

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
SUPPLEMENTAL COMMENTS ON THE ISSUE OF "INVESTMENT" - II**

Sole Arbitrator

The Honorable Michael Hwang, S.C.

Secretary of the Tribunal

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Introduction

1. By letter of March 14, 2007, the Tribunal requested the parties to submit additional written comments on the issue of investment within the meaning of Article 25(1) of the ICSID Convention, as addressed by the tribunal in *PSEG Global, Inc. and Konya İlgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Decision on Jurisdiction, annexed to the Award of January 19, 2007 [“PSEG”].

2. In *PSEG*, the Tribunal found that it had jurisdiction and that PSEG Global, Inc. (the “Claimant”) was entitled to be heard on the merits.

PSEG

3. *PSEG* concerned a dispute arising out of a contract between the Claimant and the Republic of Turkey (“Respondent”) for the development and operation of an electricity generating plant (the “Contract”). The issues of whether the Contract was an investment, whether it was legal and binding, and whether it included a final agreement on key commercial terms and what those terms were became a matter of protracted controversies between the parties. The parties’ failure to resolve their disputes led to Claimant’s request for arbitration before ICSID. The Claimant undertook certain activities in preparation for the construction of the electricity generating plant, but no funds or other resources for the actual construction of the electricity plant were expended and the plant was never constructed.

Existence of Investment

Respondent's Arguments

4. The Respondent challenged ICSID's jurisdiction on, among other grounds, that there was no investment or no investment dispute under the ICSID Convention or the bilateral investment treaty between the United States and Turkey (the "Treaty").

5. The Respondent contended that the project never moved off of the drawing board or negotiating table. It argued that although the Contract was signed there was no agreement on commercial terms due to the Claimant's dramatic underestimation of project costs, and that as a result, all activities undertaken by the Claimant were merely preparatory to the investment and did not involve any legal expectation or right. The Respondent also expressed the view that there had been simply no "meeting of the minds," notwithstanding the fact that the Contract was approved by the Turkish Government and signed by the parties. In consequence, the Respondent asserted that the Contract was not a valid and binding agreement. The Respondent also asserted that the absence or uncertainty of agreed terms made it impossible for any tribunal to fill gaps concerning the essential commercial terms.

Claimant's Arguments

6. The Claimant argued that the Respondent destroyed its investment when it breached various contractual undertakings. The Claimant also asserted that all major components of the project had been completed prior to financial closing, including the preparation of a feasibility study, a revised mine plan, and environmental studies; the

conclusion of various related agreements such as those for mining rights; the selection of a construction contractor; the conduct of hydrological studies; the procurement of a mining license for the operation of a coal mine that would provide fuel for the electricity plant; the making of loan applications and appointment of financial agents; the procurement of zoning changes and preparatory steps for the necessary expropriations; and the establishment of Claimant's branch office in Turkey and the establishment of a project company. The Claimant undertook numerous activities in reliance on the Contract.

7. The Claimant urged that the Contract plainly fell within the definition of investment under the Treaty, which includes service and investment contracts, claim to performance and intangible property. Relying on UNIDROIT Principles, the Claimant also argued that it was not always necessary to reach an agreement on all the essential terms of a contract as long as the parties have the intention of forming a contract. *See, PSEG*, ¶ 75. The Claimant also asserted that the Contract, which was signed by the parties and approved by the Turkish Council of State, was legally binding and valid. The Claimant also argued that all agreements, legal rights, licenses, authorizations, assets and property of the investor qualified as investments under the Treaty.

The *PSEG* Tribunal's Findings in Respect of the Existence of Investment

8. The *PSEG* tribunal noted that, in advancing their arguments, the Claimants relied on the accepted fact that the ICSID Convention deliberately omitted to define the term "investment" and left this definition to the parties. The *PSEG* tribunal also noted that broad definitions of "investment" were embodied in numerous treaties and agreements

and a broad interpretation of the term “investment” had been upheld by several ICSID tribunals, notably *Fedax*, and *CSOB*. *See, PSEG*, ¶ 74.

9. In *PSEG*, the tribunal found -- and the parties did not dispute -- that the Contract existed and that it had become effective. The *PSEG* tribunal also found that “by its very nature and its specific terms the Contract embodied an investment agreement under which the investor was authorized to undertake the power generation activities therein specified.” *PSEG*, ¶ 114.

