In the matter of an arbitration
under the ICSID Arbitration Rules

ICSID case no. ARB/05/10

FIAC
Börsenplatz
60313 Frankfurt

Thursday, 25th May 2006

Before:

MR MICHAEL HWANG

BETWEEN:

MALAYSIAN HISTORICAL SALVORS, SDN, BHD
Claimant

-v-

THE GOVERNMENT OF MALAYSIA
Respondent

MR H EREN and MR B RISTAU, of The Eren Law Firm, appeared on behalf of the Claimant.

The Right Honourable Tan Sri Abdul Gani bin Patail, Attorney General of Malaysia, DATO' KC VOHRAH, of Lee Hishamuddin Allen & Gledhill, DATO' C ABRAHAM, of Shearn Delamore, MRS A SULAIMAN, of the Malaysian Government, appeared on behalf of the Respondent.

Computerised transcript of
Smith Bernal Wordwave
190 Fleet Street, LONDON, EC4A 2AG
Tel: (+44) (0)20 7404 1400. Fax: (+44) (0)207 404 1424

Thursday, 25th May 2006

(9.00 am)

THE ARBITRATOR: Good morning, ladies and gentlemen. We are now commencing this hearing on jurisdiction. I am Michael Hwang, and I am the Sole Arbitrator here, assisted by Mr Ucheora Onwuamaegbu, the secretary of the tribunal.

Mr Eren, I believe you are representing the claimant. Would you kindly, for the record, identify who is on your side today?

MR EREN: Yes. I am very pleased to address the tribunal. Hello, respondents. My name is Hal Eren; I am an attorney at The Eren Law Firm. With me is Mr Bruno Ristau, who is special counsel to our law firm, also representing the claimant. Representing the claimant, MHS, is Mr Dorian Ball, its managing director and majority owner.

THE ARBITRATOR: Thank you. Mr Attorney, would you kindly introduce the members of your team?

THE ATTORNEY GENERAL: Thank you. I am Abdul Gani Patail, the Attorney General of Malaysia. Immediately to my left is Ms Aliza Sulaiman, senior federal counsel in the chambers. Immediately after her is Ms Chandra Devi Letchumanan, senior federal counsel in my chambers too. After that is Dato' KC Vohrah, from

Lee Hishamuddin Allen & Gledhill. Immediately after is Dato' Cecil Abraham, from Shearn Delamore. Both of them are practising lawyers. And of course Mr Sunil Abraham, who is also from Shearn Delamore. And lastly there, Mr Badron Ismail, who is the principal assistant director of the Marine Department of Peninsular Malaysia.

THE ARBITRATOR: Thank you. Mr Attorney, when you introduced Dato' Vohrah, I just remembered that Dato' Vohrah is now counsel for Lee Hishamuddin Allen & Gledhill. In case you do a Google search, Mr Eren, you will find that I was a partner for over 30 years at Allen & Gledhill in Singapore. That firm has not had a connection with Dato' Vohrah's firm for about 30 years. It used to be the same firm, but we split many, many years ago, so there is absolutely no connection between my former firm and Dato' Vohrah's present firm.

Right, we have here a timetable which we will try to keep to as far as possible. We are going to have the opening presentation by counsel for the respondent. I understand that counsel will be dividing up their presentation between various counsel, but of course the total time allocated will be the same.

Can I just suggest, for the benefit of counsel, both

for the saving of time as well as for the benefit of the transcriber, that when you are referring to authorities it probably would not be necessary for you to read great chunks from the judgments. Take me to the cases, give me the passage. I can read with my eyes faster than you can out loud, and it also saves the transcriber from having to follow. So that, I hope, will make for a more efficient hearing. But of course summarise the gist of it and what point you think the case makes, and then we may have a dialogue on that.

So, Mr Attorney, can I ask you now to proceed with your team's presentation.

THE ATTORNEY GENERAL: Thank you. Before I proceed, Mr Learned Arbitrator, may we request -- what we have is the documents of the claimant, and we have paginated it. We would like to introduce these documents for the purposes of ease of reference, nothing else -- all of it has been paginated -- because at this particular time, if you are to refer to any of the documents it would be quite messy. Unless there is an objection from the other side.

MR EREN: No objection.

THE ATTORNEY GENERAL: May I just proceed while that is being done?

THE ARBITRATOR: Please do.

THE ATTORNEY GENERAL: Thank you. The other matter is that there are some documents that we have introduced just now, already shown just now. Those documents which were submitted were simply for this reason alone: that is, for completeness and ease of reference. It is not exactly something very new. But I will leave it to Dato' KC Vohrah later on to put up his case on that.

THE ARBITRATOR: Sorry, Mr Attorney, are you referring to something called volume 6 in the bundle of documents?

THE ATTORNEY GENERAL: Yes.

THE ARBITRATOR: I believe this came in very late. Mr Eren, do you have anything to say about this?

MR EREN: We are notified of it and are seeing it for the first time right now.

THE ARBITRATOR: Why not take it as it comes. Let us see what use they make of it, and if you feel that you need to respond to it or object to it, let us take it at that stage.

MR EREN: Okay.

Submissions by THE ATTORNEY GENERAL

THE ATTORNEY GENERAL: Thank you. I will start with the claim first. At the heart of the claim, the claimant is seeking payment for more monies it sees due under the salvage services contract. Definitely, learned arbitrator, wild allegations of expropriation and denial

of justice were hurled at the respondent.

On the issue of expropriation, by definition the term "expropriation" would mean this: the taking by the host state of property owned by a foreign investor and located in the host state. In so far as the issue of expropriation is concerned, I wish to state this from the outset: that the respondent has no history whatsoever of expropriating foreign assets and/or investments since Malaysia gained independence in 1957. Malaysia has also consistently offered strong support for foreign investments. For this the respondent remains an irresistible choice for foreign investors, and the respondent finds the claimant's allegation particularly disturbing and very, very uncomfortable.

I wish also to draw the attention of this arbitral tribunal to a couple of matters; that is, the claimant's allegation pertaining to the issue of expropriation is misconceived and inconsistent (a), of course, in the claimant's Request for Arbitration and (b) in the claimant's memorial on jurisdiction.

Now, learned arbitrator, in its Request for Arbitration, at page 1, the claimant claims that Malaysia has confiscated the claimant's property rights. That is what he mentioned about property's rights. In the claimant's memorial on jurisdiction, at page 5, what

happened was that the claimant expressly stated that the Government of Malaysia has unlawfully taken MHS's money and violated MHS's rights to the money. So it is an issue of money and property rights.

Now, because of that, it is evident that the claimant is uncertain as to the precise nature of its claim in relation to the issue of expropriation. The claimant's assertion of unlawful retention of the claimant's monies does not amount to expropriation, but rather the withholding of monies, which as a matter of law could only mean a breach of the salvage contract, if at all.

Of course, the claimant has failed to satisfy the prima facie test laid down in the case of Joe Mining. Following advice, I will not quote any of the passages. On this matter my learned friend Dato' Cecil Abraham will address you in further detail later on.

As to the background of the claimant's case, in the late 1980s the claimant approached the respondent and offered its salvage services. The respondent agreed, of course, to the claimant's offer and entered a contract, way back in 1991, to salvage the wreck of a sunken ship known as Diana. The contract was extended at least twice before the claimant's services were completed.

The claimant was paid for its services after

an auction was held by the renowned House of Christie's. But later on the claimant was not satisfied with the amount paid and proceeded to initiate arbitration proceedings to recover more. Now, after, the claimant, though fully and ably represented, lost its claim.

In 1998, the claimant applied to the High Court in Kuala Lumpur to set aside the award or to remit the matter to the arbitrator for reconsideration. Then the claimant failed again and, instead of appealing to the Court of Appeal in Malaysia, they chose to complain to the Chartered Institute of Arbitrators London against the conduct of the arbitrator. The institute of course appointed three prominent international arbitrators: they are the learned senior counsel Mr Christopher Lau of Singapore, Mr Chelva Rajah, senior counsel of Singapore, and also Andrew Rogers QC of Australia as the chairman. In 2001 the claim was dismissed. The claimant now refers this case before yourself after it had unsuccessfully arbitrated all of these matters in the various tribunals.

Now, what I wish to emphasise here is that at no time was the claimant not ably represented by any counsels. They had very good lawyers, they had all the possible advices, and he was never denied that in Malaysia.

Now, the other matter which I wish to raise here, which of course will be elaborated by my learned friends later on, is the fact that under our laws he has the right to immediately go -- if he was not satisfied as to the conduct of the arbitrators or he feels that he is prejudiced in any manner, he could have gone to the appointing authority to challenge that; and the appointing authority, after giving due notice, will have to look into the matter. But he did not do that: he decided to go to the Chartered Institute of Arbitrators.

THE ARBITRATOR: By the time that the award was issued by the arbitrator, would not the appointing authority have been functus?

THE ATTORNEY GENERAL: It would not necessarily be so. It appears at any time during -- he must have realised -- if his contention was that the arbitrator had misconducted himself during the hearing, he could have immediately written in. My view is that, learned arbitrator, even after the matter is over, after the arbitral award has been done, he could still complain.

THE ARBITRATOR: But I do not immediately recall whether the complaint against the arbitrator was about the manner in which the award was delivered or the conduct of the arbitrator in the course of the hearing. Mr Eren can

assist me later on with that.

THE ATTORNEY GENERAL: On this matter I believe my learned friend Dato' Cecil will be elaborating on the further details.

Now, on this particular matter as to whether this arbitral tribunal has the necessary jurisdiction to hear the claimant's claims, our answer is definitely in the negative. The claimant and the claim do not fall within the scope of Article 25 of the ICSID Convention, read together with Article 7 of the IGA; that is, the agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the promotion and protection of investments. This will of course be elaborated on by Dato' KC Vohrah; I will not go into that.

Now, on the purpose of the IGA that was entered into between Malaysia and the United Kingdom, it was for only one purpose: first, to promote trade between the two countries; secondly, of course, to accord each other's, protection. If you look at Article 1 of the IGA you will notice that each country itself already, respective countries, confers to each other a certain amount of protection.

Now, Article 1(1)(b) of the IGA clearly reflects the intention of the parties. These terms were agreed upon

to protect the interests and economy of the respondent and the Government of the United Kingdom of Great Britain.

Now, it was concluded in 1981; that is to say, at a date when Malaysia needed direct foreign investment in the development of its manufacturing, industrial, and related infrastructure. The respondent wanted to limit the encouragement and protection of foreign investments made in its territory to investment made in projects that contributed to the manufacturing and industrial capacity of the country of Malaysia. In fact, any country has a right to protect its economy, and of course especially lately also the issue of security is added in. This of course must relate to the facts of foreign investment that is entering into Malaysia.

Now, it is absolutely vital that this is properly appreciated. Any liberal interpretation to the contrary or to expand that clear limited intention of the parties in respect of the IGA will run contrary to the intention of both parties to the agreement.

Now, what was in the agreement? The claimant's investment here in the salvage contract was at all times protected by the laws of Malaysia. I must say that. The Federal Constitution of Malaysia and the Law of

Nations protect its rights. There is no such thing as expropriation of property without adequate payment or compensation.

Now, after the execution of the salvage contract the claimant wanted more: it apparently wanted its investment to be protected under the IGA. But in order for it to be accorded that protection the claimant must first of all make an application to the appropriate ministry, which was the Ministry of Trade and Industry, as it was then known.

Now, the mandatory requirement of Article 1(1)(b)(ii) of the IGA must be fulfilled. Of course, the salvage contract undertaken by the claimant is not an investment in an approved project because it was never classified. I must state this because it is important. Because even in the case of Phillip Gruislin v Government of Malaysia it is stated clearly in that decision there is a purpose and methodology involved in securing approval. There is a system that you apply, and so on, before you get this approval; it is not as if every investment immediately becomes protected.

THE ARBITRATOR: Mr Attorney, was that system publicised?

THE ATTORNEY GENERAL: Yes, all the investors that come in would be able to understand that, they would know that. We also have FIC that controls foreign investments.

THE ARBITRATOR: Was it ever gazetted that to have authorisation or approval for purposes of the IGA the appropriate ministry to apply to would be your Ministry of Trade?

THE ATTORNEY GENERAL: Yes. I must say this: all the departments are aware that in order to fall within that ambit you must apply for approved project status. As for the investors overseas, all the embassies are aware of this, all the high commissions are informed of this. The laws are there, the investment guarantee agreements are there. You will not be ... Well, I would not agree to the extent that we must publish it to the extent of notifying everywhere, but these are all there on record for investment purposes. If you want to invest in Malaysia you have to come in through MITI or the FIC, the Foreign Investment Committee.

