics of investment to the level of jurisdictional conditions, which are not found in the text of the ICSID Convention.[6] 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. Additionally, the Applicant argues that the Tribunal improperly introduced a further jurisdictional requirement of "contribution to the economic development of the host State", which is not a condition for investment, but merely a "natural consequence" of investment.[7]

Thirdly, the Applicant argued that the Tribunal erred in introducing an additional requirement that the investment characteristics must not only be present "quantitatively," but must also be present "qualitatively" and "to a sufficient degree before an 'investment' can be found."[8] The Applicant maintained that "these 'qualitative' conditions have no basis in law," and are "alien to the meaning of 'investment' in the ICSID Convention."[9] The Applicant noted that minimum monetary limits for investments were considered during the negotiations of Article 25(1), but were rejected.[10] And the ICSID Convention's travaux préparatoires demonstrated that a requirement of a minimum duration of five years for an investment was debated but also rejected by the drafters.[11] Therefore, no legal basis could be found in the ICSID jurisprudence to support an additional "qualitative" requirement for either contribution or duration.

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[4] Decision ¶ 27.
[5] *Id*. ¶ 28.
[6] *Id.* ¶ 29.
[7] *Id.* ¶ 30.
[8] *Id.* ¶ 31.
[9] *Id.* ¶ 31.
[10] *Id.* ¶ 33.
[11] *Id.* ¶ 34.

In conclusion, the Applicant argued that the Tribunal's decision suffered 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."[12] Therefore, the Applicant argued that the Award should be annulled in its entirety in accordance with Article 52(1)(b) of the ICSID Convention.[13]

Finally, the Applicant also pointed out that the Tribunal should "have considered the BIT definition of 'investment'".[14]

2. The Respondent's Position (¶¶ 43-55)

The Respondent argued that the Committee should reject the Applicant's request for annulment of the Award in its entirety. The Respondent maintained that the Applicant was in effect asking the Committee to annul the Award based on the substance of the Award.[15]

The Respondent, in its submissions, emphasized the distinction between an annulment and appeal.[16] An annulment, the Respondent argued based on ICSID jurisprudence, is not a remedy against an incorrect decision[17], but instead is an "extraordinary and narrowly circumscribed remedy".[18] And in its view, the Applicant's Memorial indicated that its Application concerned 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, which is outside the scope of an application for annulment.[19]

The Respondent disputed the Applicant's argument that the consent of the parties should provide a guiding light when determining whether an "investment" exists, given that Article 25 places an outer limit upon parties' ability to refer disputes to ICSID. And regarding the Applicant's assertion that the Tribunal disregarded the Vienna Convention, the Respondent argued that not only was the Tribunal mindful of the Convention, but that its approach to interpretation was entirely consistent with the Convention.[20]

As regards the "hallmarks" of an investment, the Respondent argued that the Applicant misrepresented the case. The Tribunal's identification of five hallmarks of investment under Article 25(1), and its "fact-specific and holistic" approach to determine the extent

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[12] *Id.* ¶ 37.
[13] *Id.* ¶ 37.
[14] *Id.* ¶ 38.
[15] *Id.* ¶ 44.
[16] *Id.* ¶ 46.
[17] *Id.* ¶ 46.
[18] *Id.* ¶ 45.
[19] *Id.* ¶ 46.
[20] *Id.* ¶ 48.

to which those hallmarks were met, were "uncontroversial."[21] In the Respondent's view, even if the Tribunal had adopted a jurisdictional conditions approach, this would not have provided a basis for annulment, given that previous and subsequent tribunals have followed such an approach.[22]

In response to the Applicant's argument that the Tribunal effectively elevated characteristics found in the jurisprudence into "binding precedent," the Respondent argued that the "Tribunal conducted a meticulous analysis of the meaning of 'investment' under Article 25 of the Convention, analyzing previous ICSID jurisprudence and leading commentary, and reached a conclusion based on its assessment of the detailed facts of the case.[23]

Finally, even if the Tribunal had exceeded its powers, the Respondent argued 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. The Respondent argued that the "manifest" requirement under Article 52(1)(b) sets a high threshold and a jurisdictional mistake is not necessarily a manifest excess of powers and that the Applicant had not given appropriate weight to that point.[24]

(b) Analysis of the Ad Hoc Committee (¶¶ 56-82)