10. Emphasizing the importance of the intent of the parties to be bound to the Contract and finding abundant evidence of the same, the *PSEG* tribunal concluded that the Contract was valid and binding notwithstanding the need for rebalancing of contract terms in case of significant change in that balance. The *PSEG* tribunal also found that such rebalancing or negotiation/renegotiation of essential terms was clearly provided for in Article 8 of the Contract.

11. In the *PSEG* tribunal’s judgment, the *PSEG* tribunal’s conclusion that the Contract existed, and that it was valid and legally binding, was sufficient to establish that the *PSEG* tribunal has jurisdiction on the basis of an investment having been made in the form of a concession contract. *See, PSEG*, ¶ 104. For the *PSEG* tribunal, the existence of a valid and legally binding contract was conclusive on the issue of investment.

12. The *PSEG* tribunal deferred to the merits stage whether all or some of the activities undertaken by the Claimant qualify as part of the investment or are to be

regarded as merely preparatory. The *PSEG* tribunal also applied this principle to whether the assets of the project company in question constitute an investment.

13. The Treaty defined investment as, *inter alia*:

“(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) . . .

(iii) a claim to money or a claim to performance having economic value and associated with an investment;

(iv) . . .

(v) any right conferred by law or contract, and any licenses and permits pursuant to law”

The Criteria and Standards Applied by the *PSEG* Tribunal Support a Finding of Investment in the Present Case

14. The decision of the *PSEG* tribunal demonstrably supports MHS’s arguments that its activities with respect to the DIANA project meet the criteria of investment under the ICSID Convention and the UK/Malaysia BIT.

15. In *PSEG*, the tribunal held that a valid and legally binding contract existed and that it had jurisdiction on the basis of an investment (even though the Respondent disputed the validity and legally binding effect of the contract in question and the electricity generation plant was never completed). The *PSEG* tribunal concluded that the Contract fell within the definition of investment under the Treaty (and the ICSID Convention), which defines investment as, *inter alia*, “a right conferred by law or contract, and any licenses and permits pursuant to law”

16. In the present case, the contract between MHS and Malaysia pursuant to which MHS successfully completed the DIANA salvage is valid and legally binding, and Malaysia does not dispute the validity and legally binding effect of the DIANA salvage contract. Accordingly, under the reasoning of the *PSEG* tribunal, the mere existence of the DIANA salvage contract, which is valid and legally binding, constitutes an investment under the UK/Malaysia BIT (and the ICSID Convention) if the DIANA salvage contract falls within the definition of investment under the UK/Malaysia BIT.

17. The UK/Malaysia BIT defines investment as, *inter alia* and without limitation, “claims to money or to any performance under contract having a financial value” and “business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.” *See*, Article 1(1) (a) of the UK/Malaysia BIT.

18. For the *PSEG* tribunal, a valid and binding contract (*e.g.*, “any right conferred by law or contract, and any licenses and permits pursuant to law . . .”) constitutes investment for purposes of the Treaty and the ICSID Convention. Under the UK/Malaysia BIT, “investment” means, *inter alia*, “business concessions conferred by law or under contract” Like the Contract in *PSEG*, the DIANA salvage contract is a business concession conferred to MHS by contract and thus constitutes investment pursuant to the UK/Malaysia BIT and the ICSID Convention.

19. In this case, MHS received a part of the monies due to it as a result of its investment in the DIANA salvage contract, which is incontrovertible evidence of “performance under a contract having a financial value.” It is also incontrovertible that the DIANA salvage contract conferred a business concession to MHS for the salvage of

the DIANA and the recovery and sale of her cargo, and it is undisputed that the salvage and sale of the DIANA's cargo occurred. It is also undisputed that the salvage and sale of the DIANA's cargo would not have taken place but for MHS's investment in the DIANA project pursuant to the contract for the salvage of the DIANA between MHS and Malaysia.

20. In this case, like in *PSEG*, the relevant contract is valid and legally binding, and like in *PSEG* where the contract fell within the definition of investment under the Treaty, here the contract between MHS and Malaysia falls within the definition of investment under the UK/Malaysia BIT.