It would be similar to applying, for instance, learned arbitrator, for an application for this pioneer status.

THE ARBITRATOR: If an investor wants to seek particularly favourable treatment from the Malaysian Government then presumably it has to apply to the appropriate ministry; and if it wants to engage in certain activities then presumably there is an application under some Industrial Coordination Act or some similar legislation.

But I take it that the answer to my specific question is that there was no gazette notification that for the purposes of approval under the IGA (a) applications needed to be made and (b) applications needed to be made to MITI in particular.

THE ATTORNEY GENERAL: Yes, there are no gazettes to this effect. But the issue, learned arbitrator, is that when you come into Malaysia to put investment, there are certain procedures that you follow. They have to apply to this Foreign Investment Committee, and all this is disclosed. There are brochures on these matters. It is not as if, just because it is not in a gazette, therefore the claimants can claim, or anybody for that matter can claim, "I am not aware of that."

The point is that the departments also -- because especially in this case what happened was that the claimant entered into an agreement with a Malaysian Government agency. Even with Malacca they entered into an agreement to provide contract services.

THE ARBITRATOR: I understand your case to be that you are not denying that MHS was engaged in a lawful activity which was approved by the Malaysian Government in so far as approval was necessary, but you are saying that MHS did not have approval for the purposes of the IGA.

THE ATTORNEY GENERAL: Yes.

THE ARBITRATOR: So I take that point. My only question to you is: apart from gazette notification, was there anything published that informed investors that if they wanted to avail themselves of the protection of the IGA there was a certain procedures that needed to be followed?

THE ATTORNEY GENERAL: My response to this is that there is something on the documents that we issued just now. That will be under the Ministerial Functions Order, sir, which was gazetted.

THE ARBITRATOR: Someone will show me that later?

THE ATTORNEY GENERAL: Yes, that will be shown. But the important factor here is that, by the end of the day, with the greatest of respect, the Government of Malaysia would not deem this as an approved project, because we have always considered this as a simple service contract. It is not considered as an investment per se under the IGA.

THE ARBITRATOR: I suppose there are two ways to look at it: one is to say that it is within the prerogative of the Malaysian Government to decide what projects will receive protection under the treaty, and that is effected by way of an approval for the purposes of the IGA; and the other is to say that it is left as a matter of interpretation of the treaty whether or not a project

comes within that definition, and there is no specific pre-approval process required. You, of course, are advancing the proposition that specific approval under the treaty is required, which I understand, so you do not have to push that point. I think we have to look now at the actual treaty and the documentation to see whether or not that proposition is justified by the materials.

THE ATTORNEY GENERAL: I will leave that to the learned Dato' KC Vohrah on that matter.

Now, there is another issue that is raised by the claimant, and that is the issue of denial of justice. Now, the respondent as far as they are concerned denies that there has been any denial of justice in this instance.

If you were to look at clause 32 of the salvage contract, the claimant and respondent agreed to settle any disputes arising out of the contract in accordance with the arbitration laws of Malaysia. Both parties agreed to that. The simple matter is that both parties have agreed to settle any disputes in accordance with the arbitration laws of Malaysia.

On 27th May 1996, pursuant to a Consent Order -- now, apparently what happened was that both parties could not agree to an arbitrator, and they decided to go

to court. Of course, the application was made by the claimant, and there was a Consent Order issued, agreed by both parties. On the Consent Order that states, among other things, simply this:

(1) that the dispute between the claimant and the respondent is to be settled by arbitration in accordance with UNCITRAL Arbitration Rules of 1976 and the Rules of the Regional Centre of Arbitration at Kuala Lumpur;

(2) that the parties will revert to the director of the Regional Centre of Arbitration in Kuala Lumpur for the appointment of an arbitrator within one month from the date of this order;

(3) there will be a Sole Arbitrator;

(4) the arbitrator shall be a person who is legally qualified.

And then of course the normal things: that the arbitration shall be held in Kuala Lumpur, Malaysia; and that all arbitration proceedings will be conducted in English. That was the order given. Both parties agreed to have the Kuala Lumpur Regional Centre to appoint an arbitrator.

The claimant was also represented in that hearing by a leading counsel and arbitrator by the name of Mr William SW Davidson, from the renowned law firm of Messrs. Azman Davidson & Co. The claimant's solicitors

would have advised the claimant of the consequences of the amendment and variation to clause 32 of the salvage contract, especially as regards the applicability of section 34 of the Malaysian Arbitration Act of 1952.

THE ARBITRATOR: Mr Attorney, this denial of justice point does not seem to me to be one that really is a jurisdictional argument. Because whether or not there has been a denial of justice is something that perhaps I cannot entertain or should not entertain at this stage, unless and until we deal with all the other points.

At the heart of MHS's claim in this regard is the denial of justice, so does that not go to merits; and is it possible to deal with it as a jurisdictional issue?

THE ATTORNEY GENERAL: I am fine. I can skip this, I can leave it alone for the time being. But my concern is that when these accusations are made it does cause irreparable damage to my own country, and it would surprise me, stating what I said just now, but I will move on.

THE ARBITRATOR: I think your response to that is in the memorials which are on the website. But for my purposes I do not think I need to hear that at this stage, I do not think. It seems to me that the more pertinent argument on this aspect of the claim would be the

exhaustion of domestic remedies point, which becomes a jurisdictional issue, I suppose.

THE ATTORNEY GENERAL: I am fine with that. The claimant also made certain allegations against the judiciary of not being competent, and already the whole legal system. I will not go into that also.

THE ARBITRATOR: I thought the whole point of your jurisdictional objections is that you do not want me to hear all of that. So I have a hold on that for the moment.

THE ATTORNEY GENERAL: I will not go into the other details. Suffice it for me to say this: the claimant has never, ever complained about any breach of treaty, during all the process that was done in Malaysia, the due process of law. In other words, he went to the arbitration, and in his arguments at the arbitration there was no argument of breach of the treaty, even in the High Court itself there was no issue.

Now, even when all the letters of complain were sent to the various parties that the claimant mentioned -- that is, to the Prime Minister, including Queen Elizabeth of England, and also even to the Prime Minister's wife, and of course also to the US Chamber of Commerce, and also to the High Commission of the UK -- all these complaints were made, but never at all was

there an allegation during this time that there was a breach of the treaty. I must state that.

Now, learned arbitrator, when we look at it in total what we see is that this is a mere attempt -- after all the complaints, he was going purely by Malaysian laws and what he contracted into. But now he went further. What we are looking at, and what we are submitting to you, learned arbitrator, is that this is a matter -- when he comes before ICSID he is asking to re-arbitrate the matter. He is not doing anything else: the claimant is just asking for this tribunal to re-arbitrate a matter that has already been duly arbitrated.

If you look at the issue, first of all there is his complaint. Already he had his dispute on the selection of the arbitrator for the arbitration to be done in KL. Then he makes an application to the High Court. The High Court then says: okay, we will appoint this, we will get the Kuala Lumpur Regional Centre for Arbitration to appoint an arbitrator to be agreed by both sides. Both sides have agreed.

Now after this, having been not satisfied with the arbitrator, he went after the arbitrator, he went to the Chartered Institute of Arbitrators and complained about him. Now, the institute did not find anything wrong with the arbitrator.

On top of that he goes to the High Court and he asked for the matter to be again looked into. In his submissions in the particular case he admitted that this is an international arbitration. Having admitted that, and agreeing that section 34 applies, they are saying that section 34 of our Arbitration Act of 1952 -- they went on to say this: that common law principles must apply. The issue of inherent jurisdiction for the courts to re-look into the matter, and trying to persuade the court not to look into section 34 -- obviously the court is bound by section 34. It dismissed the thing.

Having not been satisfied with the matter, now he brings us here. It is a matter of -- then again, I must point to this: the claimant did not ever make an appeal to the Court of Appeal. There is the process of appeal, and he did not appeal. The reason being -- I will just touch on it lightly -- that there was no written judgment.

We all understand that most common countries, at the very least, practise this system in civil matters: that an oral judgment will be given out, and immediately the other party, if not satisfied with the matter, can file a Notice of Appeal, and the judge will write his judgment, which will then be issued to the parties

concerned and then the parties will proceed. We cannot say immediately, making the allegations that have been made, saying: look, there is no written judgment, therefore everything is bad.

Learned arbitrator, what we are seeing now is that, having failed in that matter, he is asking for a third bite at the cherry. The respondent contends that this arbitral tribunal, of course, has no jurisdiction and competence, because this is a purely contractual claim where the crux of the dispute is premised on a breach of the terms and conditions of the salvage contract.

With your permission, of course, learned arbitrator, may I now invite Dato' KC Vohrah to continue with the substantial submissions on this issue.

THE ARBITRATOR: Yes, we will hear from Dato' KC Vohrah.

Submissions by DATO' VOHRAH

DATO' VOHRAH: As indicated by the learned Attorney General, I will deal with three issues: the issue of locus standi; the investment in the salvage contract; and the term of "investment" as used in an approved contract, what it means.

But before I deal with these issues can I just put on record those facts which are not disputed and which are admitted by the claimant.

1. The salvage contract was signed on

3rd August 1991; see volume 1, annex 6, the respondent's bundle of documents.

2. It was extended several times until 3rd June 1995; see volume 1, annexes 8 and 9, the respondent's bundle of documents.

THE ARBITRATOR: Could I just interrupt you there? Was there a period in the salvage contract for completion, was there a contractual period?

DATO' VOHRAH: There was a contractual period.

THE ARBITRATOR: Which was ...?

DATO' VOHRAH: Which was for 18 months from 3rd August 1991.

Then we go on to the third point, that the salvage contract after extension expired on 3rd June 1995; and this can be seen in volume 1, annex 9, the respondent's bundle of documents.

Then there was a dispute that arose out of the salvage contract on 3rd July which went on for arbitration.

Now, the fifth point is this: MHS at the time that the contract was signed was not majority British owned; and this is seen in the claimant's Request for Arbitration dated 30th September 2004, Exhibit 6, the claimant's roster of shareholders.

The sixth point is this: MHS only became majority British owned on 11th December 1991; and this can be

seen in the claimant's reply memorial, dated 23rd April 2006, at page 6.

The seventh point is that MHS had never applied for the investment to be approved by the Ministry of Trade and Industry, now known as the Ministry of International Trade and Industry, in Malaysia, to be an investment in an approved project under the IGA which had been in force since 21st October 1988, as it felt that it was unnecessary to do so. That is the explanation given by the claimant, and that can seen in the claimant's reply memorial dated 23rd April 2006 at page 41.

The eighth point is this: at the time of the negotiations, and at the time of acceptance of the salvage contract, there was no provision in the contract itself which showed that approval for MHS investment was to be an investment in an approved project under the IGA that had been granted.

The ninth point is this: the first time that the issue of the IGA was raised was on 30th September 2004, when MHS filed its Request for Arbitration with the International Centre for the Settlement of Disputes; and that can be seen in its Request for Arbitration dated 30th September 2004.

Now, the tenth point is this: it is uncontradicted that the claimant's application for judicial review of

the arbitrator's award to the High Court in Malaysia was dismissed with costs on 4th February 1999. Now, more than five years later, the claimant seeks to re-arbitrate this dispute before this tribunal.

I will now go on to the locus standi point. At the time the contract was entered into, the claimant was not majority British owned, because as at 3rd August 1991, when the contract was entered into, the claimant had three equal registered shareholders: Donald Bruce Robinowe, an American national; Dorian Francis Ball, a British national; and, thirdly, Michael Flecker, an Australian national.

It is very clear that at the time that the contract was entered into the claimant was not a British company. At the time the salvage contract was signed, no issue of protection under the IGA arose, as the claimant was not majority British owned, and no issue of it having to apply for protection as required under the IGA arises. The IGA simply did not apply.

Now, therefore it follows that, because of the nature of the shareholding of the claimant at the time the contract was signed, it is overwhelmingly clear that the IGA and the protections afforded under the treaty of the IGA were never in the contemplation of the contracting parties.

Now the claimant argues that the Malaysian Marine Department's act of entering into the salvage contract on behalf the Government of Malaysia supplies the requisite classification of the project in which MHS has invested in pursuance of the salvage contract.

THE ARBITRATOR: Dato' Vohrah, you are jumping to a second point there. What I was waiting for you to develop was your authority for saying that because MHS was not majority controlled by a British national at the time of the contract therefore it has no locus standi. That is what I am waiting to hear from you, because your last proposition related to the next phase of the argument, which is: even if it was an investment, it was not an approved investment. You have three topics to talk about, so do you want to talk about the locus standi first?