The Committee first noted that the Vienna Convention was not applicable to the 1965 Washington Convention or to the 1981 United Kingdom – Malaysia BIT because Malaysia became a party to the Vienna Convention only in 1994. However, the Committee found that the non-retroactivity of the Vienna Convention was "without prejudice to the application of any rules set in it to which treaties would be subject under international law independently of the Convention."[25] The Committee found that the Vienna Convention's provisions on the interpretation of treaties had been accepted by the International Court of Justice and the international community as reflecting not only treaty commitment but also customary international law. The Committee thus applied the customary rules on interpretation of treaties as codified in the Vienna Convention.[26]

The Committee also noted that beyond the "ordinary meaning" of the term "investment", differences existed among ICSID tribunals and commentators on the meaning of "investment" under Article 25(1) of the Convention. Thus the meaning of the term "investment" may be regarded as "ambiguous or obscure" under Article 32 of the Vienna Convention, which justified resort to the preparatory work of the Convention "to determine the meaning."[27]

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[21] *Id.* ¶ 49.
[22] *Id.* ¶ 49.
[23] *Id.* ¶ 50.
[24] *Id.* ¶ 53.
[25] *Id.* ¶ 56.
[26] *Id.* ¶ 56.
[27] *Id.* ¶ 57.

The Committee examined the preparatory work of the Convention through 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.[28] Both sources revealed the intention of the Parties to deliberately leave the term "investment" undefined in the Convention.

From the Convention's travaux préparatoires, the Committee pointed out that monetary or duration limitations on claims had been rejected.[29] The Committee restated the observation made by the General Counsel of the World Bank, Aron Broches, 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" and that "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" [30] The Committee further restated Mr. Broches' explanation that the purpose of Section 1 was merely to establish "outer limits" within which the Center would have jurisdiction provided the parties' had consented to such jurisdiction.[31]

However, the Committee emphasized that the travaux préparatoires did not support the imposition of "outer limits" such as those imposed by the Sole Arbitrator in the case. The Committee found that 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."[32] The Committee found that there was "scant support" for the establishment of "criteria or hallmarks" to meet the "investment" requirement under Article 25.[33]

From the Report of the Bank's Executive Directors, the Committee confirmed the intentions of the Parties that no attempt had been made to define the term "investment", given the essential requirement of consent by the parties.[34]

The Committee found that the preparatory work of the Convention as well as the Report of the Executive Directors established 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."[35] Thus, by the terms of their consent, the parties could define jurisdiction under the Convention.

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[28] *Id.* ¶ 63.
[29] *Id.* ¶ 66.
[30] *Id.* ¶ 67.
[31] *Id.* ¶ 68.
[32] *Id.* ¶ 69.
[33] *Id.* ¶ 69.
[34] *Id.* ¶ 70.
[35] *Id.* ¶ 71.

The Committee also addressed language in the Report of the Bank's Executive Directors that consent alone will not suffice to bring a dispute within the Centre's jurisdiction. The Committee found that such language does not indicate that "investment" as used in Article 25(1) has an "objective content" that cannot absolutely be varied by the consent of the parties. "The nature of the dispute" only refers 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 requirements, the Committee found, 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."[36]

The Committee concluded that the failure of the Sole Arbitrator to consider or apply the definition of investment contained in the Malaysia-United Kingdom investment treaty constituted "a gross error that gave rise to a manifest failure to exercise jurisdiction.[37]

The Committee further observed that the Award of the Sole Arbitrator was "incompatible with the intentions and specifications" of Malaysia and the United Kingdom, which had "comprehensively described" the meaning of "investment" in their investment treaty.[38]

At the same time, however, the Committee recognized that the Sole Arbitrator had "acted in the train of several prior ICSID arbitral awards which lend a considerable measure of support to his approach."[39] The Committee considered the "seminal award" on this point, *Salini v. Morocco*, which the Committee found to be "largely consistent" with the leading commentary on the ICSID Convention, by Professor Schreuer.[40] However, the Committee noted that Professor Schreuer, unlike the Sole Arbitrator, did not treat the "characteristics" or "hallmarks" of investment "as jurisdictional requirements."[41] The Committee found that such "characteristics" of investment do not appear in the ICSID Convention and are not fixed or mandatory as a matter of law.

3. Costs (¶ 82)

The Committee ruled that the Respondent must meet all the Centre's costs of the annulment proceeding, and that each party must bear the costs of its own legal representation.

4. Decision (¶ 83)

The Committee decided as follows:

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[36] *Id.* ¶ 72.
[37] *Id.* ¶ 74.
[38] *Id.* ¶ 62.
[39] *Id.* ¶ 75.
[40] *Id.* ¶¶ 75-76.
[41] *Id.* ¶ 77.

"(1) that the Award on Jurisdiction of 17 May 2007 of the Sole Arbitrator in *Malaysian Historial 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."[42]

[42] Decision Section F.