21. The *PSEG* tribunal also found that it had jurisdiction on the basis of an investment even though the Claimant had undertaken only certain activities and the Contract had only been partially performed.¹ In the present case, MHS undertook not only all preparatory activities for the salvage contract, but it fully and successfully performed the salvage contract, and alone made and financed all the investment and capital expenditure required therefor. It bears reiteration that in performing the salvage contract, MHS, *inter alia*, identified and located the DIANA; surveyed, salvaged and recovered her valuable cargo; restored, classified, cataloged and preserved the DIANA's valuable cargo; promoted and otherwise facilitated the sale of the DIANA cargo; and also thereby conferred many benefits to Malaysia.

22. Unlike *PSEG* where all the activities in connection with the project were not performed, in the case of the DIANA, MHS fully performed and successfully completed

¹ Although the Claimant undertook certain activities in preparation for the investment, the complete investment for the construction of the electricity generating plant was not made, and the plant was never built.

all of the activities under the salvage contract. Under what can be viewed as the “activities undertaken in reliance on the contract test” of *PSEG*, MHS’s activities under the relevant contract far exceed the activities undertaken by the Claimant in *PSEG*. Accordingly, if the *PSEG* tribunal were seized with this case, it would readily and more forcefully find an investment to exist in this case, especially in light of the fact that the *PSEG* tribunal deferred to the merits stage of the proceedings the issue of what constitutes precisely an investment.

The *PSEG* Tribunal’s Response to the Jurisdictional Objection that the Dispute Does not Arise Directly out of an Investment

23. The Respondent in *PSEG* also challenged the jurisdiction of the tribunal on the basis that the dispute did not arise out of an investment. Art. VI (1) of the Treaty defined an investment dispute as:

“a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party’s foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.”

24. Claimant urged that the dispute in essence involved the interpretation and application of the Contract and also the interpretation or application of the investment authorization granted by Turkey. The Claimant also argued that since the dispute fell within the terms of Article VI of the Treaty, the jurisdictional requirement of Article 25(1) of the ICSID Convention was met as the dispute arose directly from the investment. The Claimant finally argued that since the Contract was a valid and binding instrument it was properly characterized as an investment agreement and that it could also be characterized as an investment authorization from Turkey to pursue the project in question.

25. The *PSEG* tribunal agreed and found that the Contract was valid and binding and that the Contract embodied an investment agreement under which the investor was authorized to undertake the activities specified therein. The *PSEG* tribunal concluded that the Claimant was specifically encouraged to undertake the project and that proper authorization was issued to the Claimant by the Turkish authorities, first in the form of a branch office and later as a limited liability company, authorizing the Claimant to, *inter alia*, “. . . plan, construct and operate energy power plants” The *PSEG* tribunal underscored the existence of investment authorization by stating:

“It is quite common that countries, host to an investment, will require a number of other authorizations to permit the investment to operate a number of specific activities, but in so far as the authorization to invest is concerned only one decision by the pertinent government office suffices.” *PSEG*, ¶ 118, p. 34.

26. The *PSEG* tribunal found that the Contract was valid and legally binding and that the investment embodied or contemplated by it was approved by the Respondent. The *PSEG* tribunal accordingly concluded that the dispute arose unequivocally out of an investment subject, but again, as it did with respect to the existence of investment, deferred to the merits stage of the proceedings the answer to the question whether the activities undertaken by Claimant in reliance on the Contract “. . . constituted precisely an investment as opposed to mere preparatory activities” *PSEG*, ¶121, p. 35.

The Criteria and Standards Applied by the *PSEG* Tribunal Reinforce MHS’s Arguments and Provide Further Support for a Finding of Approved Investment in the Present Case

27. In the present case, as in *PSEG*, the contract between MHS and Malaysia for the salvage of the *DIANA* is a valid and binding instrument properly characterized as an

investment agreement that can also be characterized as an investment authorization from Malaysia to pursue the salvage project. *See, PSEG*, ¶ 112.

28. Additionally, with respect to the issue of the approval of investment and the identity of the “appropriate Ministry of Malaysia” to approve the investment, MHS notes that it made its initial salvage application to the Malaysian Museums alone. On their own initiative, Malaysian Museums involved the Ministries of Finance, Transport and Culture/Tourism in pre-contractual discussions and negotiations to evaluate the MHS’s proposal and to approve the investment and by such action clearly signaled that these were the *only* ministries whose approvals were required. Notably absent from that group was the Malaysian Ministry of Trade and Industry (“MITI”), the Ministry that Malaysia *now* claims to have been the “appropriate” ministry to approve the DIANA project.