DATO' VOHRAH: Yes, I will stick to the locus standi point because I will deal with it on the other two matters that arise on the investment. Will that be all right?

THE ARBITRATOR: So the question is: what is the moment of truth, as it were, for determining the nationality of the investor, what is the legal position?

DATO' VOHRAH: As soon as it applies for approval under Article 1(1)(b)(ii).

THE ARBITRATOR: But you are jumping to an assumption that

an application for approval is necessary.

DATO' VOHRAH: Yes, and I will develop that.

THE ARBITRATOR: But if approval is necessary it is common ground that they did not apply for approval, so they are knocked out of that, so I do not have to come back to the locus standi point. But the locus standi point, as I understood you to say, is that a company which is not majority controlled by a British national as at the date of the signing of the contract or the commencement of the project is not entitled to treaty protection. So satisfy me on that, please.

DATO' VOHRAH: Yes. Well, put it this way, on 3rd August it was not British owned, it was never in the contemplation of the parties that the IGA applied. So what happened was that the status of the company, notwithstanding the change of the status of its shareholding, continued, as the requirement for the investment to be an approved project had not been got, because there was no application.

It is central to my point that there must be an application. I will be developing that. Since there was no application whatsoever it cannot possibly change the status of the contract that was entered into.

THE ARBITRATOR: No, but if there is no application then on your argument it fails; even if it were British

controlled at the date of the signing of the contract, the claim fails because it was never an approved project.

DATO' VOHRAH: Agreed. Precisely.

THE ARBITRATOR: Let me come to the point, which is that I think it is in the claimant's submissions, and there is textbook authority and probably case authority as well to say that the issue of locus standi really is the determination of the consent of the parties to ICSID arbitration, and consent is usually determined at the time that the dispute arises.

So there is already some exchange of arguments on that point in the memorials. I am waiting for you to address me on that. Because they would say that the operative moment of time for determining nationality is when the dispute started.

DATO' VOHRAH: True.

THE ARBITRATOR: Sorry, am I getting your argument correctly, Mr Eren?

MR EREN: Yes, essentially. I think you have to cite authority for the proposition, and the authority is contained in the BIT or the IGA as you referred to.

DATO' VOHRAH: That is right.

MR EREN: And the IGA is quite clear on this point. It does not say: before or at the time of contract. Please read

the IGA --

THE ARBITRATOR: Sorry, Mr Eren, I just wanted to understand that I was representing your argument correctly.

MR EREN: Yes.

THE ARBITRATOR: We will let Dato' Vohrah continue.

DATO' VOHRAH: Article 25 of the ICSID Convention states that jurisdiction is granted to the centre for a case to be heard by an arbitrator provided that the company which is a national of the other contracting state investing in the contracting state is majority owned before the dispute. But before that can happen it must arise as a result of an investment, the dispute must concern an investment. Now, Article 25 does not talk about investment, it does not define investment, it just mentions the word "investment".

So where do we get the meaning of "investment"? We must go back to the international treaty, and that treaty is the IGA between the United Kingdom and Britain [sic]. Article 7 therein confers jurisdiction to the international centre. There the word "investment" is used.

Again, how do you define "investment" in Article 7? You still have to go back to Article 1. Well, Article 1 states the whole list of investments, but it is a qualified list in the sense that it must be

an approved project. So if it is not an approved project in the first instance it cannot be an investment under Article 7 of the IGA, nor can it be an investment under Article 25.

THE ARBITRATOR: But if I were to determine that what I will call a dedicated approval of the project for treaty protection is not required on a true interpretation of the relevant documents then you have to satisfy me that they do not have locus standi simply because at the date of the contract they were not a British controlled company.

What is the evidence, when did they start work on this particular salvage project? Is there any evidence in the documents before us?

DATO' VOHRAH: Oh, yes, there are lots of documents that they started work after 3rd August.

THE ARBITRATOR: Mr Eren, is there anything that you can point to?

MR EREN: In our submissions on this very point -- I think it is in our reply, the exhibits to our reply memorial -- we have an exhibit dealing with all the interaction and correspondence between the Marine Department and MHS documenting in great deal the activities that were ongoing after the signature and execution of the contract. The Marine Department was

very intimately involved in overseeing and monitoring MHS's activities --

THE ARBITRATOR: I am sorry, Mr Eren, perhaps you did not understand my question or I did not make myself clear. I was trying to find out when did Mr Ball start work on the project.

MR BALL: On 29th September 1991, a matter of a month and a bit after the contract was signed.

DATO' VOHRAH: It is in the respondent's memorial on objections to the jurisdiction.

THE ARBITRATOR: Put it this way, I would imagine that the bulk of the work on the project would have been done after December of 1991. Would that be a fair statement that would be accepted by both parties?

DATO' VOHRAH: Yes, I think that is correct.

THE ARBITRATOR: So whenever it was, at a certain point in time when, as it were, the business end of the project started going, it was British controlled. But as a pure matter of locus standi you have to satisfy me that -- you have to look at Article 25(2)(a), which is the exception which says specifically when the consent is, on the date when the request was registered.

DATO' VOHRAH: Yes, correct. But, your Honour, I think what you mentioned is that that is provided that it is a dedicated application, right? But I am not going on

that basis. If you ask me whether there has been a specified procedure whereby the claimant has to seek approval, no, there is none, the very question that you asked of the Attorney General. But that is not my point. That is why I thought I would develop that point when I deal with investments. Would that be all right?

THE ARBITRATOR: Yes.

DATO' VOHRAH: That is why I am saying it is important that what the claimant is saying is that, because the Malaysian Marine Department's act of entering into the salvage contract on behalf of the Government of Malaysia, that supplies the requisite classification of the project in which MHS invested pursuant to the salvage contract as an approved contract. Secondly, there can be no stronger and more specific manifestation of approval by the Marine Department, a department of the Malaysian Transport Ministry, of the investment project to which the salvage contract relates than the act of the Marine Department's execution of the salvage contract for the Government of Malaysia.

That is why I say, at the time when the salvage contract was executed, the Marine Department was not concerned with the IGA at all, because the IGA was not in the contemplation of the parties. I will come to that point later --

THE ARBITRATOR: Sorry, just to remind me again, at the time that the contract was signed, what was the percentage of nationality?

DATO' VOHRAH: Was third British.

THE ARBITRATOR: And the other two-thirds.

DATO' VOHRAH: One was Australian and the other was American.

THE ARBITRATOR: So it falls between three stalls, does it? Were there IGAs with Australia and America at that time?

DATO' VOHRAH: With the US.

THE ARBITRATOR: With the US there was. But it would not have been availed to the US either because --

DATO' VOHRAH: No, because it was not a majority owner. That is the point. At the time that the salvage contract was signed no issue of the IGA arose at all, it was not within the contemplation of the parties. I would go further from the correspondence that has been exhibited in both the claimant's papers and our papers: they did not know of the existence of the IGA at that time --

THE ARBITRATOR: I am sure that was not top of the mind for either party, but that may not be relevant. This is all a matter of law; the treaty may apply irrespective of the parties' knowledge or intentions. Whereas your case, the Malaysian Government's case is that people

have to focus their mind on the treaty in order to get protection. I understand your point, so why not develop the materials in support of that.

DATO' VOHRAH: Well, clause 1.5 of the salvage contract -- if I may elaborate further on the issue of the Marine Department -- defines it as:

"The term 'government' whenever used herein and in all Contract documents shall mean where appropriate the Secretary General, Ministry of Finance, the Secretary General, Ministry of Transport, the Secretary General, Ministry of Culture and Tourism, the Director General of Museums and the Director of Marine, Peninsular Malaysia or their authorised representatives."

THE ARBITRATOR: I understand what is in issue between the parties. You are saying that they needed dedicated approval from MITI; they are saying that they negotiated with six departments of the Malaysian Government, therefore the government did impliedly give approval. All of that is on the record, and it is a question of satisfying me that as a matter of law there was this dedicated approval requirement. Examine the treaty, examine the correspondence between the Malaysian and British Governments to satisfy me that that was the intention of the parties.

DATO' VOHRAH: I will take the issue of investments and the

approval project together then. Basically it is this: it is not just the correspondence that matters, actually; what matters in fact is that there are set laws and set procedures within the Malaysian system.

THE ARBITRATOR: You see, but the problem about your set procedures is that that would be opaque, that would not be known to potential investors unless there were pamphlets or gazettes or some kind of published information fed to the investing public.

DATO' VOHRAH: Your Honour, when someone comes and invests in your country, for example, or my country, or anybody else's country, surely the first thing that the investor does is to find out what advantages he can have, having his investment in that country, and surely the IGA is a definite benefit to have.

THE ARBITRATOR: Yes, but if he reads the IGA he may just say that approval in that context means approval for my contract; since I am contracting with the Malaysian Government that is approval per se. That is a view that he might take.

DATO' VOHRAH: That is my point. Because the IGA article 1(b) talks about the appropriate ministry.

THE ARBITRATOR: So that is the argument that I want to hear from you developed, the interpretation argument, not the factual scenario, because the factual scenario is

generally quite vague and I do not think I can decide a jurisdictional point based on the evidence, if that is what you want to call it, of what you expect the investor to have known at the particular time, or what the internal thinking of the Malaysian Government was at that time. I do not think I can decide a jurisdictional point on that basis. Then we would have to defer it to the hearing on merits.

DATO' VOHRAH: When you talk about the appropriate ministry it must mean ministry in the context of the prevailing laws of the country. I think, your Honour, that must be the inference that can be drawn. That is why I was developing the argument that we have this Ministerial Functions Order made under the Ministerial Functions Act, and I will refer your Honour to the latest volume that we passed.

If I can turn to the Ministerial Functions Order, which is the sixth volume, volume 6, at tab or annex 100. What it says here -- this was earlier exhibited, but it was not a complete set --

MR EREN: We just received this this morning and did not know about it until now, but that is fine. Go ahead, proceed.

DATO' VOHRAH: Otherwise I will refer to the earlier volume.

MR EREN: We are fine.

THE ARBITRATOR: I am looking at the Ministerial Functions Functions Act 1999.

DATO' VOHRAH: The Ministerial Functions Act would be at annex 48. You are looking at it, your Honour. What it says here is -- can I go first to the Ministerial Functions Act?

THE ARBITRATOR: Yes.

DATO' VOHRAH: That would be annex 48 of volume 2 of the respondent's documents. What it says here is, section 2:

"The Yang di-Pertuan Agong may by order notify in a gazette:

"(a) that a minister has been conferred with any functions or has been charged with any responsibility in respect of a particular department or subject or that any transfer ...", et cetera.

And:

"(b) that any style or title has been assigned to any minister ... or that any change in any style and title referred to has been made."

The language used in Article 1 that it is to be an appropriate ministry is to take into account that from time to time the functions of the government ministers change, and sometimes a minister -- the Ministry of Trade and Industry it was known as at one

time, and then it became the Ministry of International Trade and Industry, and it is now known as just the Ministry of International Trade. So instead of using "Ministry of Trade" as the ministry to which you apply to get the project approved, that is why you use this loose phrase "appropriate ministry" to take into account the system in our law that ministries' portfolios can change.

For the purpose of this case, at the time when the contract was entered into the Ministry of Trade / International Trade was not at all represented in the committee that dealt with the group representing MHS, and when the contract was signed it was signed with the Marine Department. The reason was this: that in the case of the Ministry of Finance, if one looks at page ...

First and foremost there was the Ministry of Finance, and that was chosen because the Ministry of Finance deals with the portfolio of procurement of contracts for services and goods. For the transport department that was for the purpose of providing transport to and from waterways, along waterways, and also for the fact that it had under its control the merchant shipping ordinance. And the third ministry was the Ministry of Culture and Tourism, which had within

its wing the museum department.

So when the contract was entered into the Ministry of Trade was not part of the parties, and in fact it is so mentioned in the definition of the government.

So if one looks at the Minister of Finance at page 248, under tab or annex 100, it can be seen, if one flips over the page to 250, in the third column the department: "Contract and Supply Management Division, formulation of policies and procedures on procurement of goods, services and works". And yet if one flips further down, further over to 250, the one that I read: "formulation of policies and procedures on procurement of goods, services and works". So this was the reason why the Ministry of Finance was represented in the committee that dealt with the contract. It is the same with the other ministries that were involved.

THE ARBITRATOR: Is the point you are making that the appropriate ministry was the Ministry of Trade and Industry, whose functions start at page 239 and go to on page 240? And are you going to take me to the department which is under the Ministry of Trade called MIDA, the Malaysian Industrial Development Authority, which seems to have the function of promotion of domestic and foreign investments?