29. It is obvious that had the approval of MITI been necessary at the time, MITI would *also* have been included in the pre-contractual discussions and negotiations so that MITI could also evaluate the DIANA project and determine whether it should be approved. It is manifest that MITI’s approval for the DIANA project/contract was not required by Malaysian law, and to the extent it was, in the case of the DIANA project, as previously explained, any such requirement was waived.

30. It would have been absurd for the Marine Department to have approved and executed the contract for and on behalf of the three relevant Ministries of the Government of Malaysia and on behalf of the Government of Malaysia, and subsequently require MHS to submit the executed contract (which was not conditioned on further Malaysian government approval) for further, separate approval by MITI, a

Malaysian ministry subordinate to the Government of Malaysia. Malaysia's contentions in this regard are implausible and devoid of merit.

31. MITI was not involved in the approval process because the DIANA salvage was neither "trade" nor "industry" and thus not the type of project within MITI's competence. It was simply not the "appropriate ministry" to approve a historic shipwreck salvage project.

32. The Government of Malaysia required the promoters of the DIANA project and the principals of MHS to set up a Malaysian company as the vehicle through which to pursue and undertake the DIANA project. MHS was established and continues to exist solely for this purpose and has not carried out any other activity or business.

33. As was the case in *PSEG*, the incorporation of MHS in Malaysia as a private limited company financed with foreign capital and the execution of the DIANA salvage contract between Malaysia and MHS, a contract that clearly embodies and requires investment by MHS, constitutes further evidence of Malaysia's approval of MHS's investment in the DIANA project. Like the Claimant in *PSEG*, MHS was specifically encouraged and induced to undertake the DIANA project and proper authorization was issued to MHS for this purpose by the registration of MHS in Malaysia and the Malaysian Government's entry into the DIANA salvage contract with MHS.

34. In *PSEG*, the Respondent argued that the contract execution and approval of the Contract by the Turkish Council of State, a requirement under Turkish law for contracts involving the state, was not enough and that additional approvals were needed (the so-called pink and green certificates). This argument was dismissed. In the present case,

Malaysia has similarly argued that approval and execution of a contract on behalf of and binding the Government of Malaysia was insufficient and that a further approval, qualifying the investment for protection under the UK/Malaysia BIT had to be obtained from MITI. This argument too should also be dismissed. Malaysia is attempting to convince this Tribunal that in addition to obtaining approval for an investment contract to be performed, British investors in Malaysia were required to obtain a further level of approval from MITI if they wished their investment to qualify for protection under the UK/Malaysia BIT. No such meaning or requirement can be derived from the wording of the UK/Malaysia BIT, and also because Malaysia has submitted no evidence in support of the claim that there was such a requirement under Malaysian law. Furthermore, as this Tribunal will recall, even though British nationals are major investors in Malaysia, Malaysia unequivocally and incredibly maintains that there are no British investments in Malaysia that are protected by the UK/Malaysia BIT because these investments lack MITI approval. *See*, Frankfurt Hearing Transcript, 140:9-25; 141:1-15.

35. The relevant provisions of the UK/Malaysia BIT are similar to, if not identical with the relevant provisions of the treaty between the United States and Turkey at issue in *PSEG*. The pertinent facts in the present case and the pertinent facts in *PSEG* are materially identical. The contract at issue in *PSEG* and the contract for the salvage of the *DIANA* fall within the definition of investment as that term is defined under, respectively, the bilateral investment treaty between the United States and Turkey and the UK/Malaysia BIT; the disputes between the parties arises out of such contracts or investments; and both contracts were authorized and approved.

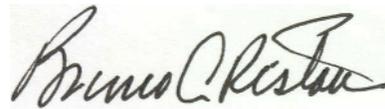
36. *PSEG* firmly supports this Tribunal's jurisdiction and this Tribunal should so hold.

Like the Claimant in *PSEG*, *MHS* is entitled to be heard on the merits.

Respectfully submitted,



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