DATO' VOHRAH: That is right, yes.

THE ARBITRATOR: So you are saying that they should have gone to MIDA?

DATO' VOHRAH: Yes, they should have gone to MIDA. And that is on the next page, 240. This is repeated throughout the other ministry function orders --

THE ARBITRATOR: You see, there are two points here: one is what is the appropriate Malaysian department for overseeing this particular project; and another is what is the appropriate department for granting approval for investment treaty protection. And the question is -- you are arguing that it is a condition precedent to having protection that you must have an approval from whatever the appropriate Malaysian Government agency is to grant treaty protection.

DATO' VOHRAH: Right.

THE ARBITRATOR: So treaty protection, is -- how should I put it? -- granted in the discretion of the Malaysian Government. Whereas they would say that by virtue of the treaty it is as of right, so long as you have approval for your project; so long as the Malaysian Government gives you approval for your project, you get protection without dedicated or specific approval. So that is the interpretation. We are not surely going to look at your domestic legislation. We have to look at the treaty and interpret the treaty.

DATO' VOHRAH: But it must get its meaning from -- I mean, words like "appropriate ministry" must have a meaning. Otherwise --

THE ARBITRATOR: No, because "the appropriate ministry" simply defines within the Malaysian system what is the appropriate ministry for dealing with the function. But the function has to be determined by reference to the treaty itself, which says what function does the appropriate ministry have to achieve. We are looking at Article 1(1)(b) of the treaty.

DATO' VOHRAH: That is right.

THE ARBITRATOR: And the term shall refer to all investments made in projects classified by the appropriate ministry of Malaysia in accordance with this legislation and administrative practice as an approved project. I am just observing that does not say "a protected project" or "an approved project for purposes of this treaty".

So there are many kinds of approval; it is a question of interpretation of what was intended by the two governments when they signed this treaty and said: you need to have approval for your project, approval from the appropriate ministry in Malaysia. Their argument is: I went to the appropriate ministry because this is a Marine Department project, and the Marine Department together with all the other departments that

had an interest in this project gave me an approval. You have to satisfy me that that is not the kind of approval that is contemplated by Article 1(1)(b).

DATO' VOHRAH: Can I refer your Honour to volume 1 of my bundle, annex 35, page 110. This is a letter from the Deputy Secretary General of the Ministry of Trade and Industry. This is a letter to the Deputy High Commissioner in Malaysia and it is signed by the Deputy Secretary General.

"Investment promotion and protection agreement between Malaysia and the United Kingdom. I refer to your letter of the above matter and would like to confirm your understanding of Article 1(a)(2).

"The provision of the said article [Article 1(a)(2)] actually relates to the legislative and administrative procedures of the approvals approving subjects by the relevant authorities in Malaysia. While manufacturing activities will generally be governed by legislation, namely the Industrial Coordination Act 1975 amended in 1977, approval for non-manufacturing activities will have to be obtained according to administrative procedures and practices in Malaysia.

"I trust the clarification above will clear your doubts on the said article."

So it must be in accordance with our, the Malaysian,

procedures.

THE ARBITRATOR: Yes, but you see this letter, which is tab 35, which is the Malaysian Government's letter of 31st March 1978 to the British High Commission, that approval refers not to approval for purposes of the treaty; is that not so?

DATO' VOHRAH: No, it is for the treaty.

THE ATTORNEY GENERAL: These were the negotiations leading to the treaty.

THE ARBITRATOR: Excuse me. I am sorry, I am not making myself clear. If you read this letter of 31st March, you turn over the page to tab 36, the British High Commissioner's letter of 17th April 1978, there is a further query from the British High Commission, and the question is this: they, meaning the British Government, would like to know whether in practice approval has been sought and given for non-manufacturing investments, such as services, plantations, portfolio investments.

And then you go to tab 37, where there is a reply from the Malaysian Government of 24th April 1978, it says that Article 1(1)(ii) as it stands covers non-manufacturing activities, such as services, plantations, portfolio investments; and that, in practice, approvals for such non-manufacturing

activities had been granted by the government in the past.

If you read that, and coming back to the letter that you cite, this correspondence surely is exploring what is going to be the attitude or the position of the Malaysian Government after the treaty has been entered into by reference to what the Malaysian Government had been doing before the treaty had been entered into.

Therefore it seems to me, reading this exchange of correspondence, that what the British Government and Malaysian Government were talking about -- the British Government is asking the Malaysian Government: can you satisfy me that if my investors comes in and invest in services you will give them approval? And your Malaysian Government says: yes, we have done so in the past, and therefore we will do so in the future. And that approval in the past cannot have been treaty protection approval, it was just general approval.

DATO' VOHRAH: Yes.

THE ARBITRATOR: So you could interpret this correspondence as implying that the Malaysian Government is assuring the British Government: whatever we have done in the past in terms of approvals, we will give your nationals protection when they continue to investment in services, in plantations, in non-manufacturing activities. That

is the assurance that seems to have been given by the Malaysian Government.

DATO' VOHRAH: That was in the absence of an article like -- because there was no treaty then.

THE ARBITRATOR: But they were discussing the draft.

DATO' VOHRAH: Yes, they were discussing the draft --

THE ARBITRATOR: And the intention of the draft -- whether or not I can look at this, you can submit on, whether or not that is an admissible aid to interpretation --

DATO' VOHRAH: Our submission that I think the language of the IGA as it stands is fairly clear, and it must be looked at in the context of what the legislative procedures --

THE ARBITRATOR: I am sorry to be intervening so much in your presentation, Dato', but it seems to me that this goes to the heart of the issue, so we need to spend bit of time on that. When you say it is clear, I would say it is perhaps not as clear as the ASEAN Treaty -- and you are going to take me to that case, I presume, in a minute -- if you compare the wording of this treaty and the ASEAN Treaty, the ASEAN Treaty is more specific about approvals that need to be registered. So that word does not appear in this IGA.

DATO' VOHRAH: But I would --

THE ARBITRATOR: So I really want you to focus on this point

because this is probably the most important point of today's argument, because this is one we do not have a lot of guidance on. All the other jurisdictional points we do have ICSID case law to help us; this one we do not have a lot, so you really need to help me on this.

DATO' VOHRAH: The Gruislin case would be at point, would it not?

THE ARBITRATOR: Yes. Of course you should present the case in the way that you want, but I am just telling you from my perspective this is the most important submission that you have to make. I am aware of the general arguments, so I want you to focus on your best points so that I understand you.

DATO' VOHRAH: I think in the case of Gruislin, for example --

THE ARBITRATOR: Shall we look at Gruislin?

DATO' VOHRAH: Yes. This will be annex 87, in volume 4.

In Philippe Gruislin the claimant claimed from the respondent the amount of losses in the value of his investments arising from the alleged breach by the respondent of the terms of the IGA made on 22nd December 1979. The claim was that the imposition by the respondent of exchange controls in September 1998 constituted a breach of obligations by the respondent to

the claimant under the terms of the IGA.

Now, the claimant claimed that in January 1996 he made an investment of some US$2.3 million in securities listed in the KL stock exchange, through the entity known as the Emerging Asian Markets Equity City Portfolio, the "EAMEC Portfolio", managed by Citycorp Folios SA, a society under the laws of Luxembourg. As a result of the exchange controls imposed by the respondent in 1998 the respondent suffered losses of investment in the portfolio.

Now, this issue of the IGA provision between Luxembourg and Malaysia, which is almost similar to us, I do not think we need to go into the casuistry of language that was indulged in, whether it should be indented or not indented, I think we can go straightaway to the facts.

The tribunal held that in relation to Proviso (i) of Article 1(3) under the IGA, Proviso (i) requires that to be a protected asset within the definition of investment of 1(3) of the IGA there has to be an investment in an "approved project". The claimant contended that the proviso is satisfied with respect to the KLSE investment because of the approval of the Capital Issues Committee, the CIC, it is an approval of the existing or intended business activity of a corporation.

Now this is important: the answer to this proposition stated by the tribunal was this: that the Proviso (i) in the CIC requirements concerned different subject-matters. Approval by the CIC may satisfy a governmental requirement that the business of a corporation be approved by a governmental agency. But this is not the contents or subject-matter of the "approved project" requirements of Proviso (i). What is required is something --

THE ARBITRATOR: I am sorry, Dato' Vohrah, are you reading from the award?

DATO' VOHRAH: Yes, I am reading from my extract.

THE ARBITRATOR: Do you have the page reference so that I can follow it?

DATO' VOHRAH: 13.6 of Gruislin. Sorry about that, your Honour.

THE ARBITRATOR: Yes, I have 13.6, thank you.

DATO' VOHRAH: Approval by the CIC may satisfy a governmental requirement that the business of a corporation be approved by a governmental agency. But this is not the content or subject-matter of the "approved project" requirements of proviso (i). What is required is something constituting a regulatory approval of a "project", as such, and not merely an approval at the same time as the general business activities of

a corporation.

The tribunal actually rejected the claimant's contention that a CIC approval for a corporation in the listing processes for the KLSE suffices to satisfy the request for an "approved project" under the proviso. The tribunal also held that it is for the claimant to establish that the particular assets of the EAMEC portfolio constituted by the KLSE investment fall within the definition of Article 1(3). The onus has shifted to them to show that.

Actually, it has been pointed out that having regulatory approval is not peculiarly Malaysian. As you mentioned, in the ASEAN context there is a necessity for it. Also in the Joe Mining case, volume 2, tab 54, paragraph 56, that is also mentioned.

THE ARBITRATOR: Show me the relevant part of Joy Mining.

DATO' VOHRAH: Paragraph 56, page 13 of the award --

THE ARBITRATOR: Joy Mining is tab 54, is it?

DATO' VOHRAH: Yes. Tab 54, paragraph 56, page 13. If I may read -- I will read the first sentence as well, although it may not be in context:

"The terms of the contract are entirely normal commercial terms, including those giving the bank guarantees. No reference to investment is anywhere made, and no steps were taken to qualify it as

an investment under the Egyptian mechanism for the authorisation of foreign investments, nor were any steps taken to take advantage of any of the incentives ..." --

THE ARBITRATOR: Sorry, Dato' Vohrah, can you pause a moment. How many paragraphs of Joy Mining do you want me to pay attention to?

DATO' VOHRAH: Only that particular one.

THE ARBITRATOR: That deals with a different point, does it not?

DATO' VOHRAH: It does.

THE ARBITRATOR: Joy Mining you were citing, I think, for the point that a contract is not an investment. That is the point you want to emphasise?

DATO' VOHRAH: Yes. This is just to show that there are other countries that have regulatory mechanisms available for anybody who wants to invest in the country. In fact Sri Lanka also has that.

THE ARBITRATOR: Sorry, do you want to take me back to Gruislin or have you finished with Gruislin?

DATO' VOHRAH: I have finished with Gruislin, because what I need to point out about Gruislin is that first and foremost it is up to the claimant to show that he has made an application for approval, which he did not do. Because approval does mean that the person that you apply to applies his mind to what you are asking for.

It is not just any ordinary thing; you have to apply for approval. Approval means -- can I just cite this Blacks Dictionary definition of "approval"?

THE ARBITRATOR: This is volume 6, is it?

DATO' VOHRAH: Volume 6.

THE ARBITRATOR: Tab 99.

DATO' VOHRAH: Yes, what it says here for "approval" in the right column, at the top:

"The act of confirming, ratifying ... sanctioning or consenting to some act or thing done by another. Approval implies knowledge and exercise of discretion after knowledge."

There must be knowledge that this person, the claimant, is applying for its investment to be an approved investment, not just any investment. And then, after the approving authority applies its mind, the approval is then given or not given.

THE ARBITRATOR: But he would say that your approving authority did apply its mind whether or not to grant them the project and to give them all the consequential approvals that were necessary to carry out that project. We are back to this argument about whether you need to have a dedicated approval for purposes of treaty protection. That really is the only issue which arises in this argument, which is very important to your case,

and I just want you to give me all of the materials in support of that interpretation that you advance for the argument that it must be dedicated approval to get treaty protection, you must apply for treaty protection approval.

DATO' VOHRAH: That is true. Because we do have this particular provision in other BITs. In fact, we have something like 47 BITs on this. We have examples --

THE ARBITRATOR: I have seen the examples. All this shows is that some people are more careful about this than others. Some people may not accept that interpretation which I threw out to you as a possible interpretation of this treaty, that you get the protection without asking for it. Some people may say: no, if I am to put money in I had better be sure that I have it, and I want them to give it to me in black and white, and they write from an abundance of caution rather than as a precondition.

DATO' VOHRAH: Then why have the qualifying proviso? Do not have it. Any investment that comes into Malaysia is protected, so why bother to get an application made?

THE ARBITRATOR: I will let Mr Eren answer that. Do you want to proceed on? I am just aware that we are coming close to the time limit for the first round and we perhaps ought to hear from Dato' Abraham.

DATO' VOHRAH: Do you want to ask me any more questions on

this?

THE ARBITRATOR: No, I think I have the drift of your argument, and you can save your response to Mr Eren. Your best points are Gruislin and the correspondence with the British High Commission, I suppose, and you say that --

DATO' VOHRAH: Sorry, and the fact that: why have the proviso?

THE ARBITRATOR: As a matter of interpretation, yes.

DATO' VOHRAH: Thank you.

(10.34 am)

Submissions by DATO' ABRAHAM

DATO' ABRAHAM: If I could straight away deal with the first point that I want to make, which is that the claimant's claim is a pure contractual claim, and therefore should not be elevated to a investment dispute. That is the first proposition that I want to advance.

This, your Honour, I say is a simple question of looking at the salvage contract. If I could take your Honour straight away to annexure 6, in volume 1, and just point out certain clauses which will indicate what the nature of the contract is. I am sure your Honour is aware what a salvage contract is, but ...

THE ARBITRATOR: The way I understand it, the claim is not purely on the contract, because MHS has complaints about

what happened in the court system, so that is clearly not a contractual claim.

DATO' ABRAHAM: Yes.

THE ARBITRATOR: My only question is whether or not -- it is not clear to me whether MHS is basing its claim purely on the way in which it was treated through the arbitration and in the courts or whether it seeks still to run a contractual claim on its own merits by invoking for example the umbrella clause.

Mr Eren, can you help me on that?

MR EREN: We have, I believe, several causes of action under the BIT. So at the merits stage of the proceedings we would plead all of them and support our arguments therefore.

THE ARBITRATOR: So you would still go back and argue on the merits of the contract as one of the --

MR EREN: It is an option available to us, we believe.

THE ARBITRATOR: So I will hear you on that part, having regard to the potentiality that MHS might be running a contractual claim. But I think they would run the contract claim under the umbrella of the treaty.

MR EREN: Absolutely. We are not alleging before this tribunal a breach of contract. As stated many times before, we are alleging violations of the BIT or, as you call it, the IGA. So I would like to make that clear,

and I think it is abundantly clear.

Now, within the IGA or the BIT we have an umbrella clause that in addition to traditional international law precepts and violations there is a mechanism which elevates mere contractual claims to the international plane, to the level of the BIT.

THE ARBITRATOR: I understand that, Mr Eren. I just wanted to get it clear in my mind so Dato' Abraham can address my concerns.

DATO' ABRAHAM: If one looks at just two clauses: clauses 4 and 7; tab 6, in volume 1. I do not propose to read them. It is evident from reading these that the claimant has agreed to provide a service and will be paid for successfully providing the service, in this case salvaging the wreck, the Diana.

Then the other clauses, clauses 17, 18 and 19, deal with the fact that ownership is vested in the respondent. So it is clauses 17, 18 and 19 that establish ownership of this. For completeness, there is clause 32, which is the Arbitration Clause.

So if one just looks at the salvage contract it becomes apparent that it is a service contract, and nothing more. So the question is in the claim -- and perhaps I can deal with this with the fork in the road argument at the same time. If one looks at the claim

that they made before the arbitral tribunal, the claim before the arbitral tribunal is identical to the claim that is before this tribunal. The parties are the same, the subject-matter of the claim is the same, the remedy is the same. So that has already been adjudicated upon and decided upon in the domestic tribunal. So they are coming to this tribunal to re-litigate the same claim, and the question is whether they can do that.

If I could just say that, looking at the cases on the fork in the road argument -- because of the shortness of time I am going to be very brief -- the cases say: if the parties are identical, if the causes of action are identical, the remedy is the same, you have thereby elected to go before the domestic courts, you now cannot come to this. In those cases in which they have come there is a difference in the identity of the parties.

THE ARBITRATOR: But here they have the denial of justice claim which will overwrite that. The issue will not be the same.

DATO' ABRAHAM: Yes, but so far as the denial of justice claim is concerned, earlier on you said that it is a merits claim.

THE ARBITRATOR: But you cannot knock that out on a jurisdictional point.

DATO' ABRAHAM: But in at least two cases that I am aware of they have considered the issue of denial of justice as a jurisdictional issue. If I could just take --

THE ARBITRATOR: Yes, help me there, give me the cases, please.

DATO' ABRAHAM: Can I take your Honour to Waste Management, which is in volume 5, tab 97, paragraphs 94, 95, 96, 97 and 98.

The other case is the Mondev case, which is in volume 3, tab 78, paragraph 126.

THE ARBITRATOR: Does Mondev not turn on the specific provisions of NAFTA?

DATO' ABRAHAM: It turns on the specification provisions of NAFTA, but what I am saying is that it can be, and this is one instance in which it has been, dealt with as a jurisdictional issue. There are these two cases which I cite.

THE ARBITRATOR: Okay.

DATO' ABRAHAM: Now, if I can go back to where I started, so far as the contractual claim is concerned, your Honour, what I am relying on in support of my argument that this is a pure contractual claim and it cannot be elevated to a treaty claim, I rely essentially on the SGS v Islamic Republic of Pakistan, which is tab 56, volume 2. If I could take your Honour to paragraph 161, and if

I could just read that:

"We recognise that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investment', the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject-matter of the dispute, does not relate to the legal basis of the claims or the cause of action asserted in those claims."

And then it went on to hold that in that particular instance it was a pure contractual claim, and it was not elevated to a treaty claim as such.

The dispute resolution clause in both the cases is not very different. If one looks at the cause of action in this particular case appears that besides the various other various claims they are saying that it is expropriation. Expropriation, I agree, is a merits claim.

But in Joy Mining what they say is that when you make a claim of expropriation you must satisfy what is said to be a prima facie test. If I could turn your Honour to tab 54, to the Joy Mining case, tab 54 in volume 2, the relevant paragraphs are 77-81. There one is dealing with a bank guarantee, as to whether that was

a treaty claim.

This is what they say in paragraph 77. They look at SGS Pakistan, and they say:

"In SGS v Pakistan the Tribunal came to the conclusion that it did not have jurisdiction over contract claims 'which do not also constitute or amount to breaches of the substantive standards of the BIT'."

"In the present case the situation is rendered somewhat simpler by the fact that a bank guarantee is clearly a commercial element of the contract. The claimant's arguments to the effect that the non-release of the guarantee constitutes a violation of the Treaty are difficult to accept. In fact, the argument is not sustainable that nationalisation has taken place or a measure equivalent to an expropriation have been adopted by the Egyptian Government. Not only is there no taking of property in this matter, either directly or indirectly, but the guarantee is to be released as soon as the disputed performance under the contract is settled. It is hardly possible to expropriate a contingent liability. Although normally a specific finding to this effect would pertain to the merits, in this case not even the prima facie test would be met."

So the point I am making is this, your Honour: if you look at the entire claim of the claimants they are

saying we have confiscated their assets, their money, which is an expropriation, but they do not even pass the prima facie test as expounded in Joy Mining. So that is the point I make.

THE ARBITRATOR: The case that I would like you to deal with, if not now then maybe in the response later, is the Salini v Morocco case, which does suggest that a contractual claim can be treated as an investment.

DATO' ABRAHAM: In fact, the Salini v Kingdom of Morocco case can quite easily be distinguish on the basis of the applicable IGA. For instance, in the Salini v Kingdom of Morocco case, if one looks at the BIT, the BIT is very clear in the sense that it gives a choice as to how the disputes are to be resolved.

I think one should look at Article 8 of the BIT. I do not have time to read it out, but I have already set it out in our reply at paragraphs at paragraphs 122-126. Because there they had a choice as to whether they wished to submit the dispute to the competent court of the contracting contract or to an ICSID arbitration, in Salini. Here we say there is no such choice, and here in any event they have submitted it to the local courts as such.

Since I have about five minutes more, can I just deal with the question of exhaustion of internal

remedies very quickly? I have dealt with it in my memorial in great detail.

Your Honour, basically we say that the claimant in this case decided to change the type of arbitration, one which was governed by the 1952 Act, which would have meant that they would have had recourse to the courts for misconduct of the arbitrator or to remit the award as such. They decided to opt for KL Regional Centre of Arbitration, and that brings in section 34. But whether or not section 34 actually applied to them is a moot point, because the law on this point in Malaysia is not settled. A recent decision of the Court of Appeal now says that you can go to the court, even if section 34 applies, for interim relief.

THE ARBITRATOR: But that is only to assist, and not to supervise in that sense, not to nullify the award.

DATO' ABRAHAM: Yes. The point I make is this: the question has never been argued and tested as to, where it is an arbitration of a domestic nature involving the rules, whether section 34 was intended to apply to such a dispute.

THE ARBITRATOR: Sorry, but let us just try to see -- let me understand the logic of this argument, where it takes you to.

If section 34 had the effect of taking that dispute

out of the supervisory jurisdiction of the Malaysian court system then the application that was in fact made to the Malaysian High Court was made on a false premise and should not have been heard at all, it should have been thrown out by the court. I have not gone through the reasons, because in the bundles that have been sent to me -- well, there were no reasons given by the court.

So are you saying that theoretically he could have dismissed it simply for want of jurisdiction?

DATO' ABRAHAM: My response is this, your Honour: the judge, following one line of cases, would have come to the conclusion that section 34 applies, it is a complete answer, I have no jurisdiction.

THE ARBITRATOR: But that does not help you, though, does it?

DATO' ABRAHAM: But the point it this, it helps me in this sense: they chose to take the arbitration outside the 1952 Act, because clause 32 says Arbitration Act 1952. They, with the benefit of legal advice in Malaysia, took it out of the Malaysian Arbitration Act, and its supervisory jurisdiction by the court, and decided to put it into the Kuala Lumpur Regional Centre. So having elected and made that choice, how can they then say that there has been a denial of justice because the Malaysian courts have no jurisdiction? They have converted it,

whether they like it or not, to an international arbitration in which supervision by the court is limited.

THE ARBITRATOR: This is a very esoteric point of Malaysian arbitration law. I am not sure whether Mr Eren quite understands what you are saying.

There are, I suppose, different ways of looking at the impact of that particular argument. On the one hand, they could say that, having elected for a KLRCA arbitration, they would have exhausted all legal remedies. There was perhaps a forlorn and doomed application to the High Court which, strictly speaking, on one interpretation, had no jurisdiction to hear the case at all. Therefore, there was no point in going on with the appeal.

I think the point you are making is that if you elect for a KLRCA arbitration, and you know that there is or there may not be then any chance of a review by the courts, then there is no denial of justice because the opportunity does not arise for the courts to intervene; and if the courts cannot intervene then the government cannot be responsible for the act of the KLRCA, which is not, strictly speaking, a part of the government or judicial system. Is that the point you are making?

DATO' ABRAHAM: Those are the two points. But I just add one other arrow to my quiver, if I can say. The point is that the law in respect of this in Malaysia is not settled, because we are dealing with two domestic parties. Section 34 was never intended to deal with domestic arbitration. Now, there is no decision of the Federal Court on this issue. Very recently the Court of Appeal in Malaysia has said that they will assist.

So the question is: if they had then proceeded to go to the Court of Appeal with leave to the Federal Court, the issue may be settled once and for all. So what I am saying is that the third argument is that it is an open question still as to whether section 34 does apply to domestic arbitrations, despite the fact that it is under the Regional Centre. So that is the third point I am making.

THE ARBITRATOR: Is there no provision under the Act for opting in?

DATO' ABRAHAM: That is only under the new Act, not the old Act. Under the old Act there is no such provision for opting in and out.

THE ARBITRATOR: By local companies?

DATO' ABRAHAM: By local companies. But the point is that at the moment, once you arbitrate under those rules, one school of thought is that section 34 is a complete

answer, another school of thought is that it only applies to international arbitrations, not to domestic arbitrations, which is what this was. But the point is that Article 32 in the salvage agreement provided for a 1952 ad hoc arbitration. Why did they opt out of that and take refuge under the KL Regional Centre Rules? That was done with the benefit of legal advice. We had nothing to do with it. We are in the same position as the respondents, in the sense that if we had lost at the arbitration we too may not have had a remedy.

THE ARBITRATOR: Sorry, that was a consent.

DATO' ABRAHAM: That was a consent.

THE ARBITRATOR: So you had something to do with it.

DATO' ABRAHAM: Both sides agreed to the Consent Order once it was considered.

The last point I make is this, your Honour: in so far as exhaustion of legal remedies is concerned, I rely on the Lowen case, and I think you are familiar with it, which is at volume 3, tab 81.

The last point is this: in so far as the disciplinary proceedings are concerned, we say that has nothing to do with Malaysia or the judicial system.

THE ARBITRATOR: I think in the previous hearing Mr Eren said it was really not part of their case, it was just part of the factual narrative, it happened.

DATO' ABRAHAM: But they say it is part of the exhaustion of the internal remedies. But it is not. And the letters to the various ministries and the Queen, et cetera, again has nothing to do with exhaustion of internal remedies.

THE ARBITRATOR: Do you want to help me with this point that was raised by the Attorney General earlier: that if MHS had not been happy with the way in which the arbitration was conducted they should have come back to the appointing authority?

DATO' ABRAHAM: I think it is this is, your Honour: in the course of the arbitral proceedings, I think there are documents to the effect that Mr Dorian Ball has stated that Mr Richard Talalla made various remarks which indicated his bias. That was in the course and conduct of those proceedings.

At that particular point in time one could have approached the appointing authority for his removal on the grounds of bias; that was a remedy that was open to them. But once the award was handed down, the only remedy that they had was under Rule 37, to say that: your reasons were inadequate, would you like to give us an additional award? And I have referred to that in my memorial. That was the only other remedy -- and I use the word "remedy" in quotes because an additional award

is really to seek clarification. So the clarification would be: you should give reasons, you have not given reasons; would you like to give your reasons? But they did not even exercise that right. What they say is that they went back to the director.

Could I just stop here, because I think Aliza wants to say a few words on the umbrella clause.

(11.01 am)

Submissions by MS SULAIMAN

MS SULAIMAN: As you are aware, Mr Arbitrator, the issue of the umbrella clause was first raised by the claimant in their memorial dated March 15th, 2006, at pages 24 and 25.

The claimant has sought to argue that Article 2(2) of the IGA contains an umbrella clause, and in particular the last sentence, which reads:

"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."

So the claimant is alleging that this umbrella clause elevates mere contractual obligations to international obligations.

Mr Arbitrator, only one case has been cited by the claimant in its memorial to support its argument, and that is the case of Waste Management, which is in

annex 97, volume 5, of the respondent's bundle of documents.

Dato' Cecil has pointed out one distinguishing feature of the case of Waste Management, and that is the fact that it involves a concession agreement and that allegations of expropriation were forwarded by the investor in that case.

But I wish to point out that the part that is cited by the claimant to support their argument about the elevation of the umbrella clause, namely paragraph 73 of the award, consists of merely an observation by the tribunal that Chapter 11 of the NAFTA does not give jurisdiction in respect of breaches of investment contracts, and does not contain an umbrella clause.

If, Mr Arbitrator, you turn to paragraph 149 of the award in Waste Management, the tribunal noted that there was no suggestion that the contracts in Waste Management were internationalised in any way. The tribunal also made an observation that, while conduct such as expropriation may involve a breach of NAFTA standards and a breach of contract, the two categories are distinct. So for a claim to be a treaty claim it is necessary to prove that the conduct was a breach of the substantive standards in NAFTA. Just to show that it is a breach of contract is not enough.

So the respondent will submit that, on the basis of Waste Management, the claimant has forwarded no concrete reason or justification to support its argument that there had been this elevation.

In fact, the claimant's contention clearly contradicts their own admission that the salvage contract is a commercial contract between the government and the salvor. For this, Mr Arbitrator, you may refer to the claimant's letter dated 18th July 1994; that is Exhibit P, at page 504 of the claimant's exhibits to the memorial on jurisdiction.

THE ARBITRATOR: What is the clause number for the umbrella clause?

MS SULAIMAN: Article 2, paragraph 2 of the IGA, the last sentence.

As regards our reply on this issue, it can be found at paragraphs 121-126, pages 44-50 of the respondent's memorial. It is also set out in greater detail at paragraphs 48-73, pages 17 to 30 of the respondent's reply memorial. Dato' Cecil has adverted to the fact that the respondent is relying on three cases, two of which are the landmark cases on the issue of umbrella clause: that is the case of SGS v Pakistan and SGS v Philippines.

Of course, the claimant in both cases had argued

that the inclusion of the so-called umbrella clauses in those two cases, Article 11 of the Swiss-Pakistan BIT and Article 10(2) of the Swiss-Philippines BIT, had the effect of elevating a simple breach of contract to a treaty claim under international law.

Interestingly, of course, the tribunals in both cases came to a different conclusion in respect of the issue of jurisdiction over claims for a breach of contract. The relevant passage that the respondent wishes to rely on from the award in SGS v Pakistan is paragraph 168, which can be found at paragraph 59, pages 20-22 of the respondent's reply memorial.

The tribunal in SGS v Pakistan had adopted the normal rule of interpretation as set out in Article 31 of the Vienna Convention on the Law of Treaties, so it gave the ordinary meaning to the text of the umbrella clause. But the tribunal found that the umbrella clause in Article 11 did not transform SGS's claims against the Government of Pakistan into claims for breach of the BIT.

The tribunal in fact took into account certain policy concerns: that if the umbrella clause is interpreted according to its ordinary meaning, this would internationalise contracts into international agreements, and it would broaden the scope of Article 11

of the Swiss-Pakistan BIT beyond what the tribunal was willing to accept.

So the tribunal in SGS v Philippines adopted a broader approach to the interpretation of umbrella clauses, the relevant passage being paragraph 119 of the award, and this can be found in paragraph 62, page 23 of respondent's reply memorial.

The tribunal in SGS v Philippines adopted a similar contextual approach to interpretation, but then came to the conclusion that the umbrella clause, Article 10(2), referred to contractual obligations which had been assumed by the Government of the Philippines, and therefore had elevated SGS's contract breach claims into treaty breach claims. On the policy concerned that was addressed by SGS v Pakistan, the tribunal in SGS v Philippines was of the view that the umbrella clause merely addresses the performance of the obligations entered into with regard to specific investments once this is ascertained, and not as to the scope of such commitments.

There is a third case relied on by the respondent, and that is the case of Joy Mining, which has been adverted to by Dato' Cecil.

So in essence, Mr Arbitrator, you have before you a restrictive approach in SGS v Pakistan and a broader

approach in SGS v Philippines. But what the respondent wishes to emphasise here is that the arbitral tribunal in both SGS cases found that the subject-matter of the contract constituted a form of investment. So the claimant has fulfilled the threshold requirement of investment in both of those cases.

Ultimately the respondent would submit that Article 2, paragraph 2 of the IGA is to be considered in light of the specific facts, language and provisions of the IGA; it cannot be construed to automatically elevate all contract disputes into investment disputes just because it is in the nature of an umbrella clause.

The respondent submits that it cannot be the function of an umbrella clause to turn every disagreement on the performance of a contract into an issue for which international arbitration is available. So there should be appropriate restraint and reasonable practice in this regard, and a balance has to be struck between the interests of host states and those of foreign investors.

As has been submitted earlier by Dato' KC Vohrah, the term "investment" in our IGA is restricted according to the proviso which is found in Article 1(1)(b)(ii), which requires that investments made in projects be classified by the appropriate ministry -- and in this

case the respondent would say that the appropriate ministry is the Ministry of International Trade and Industry -- before such investment can benefit from any protection under the IGA.

Due to the fact that the claimant has failed to show the obtainment of such approval from MITI, the requirement under Article 2, paragraph 2 of the IGA that there must be an obligation with regard to an investment has not been fulfilled.

Accordingly the respondent would submit that the claimant's allegation that the umbrella clause in Article 2(2) of the IGA has elevated a mere contractual obligation to an international law obligation is totally unfounded, and as such this arbitral tribunal does not have jurisdiction in respect of this matter. Thank you, Mr Arbitrator.

THE ARBITRATOR: Thank you. I think when the respondent comes back with its response submissions you might want to deal with SGS v Philippines in the context of what it says about the definition of "investment". Because there again there was a service contract that was held to be an investment for the purposes of that particular treaty. But I am sure that that will be raised by Mr Eren.

So I think this would be the appropriate time for us

to have our break. If we could try to reassemble in ten minutes or so. Thank you.

(11.10 am)

(A short break)

(11.30 am)

THE ARBITRATOR: Ladies and gentlemen, we will resume, and Mr Eren will address the tribunal.

Submissions by MR EREN

MR EREN: It is an honour to address this tribunal. We thank Malaysia for appearing. We especially appreciate the Attorney General's statement that Malaysia is taking this case very seriously. We are aware of the consequences of what we allege, and that is the reason why we are here: to arrive at the truth, so that both parties' interests can be upheld according to the rule of law.

I would like to start off by drawing a road map with respect to the issue of jurisdiction. With all due respect, the respondent has combined its jurisdictional discussion with many elements of the merits of the case. The purpose of this hearing today, which is part of the jurisdictional phase, is simply to address the jurisdictional elements, and to understand and arrive at a decision as to whether the jurisdictional elements of our claim are met.

First, MHS has alleged claims which are justiciable under the UK-Malaysia BIT. We are not here alleging a breach of contract. Specifically we allege, and we will prove at the merits stage of these proceedings, that MHS has been denied fair and equitable treatment, that Malaysia has failed to observe its obligations to MHS as required under the BIT, and that Malaysia has expropriated MHS's property or rights to property or money.

With respect to the observance of obligations, we reserve the right to make the argument with respect to the umbrella clause. But again I do not want to discuss whether our claim in this regard will succeed or not because again that is a merits stage issue.

So first we have covered why are we here: it is not for breach of contract; it is for breach of the BIT, and we have made our prima facie case in this regard.

Second, the legal claims that we allege violation, of or the provisions that we allege violation of, must have arisen directly out of an investment, and that is pursuant to Article 1(1) of the BIT.

Third, the dispute has is to be between Malaysia and a national of the United Kingdom. I do not think there is any dispute in this regard.

Fourth, the parties must have consented in writing

to submit the dispute to the jurisdiction of the centre.

Fifth, the investment at issue has to fall within the term of "investment" as defined under the UK-Malaysia BIT.

Sixth, the investment has to have been approved by the appropriate ministry in Malaysia. Actually, the wording of the Malaysia-UK BIT is that it has to have been classified as an "approved project" by the appropriate ministry in accordance with its legislation and administrative practice.

Seventh, the parties in dispute, MHS and Malaysia, must have tried to resolve their differences and disputes within three months in Malaysia. The standard is not exhaustion of local remedies. We thoroughly disagree with this premise. The BIT is very clear in its language, and I do not think it has to be subjected to fine interpretations.

With respect to challenges, Malaysia has raised six challenges. Malaysia has contended that MHS has no locus standi to prosecute this case. We submit that MHS does have locus standi. We also submit, in response to the second challenge, that MHS's claim is for money under a contract which constitutes an investment pursuant to the definition in the UK-Malaysia BIT. Third, we reinforce our contention that the contract

relates to an approved project.

In sum, MHS has met and exceeded the required standards and criteria as articulated in the ICSID Convention and the UK-Malaysia BIT. The issue taken up by the honourable Attorney General that there was no denial of justice is not a jurisdictional challenge; again, it is a merits issues.

I will go on to address in particular the jurisdictional requirements of the ICSID Convention that there be a legal dispute arising out of an investment. We do have a dispute, I do not think anyone can dispute that. I think it is also conceded by Malaysia that there was an investment here. The contention of Malaysia is simply that it was not an investment in an approved project.

THE ARBITRATOR: No, I think they do dispute that it is an investment. They say it is a contractual claim.

MR EREN: Okay. Some of the statements made by the respondent earlier, I believe, were contradictory to that. But, okay, if you do contend or contest that issue, we are willing to respond to it.

The issue of investment: I do not think there can be any better example of investment than what Mr Ball and his company engaged in with respect to the location, the survey, the salvage of the wreck of the Diana. One must

ask: who expended the financial and other resources for this project to succeed? MHS.

MHS and the Government of Malaysia engaged in an enterprise where MHS was obliged to invest monies, invest capital within a certain period of time to achieve a desired result of the parties. MHS did so. Not only did MHS invest money, Mr Ball risked his own life for the success of this project. He is the one who personally located the wreck of the Diana at 5 am in the morning one day.

MHS is a national of the United Kingdom within the meaning of the treaty and the ICSID Convention. I do not think there is any dispute with respect to that.

Third, consent: we believe that the parties have consented to ICSID jurisdiction. Malaysia did so by signing the ICSID Convention and the UK-Malaysia BIT, and MHS did so by requesting arbitration at ICSID in September of 2004.

There was some discussion earlier today about whether Mr Ball and MHS had locus standi to prosecute this case. Again we remind the tribunal that the applicable standard in the UK-Malaysia BIT is that Mr Ball, or a British national, had to have been the majority owner of MHS prior to the arising of the dispute, not at the time of contract. There was much

discussion on this very simple issue, and it was bundled with the issue of approval, which we believe is a separate and distinct and analytically different matter.

THE ARBITRATOR: Were you going to say something more about the definition of investment, Mr Eren? I will tell you what I would like you to respond to, and if you cannot do it now maybe you can do it after lunch. The respondents have not pressed this point in their oral submissions, but there is a case called Joy Mining, and in Joy Mining the tribunal laid down some typical characteristics of an investment. I am just reading the relevant extract here:

"The project in question must have a certain duration, a regularity of profit and return, an element of risk, substantial commitment, and it should contribute a significant contribution to the whole state's development."

So there are about four or five elements there which have been picked up in a subsequent leading textbook on the subject and analysed as being the typical characteristics of an investment for purposes of an ICSID arbitration. You might want to address whether or not this project fits those characteristics.

MR EREN: Sure. First and foremost, with respect to the

issue of investment, we have to look to Article 1(1)(a) of the UK-Malaysia BIT, where the term "investment" is broadly and non-exhaustively defined to include claims to money or to any performance under contract having a financial value. So at the outset I think we have to be guided by the definition in the BIT itself. It is clear that MHS continues to have a claim against Malaysia for money, as well as a claim to performance under a contract having a financial value.

In Joy the question with respect to investment was whether bank guarantees issued in support of a project entailing the supply and installation of equipment was an investment within the meaning of the UK-Egypt BIT. The tribunal held that a bank guarantee was not an investment. MHS's activities and its expenditure of funds and other resources pursuant to the contract is not a bank guarantee, by any stretch of the imagination. A bank guarantee is simply something ancillary to the project itself.

We agree that the tribunal in Joy found that the bank guarantee was merely a contingent liability. And the tribunal in Joy also noted that the production and supply of equipment involved in this case was the normal activity of the company. They basically took goods off the shelf and sold them to Egypt on an FOB UK or an FOB

USA basis. It was a contract basically for the sale of goods.

This case is very distinguishable from Joy. We are not seeking a release of a bank guarantee or any other contingent liability. More importantly, unlike in Joy, the contract here involved is not related to the supply of goods and services. Here MHS brought to bear on the Diana project its specialised expertise and capital, and custom-tailored the investment to the specific project at hand. It was not simply a sale of goods off-the-shelf.

Unlike the case in Joy, MHS here was not to derive payment by the presentation of invoices to the buyer, but rather by receiving a portion of the value of the items recovered as a result of its contributions and expertise and equipment, money, time, valuable resources.

The issue here really to be grasped is the method by which MHS was to get paid. MHS took risk in the enterprise: the quintessence of investment. It outlaid capital in hopes, with reasoned decision, that the wreck would be found, that the wreck would contain valuable cargo, and the valuable cargo would be sufficient not only to cover the costs of location and investment but also its reasoned expectations of profit from the

enterprise.

When MHS expended its capital and resources in locating and salvaging the wreck, they did so without any certainty. If the wreck were not found, Malaysia would have no obligation to MHS. And even if the wreck were found, the value of the items recovered might not even have covered MHS's costs.

These are not the types of risks that Joy took. Joy took regularly produced goods off the shelf and sold them to Egypt, in respect of which they expected payments. The bank guarantees were ancillary to this payment obligation, which is a contractual risk, not an enterprise risk. Joy did not partake in a share of the enterprise in which the mining equipment was to be used in Egypt. I think it was for the mining of phosphates. If it had, I think the tribunal would have much more readily found that the underlying project itself was an investment. But, then again, it is still could find that the bank guarantees were ancillary to that, and those were not really covered within the meaning and intent of the relevant BIT.

So the risk that MHS took here is the dispositive and distinguishing feature between Joy and MHS.

THE ARBITRATOR: Mr Eren, was this salvage contract different from any other salvage contract? Because my

understanding is that the no-finds-no-pay basis is a fairly common method of reward for a salvor, that is your typical Lloyd's form.

MR EREN: Savage contracts typically are on a no-finds-no-pay basis, but there are other contracts where the salvor does not assume that risk, and the price that it expects to derive from the enterprise is adjusted as a result. I think there was actually, with respect to the case of Malaysia, one such other contract involving the Nassau, where Malaysia entered into a contract on a fee-for-services basis.

THE ARBITRATOR: But if you accept that it is not uncommon for salvage contracts to be done on a completely contingent basis, and if we substituted the Diana for an ordinary vessel that belonged to the Malaysian Navy, for example, that had sunk and they simply wanted it recovered, would that by your argument be an investment covered by the treaty? Because it would then mean that every salvage contract would be of the nature of an investment.

MR EREN: Yes, I believe so. Because the expedition, or the exercise of salvage, these are not readily produced goods, it is not readily replicated. Every salvage contract is different from the other, as we can all appreciate. The wrecks on the bottom of the sea are

rarely located in the same place, they rarely took place at the same time, they rarely carry all the valuable cargo that salvors seek to recover. So it is not like taking a series of bottles that have been mass-produced and selling them. In the salvor context, each bottle is specifically produced for that particular project, and this entails study of history, knowledge of marine matters, all the knowledge that is necessary for successful salvors.

What drives that need for knowledge and specificity is the risk that is being taken. Because with more knowledge, with more expertise from the salvor's perspective, the risk is reduced. Which is a very noble cause for an investor to take into account.

When we invest what do we seek? We seek knowledge. The securities laws, I think, all round the world require disclosure and knowledge so that one can make a better and informed decision about the risk that one wants to take in placing one's money in something that may or may not bring a reward. It may even cost money. Those principles apply here.

If the contract in question had provided that MHS would provide services or expend its best efforts in return for a monthly fee of whatever, then it can be construed more in the light of something that is not

an investment. But even in such cases ICSID tribunals have held that investment is apparent. Because in the Salini case, for example, which I believe you discussed earlier, it was a contract for the building of a roadway in Morocco, and it was not on a risked basis, but more on a fee-for-services basis, and there the tribunal held that indeed a claim to money arose. Which is the same definition that appears in the BIT.

So even something not commonly understood to be an investment under ICSID jurisprudence is an investment because it gives rise to a claim for money. That can arise from a service, an investment, a sale of goods. There are degrees, of course, but I think that the tribunals that have held in this regard support MHS's contention/assertion that there is an investment here.

The quintessence of investment is risk-taking, and that was borne 100 per cent by MHS in this case. The split of revenues 70/30 foresaw that: MHS was allocated 70 per cent of the value of the recovered finds; Malaysia was afforded 30 per cent. Again, a typical investment or revenue-sharing split, not a fee-for-services contract in the context of sales of goods or replicated services.

Next I would like to discuss the issue of approved project. I think we are belabouring an obvious point.

We have made our arguments as to why ... Malaysia's contention is that the absence of MITI approval is fatal on the issue of approval and jurisdiction.

Malaysia entered into the contract. The specific ministry in charge of this particular function was approached by MHS, initially the Museums Department, which is part of the Ministry of Culture and Tourism, thinking that, given the subject-matter of marine salvage, antiquities, and the specific legislation of the Museum Department, that would be the logical government ministry to deal with in respect of this matter. Indeed, that was confirmed by the Museums Department in their evaluation of the application, and then the Marine Department's involvement subsequently in the three-year period that it took to negotiate the contract. The contract was signed in August of 1991; the application was made in 1988.

Second, the Government of Malaysia, the Marine Department on behalf of the government, with the consent and approval of the Ministry of Finance, entered into the contract on behalf of the Malaysian Government. And rightly so. The Marine Department, their function, their charge, their jurisdiction, if you will, concerns marine matters. So we have two ministries, if you will, that concern themselves with the subject-matter of

marine salvage. Compared to MITI or any other department, I think that their jurisdiction and their function is most closely related to the subject-matter of marine salvage, appropriately so.

The contract was signed, again with the consent of the Ministry of Finance and a committee that had been formed. I think it was an informal committee. Notably absent from this committee was MITI. I do not think there is anything, and I do not think the respondent has cited any legislation or administrative practice, that says that MITI approval must be sought for the approval of projects in Malaysia.

I mean, what Malaysia is saying is that this project was not approved for purposes of the BIT, and that such specific approval is required. The UK-Malaysia BIT does not say that. Approval means approval. Subsequently it has to be by the appropriate ministry. There can be no more appropriate ministry in this case than the Marine Department and the Museums Department, as well as the Ministry of Finance, who is involved I think you said in government procurement matters.

As we stated in our memorials, not only was there one ministry, there was a committee of ministries looking after and approving this project and accepting all the benefits therefrom.

THE ARBITRATOR: I think what the Malaysian Government is saying is that treaty protection is an extra benefit that you will get over and above authorisation for your project, comparable for example to a tax holiday or some other financial benefits. So you would go to one department to negotiate approval for the project, for permission to come in and do what you wanted to do, and having got that approval you would go along to another department to say: now I want my treaty protection approval. That is what they are saying. It is just like another benefit, tax benefit or financial benefit --

MR EREN: There is no Malaysian law or known public and administrative practice in this regard. This is something that is being thrust upon the tribunal after the fact. You have cited no legislation that says that MHS should have gone to MITI. The legislation that really governs this activity is the Antiquities Act and the legislative authority for the Marine Department, which is the Merchant Shipping Ordinance of 1952. These are the underlying statutes.

MITI -- I think if MHS had gone to MITI it would certainly have been out of place, and the logical thing for MITI to have done would be to refer the matter to where it first started.

THE ARBITRATOR: But that is not exactly the point. I think the point that Malaysia -- they do not say it in so many words but it is implicit in their argument that somewhere along the line of the negotiations with the Malaysian Government authorities, whether or not this was something that in your client's mind at the time, they are postulating a scenario that says MHS should at some stage in the negotiation process, or even while they were undertaking the project, particularly after Mr Ball acquired his controlling interest in the company at the end of 1991, have said: I want to be sure that this project does have treaty protection under the BIT. And he would should then have raised it with the Marine Department, and said: well, can you confirm that this is an approved project for purposes of the BIT? And they might have said then: we do not know, we will have to make enquiries. And they would come back and say: no, we do not do this approval; go and see MITI, or whoever it is. That enquiry was not made. That is the scenario that they are postulating that should have happened.

MR EREN: If there was fair notice of any such requirement I think we could give more credibility to that position of Malaysia. The UK-Malaysia BIT certainly does not impose that burden on MHS. It simply states: approval by the appropriate ministry in Malaysia; or, classified

as being approved by the appropriate ministry in Malaysia. I think the Malaysian Government could have thought that MHS was being silly by requesting further approval of a contract that the Malaysian Government itself was just entering into. There was not the specific requirement to separately register a project that has already been approved. The plain meaning of the main words of the treaty have to govern here.

I think what Malaysia is saying is that in order to have treaty approval one must specifically register. If this is indeed the position of the Malaysian Government I think it should be publicised. You are on record as having said this. Are you serious, is my question? What will this announcement do to current investors in Malaysia, is my question? I do not think there is any such requirement in the BIT, and this argument is made out of old whole cloth. It just defies common logic that has to govern here, that there was approval.

Even if there was MITI approval necessary, the government waived such requirement. We have no notice of any such requirement. We are hearing of it really for the first time in this arbitration. And I do not think other investors who are currently in Malaysia have any knowledge of such requirement. I will be glad to let them know about it, if that is indeed the position

of the government.

THE ARBITRATOR: My tentative thinking on this is that I am not so concerned with events post the treaty as determining how to interpret the treaty. I may look at the negotiations between the British and the Malaysian Governments as giving me some assistance, but even then, as you know, in treaty interpretation you can only advert to travaux préparatoires if there is doubt in the meaning of the words. So somebody has to make a submission to me whether or not the words are open to doubt.

But whether or not other investors behave in a certain way or the government publicises or does not publicise the requirement may not be so determinative of the meaning of the treaty, because the treaty really is law; it is private law, in a way, but it is nevertheless law. So everyone is supposed to know the law, whether you are an investor, whether you are the government. So either the words mean what the government says it means, or what your client says it means, or it does not mean --

MR EREN: If the words were specific I would agree with Malaysia. But it simply says that it has to be approved by the government.

THE ARBITRATOR: I think I understand your argument, as you

gather from the way that I put it to the other side.

MR EREN: That provision, as we have stated in our memorials, is geared more towards instances or examples of investments where the contract counterparty is not the government itself.

THE ARBITRATOR: Well, at some point you are going to arrive at an analysis of Gruislin's case?

MR EREN: Yes, sure.

THE ARBITRATOR: Have you had -- again I think I would appreciate the respondents in their response to help me with how they view the Burmese case. Mr Eren, are you going to deal with the Burmese case?

MR EREN: Which one, I am sorry?

THE ARBITRATOR: I always have difficulty pronouncing the name of the claimant, but the treaty investment case which involved the Myanmar Government which is in the respondent's bundle. If you have not dealt with it you can look at it over the lunch break.

Can you assist, Mr Attorney? It is in your bundle, it is one of your authorities. This is the one, actually, because we have relatively little jurisprudence on this type of treaty where there is a specific form of registration required. I was pointing out to the respondent just now in argument that if you look at the Burmese case that is a case which is

the nearest, apart from the Gruislin case -- the only other case where there was such an approval. That case was based on the ASEAN Investment Treaty, which has a specific requirement for registration, as you were just highlighting. So it might be profitable for you to look at the reasoning in that case and the wording in the treaty and then deriving some --

MR EREN: Sure, we will gladly do that.

DATO' ABRAHAM: It is volume 5, tab 91.

THE ARBITRATOR: Thank you. Perhaps both of you could look at it during the lunch break and come back to that. Over to you again, Mr Eren.

MR EREN: I think the intent of the relevant section in the treaty, the paragraph, is that investments that should not be protected, because they would be illegal, naturally that is Malaysia's sovereign prerogative to control what investments take place within its territory. We are not questioning that. We are simply saying that here there was abundant, clear, knowing approval.

You cited the Blacks Law Dictionary on the definition of "approval". That supports our case. Three years of negotiation is what took place, a signature of the contract, and then throughout the performance very close monitoring of the contract.

Moreover, the acceptance of all of the benefits of the contract.

So even if your arguments were to succeed, I think you are estopped from raising them in this instance, especially in light of the fact that you have cited no authority for specific MITI approval. The examples that you have given are just that: they are examples. They are unknown to the public. There is no legislation in Malaysia that points an investor to MITI, especially in such a case where the government itself --

THE ARBITRATOR: Can I say that I think both sides are perhaps off the track in focusing on MITI as such. It is not MITI as the body that approves; it is the actual requirement for any Malaysian authority to give treaty protection approval. That is the issue. Do you read those words as requiring a specific approval qua the treaty as opposed to approval to come into Malaysia to do what you want to do?

MR EREN: No. We do not see any specific requirement, no.

THE ARBITRATOR: That is the point you are really making, Mr Eren. You do not have to focus on MITI. You are saying that no one told us that we needed to go and get the chop to say "treaty approved investment" as opposed to just simple approval.

MR EREN: Right. Otherwise I think the treaty would really

lose its intent, if on the one hand Malaysia agrees to approve projects and on the other hand it reserves the right not to approve projects. That seems nonsensical to us.

The Gruislin case on the issue of approval: again we do not disagree with the holding of Gruislin; we believe it supports our case. In Gruislin the investor purchased shares on the Malaysian Exchange through a mutual fund intermediary. It is an anonymous exchange, where Malaysia had no knowledge of who the particular investor was. Again the differentiating features between Gruislin and this case are --

THE ARBITRATOR: Sorry, is that because he purchased it through the mutual fund which was the registered holder of the securities?

MR EREN: Yes. And I think the tribunal held that any cause of action that Gruislin has is against the mutual fund, and not Malaysia. The investment was far removed from any approval by Malaysia itself. It was remote.

THE ARBITRATOR: But I think they are relying on some general statements of principle by the tribunal. I mean in all of these cases of course the facts are distinguishable. I take your point that it was not a direct contract between the investor and the Malaysian Government, as in your case, but I think what they would

be relying on is the analysis of the meaning of the equivalent -- was it the Belgian treaty?

MR EREN: Belgo Luxembourg.

THE ARBITRATOR: And what it implies in terms of approval. So you might want to look at that and address that. Can someone on the Malaysian side help us with the citation? Where would we find the Gruislin case?

THE ATTORNEY GENERAL: It is in volume 4, actually, at item 87.

THE ARBITRATOR: Actually, when the Malaysians referred to this case just now I do not think they focused on the part that I was looking at when I read it earlier. Just give me a minute. (Pause).

It is actually quite a long analysis, but it begins at paragraph 17. Section 17 is the whole approved projects issue, and then there is a lot of --

MR EREN: These were securities listed on a public exchange, which is not the case here. They were investments in the Stock Market which could be traded by anyone. They were not directly connected to the development of an approved project. They were secondary market trading in securities related to a project. I think those facts are material enough to distinguish our case from Gruislin. Here there was specific contact, contact for over three years with the government, in getting to

a point where the contract was executed.

The other point made by Gruislin is that there was benefit to the whole state. Gruislin was simply an investment in something that had already been invested. It was a transfer of an investment, it was not really an investment. I think that is really the distinguishing feature, amongst the other facts, between our case and Gruislin.

Here this is a specific, fresh investment, expenditure of capital, funds and other resources for a very specific project, with the full knowledge, consent and participation of the Government of Malaysia.

THE ARBITRATOR: I am looking at it very quickly, and perhaps the Malaysian lawyers can help me with this later on: I am looking at the conclusion of the learned arbitrator at 24.1 of the award. He says:

"An investment in the KLSE will fall within the broad definition of an asset under paragraph (b) of Article 1(3) of the IGA. This in itself does not make the investment a protected asset, for the investment will be entitled to protection under the IGA only if proviso (i) is satisfied."

Proviso (i) is similar to the proviso that we have in this case, but I cannot immediately find the basis for the learned arbitrator's analysis of his conclusion,

so maybe you could look at it over lunch and help me out with this.

Do you want to move on from there, if you have finished your discussion of Gruislin?

MR EREN: I think I have finished with Gruislin.

The fourth issue I would like to address is that our cause of action and our appearance before ICSID is purely a contractual claim. Again we are not alleging breach of contract; we did that in Malaysia. We are alleging violations of the UK-Malaysia BIT and international law.

Now, within the UK-Malaysia BIT we have touched upon the fact that there is an umbrella clause which in the merits stage remains to be seen as to whether it actually applies and can be made to serve MHS's interests. But this is not our only cause of action, so the respondent's exhaustive commentary on whether the umbrella clause applies or not is really not a jurisdictional issue, because our other causes of action certainly are.

You cited the cases of SGS v Pakistan and others. We have no disagreement, really, with these cases. These cases stand for the proposition that pure breach of contract claims shall be settled in accordance with the relevant dispute resolution clause that the parties

have selected at the time of contract, unless those do rise to the level of BIT claims. Whether they do in this instance or not again is to be determined at the merits stage.

In Waste Management the tribunal touched upon the fact that there are umbrella clauses that do bring contractual claims to the level of BIT claims and international law claims.

THE ARBITRATOR: Do you want to summarise those claims or express them in terms of the treaty?

MR EREN: Sure. We allege that Malaysia has failed to accord MHS fair and equitable treatment. Within this allegation is subsumed Malaysia's denial of justice to MHS in its courts and otherwise. Second --

THE ARBITRATOR: Sorry, but this part of the claim really focuses on the events after the arbitrator gave his award; yes?

MR EREN: Yes.

THE ARBITRATOR: Okay.

MR EREN: Second, by failing to provide MHS a proper remedy in courts or the protection of its courts Malaysia expropriated MHS's rights to property, and property, by not giving it the means to enforce its property rights. That is also a BIT claim.

Then, third: the failure to upheld obligations. It

is our contention that the breach of the contract itself, by virtue of this protection embedded in the BIT, elevates even a mere contractual claim to one that can be properly decided by this tribunal.

THE ARBITRATOR: Sorry, I missed that. What was the element that elevated the contractual claim to a treaty claim, the third point?

MR EREN: The provision in the BIT that provides for Malaysia's observance of all obligations to nationals of another contracting state.

THE ARBITRATOR: That is the umbrella clause?

MR EREN: Right, Article 2(2). Within Article 2.2 of the BIT is protection of investment, fair and equitable treatment, the obligation not to submit MHS an unreasonable and discriminatory measures, and fourth the observance of obligations. Within Article 4(1) is expropriation; and then Article 5, repatriation of investment.

THE ARBITRATOR: I was just understanding you to say, Mr Eren, at the beginning of your submissions on this segment that not all contractual claims would be treaty claims, even with the umbrella clause; that if there was simple nonpayment of an amount due under a contract, if there was a dispute about how much was due under a contract, which might be a breach of contract per se

that would not amount to a breach of a treaty obligation, it would have to be something more egregious than that, something along the lines of your two earlier arguments.

MR EREN: We believe that in this instance there is an umbrella clause that does elevate the breach of contract to the international plane.

THE ARBITRATOR: So are you saying that the effect of the umbrella clause then is to equate a contractual claim with a treaty claim where there is such a broad umbrella clause?

MR EREN: Yes.

THE ARBITRATOR: So there is a complete congruence then of the contractual claim as a treaty claim if the government has undertaken that particular obligation?

MR EREN: Yes.

THE ARBITRATOR: Thank you.

(12.25 pm)

Submissions by MR RISTAU

MR RISTAU: Mr Arbitrator, Mr Attorney General, ladies and gentlemen on the other side, I have cogitated about one aspect of this case, and I certainly do not wish to appear as being presumptuous by making judgments on Malaysian law -- you are in a much better position to do that than I am -- but I have reviewed treaties on the

law and practice of arbitration in Malaysia by a lady by the name of Grace Xavier, a book that I found in the library of the Congress Law Division, and it appears to me from what Ms Xavier wrote that the courts in Malaysia lack jurisdiction to intervene or review the work of arbitral tribunals in international arbitrations.

Now, this rule was adopted by a 1980 amendment to the Malaysian Arbitration Act of 1952, which is the British Arbitration Act. The amendment in 1982 added section 34.1 to the Act, and provides that all international arbitrations administered by the Regional Centre for Arbitration in Kuala Lumpur are excluded from supervision by the Malaysian courts.

Now, if that is correct then through legislation Malaysia has made it impossible for a party that has arbitrated in Malaysia to invoke the aid of tribunals, because the new section 34.1 clearly says: you, courts, have absolutely no jurisdiction. And the way the international nature of an arbitration is defined is: if the ICSID Rules are being used for purposes of this particular arbitration.

Now this gives me also pause of thought, as a frustrated academic. It seems to me that the ICSID Rules go hand-in-hand with the ICSID Model Arbitration Statute, and all countries that I know of,

including some of the states of the union in America that have now adopted the UNCITRAL Statute as local domestic law, they have all adopted the statute to begin with and then the companion, the rules. But here I do not understand why -- and maybe it is not for me to understand -- why your legislature has enacted the ICSID Rules but you do not have any substantive rules, you have no lex arbitri to govern the arbitration.

So in consequence I think it is fair to say that there is no manner and means by which a person in an international arbitration can go to your courts for assistance, because your legislature has cut it out. It is therefore absolutely correct in this case to say there was no way of obtaining any factive assistance after the local arbitration was terminated with this most unusual award that the Arbitrator Talalla issued, when he was reminded that under the UNCITRAL Rules he is required to write a written opinion, which he had not done, he had only issued a one-page order. He said: you want an opinion, I will give you an opinion. And he certified the 700-page transcript of the arbitration as his written opinion.

Now, had we had an opportunity to litigate that in court we would have had a few things to say about it, but there is no need wasting your time and wasting our

distinguished arbitrator's time, because for the reasons I just pointed out there was no and there is no way in which a party in an international arbitration can invoke the aid of the Malaysian courts in order to rectify a mistake.

Now, we take the position that there was a denial of justice in the course of the arbitration. That in turn will depend on quite a bit of evidence to be adduced to the distinguished arbitrator. This is not a time to discuss evidence, so I will therefore not burden this meeting with the evidence which I will adduce in support of our claim of denial of justice. The question whether there has been a denial of justice in our opinion is a question for the merits stage of the proceedings.

Our friends across the table have also in their briefs raised the issue about exhaustion of domestic remedies, and they maintain that that is a jurisdictional defence. I disagree with some of the views that they take about jurisdictional defences, but it certainly is not a jurisdictional defence, exhaustion of domestic remedies. This tool would have to be taken up by you, sir, at the trial stage. But here again you run into the problem that I discussed at the beginning: there are no domestic remedies to be exhausted. And I would love to hear from my friends across the table

how they are going to argue the issue of domestic remedies.

Finally, we maintain that MHS has a claim which is justiciable under the UK-Malaysia BIT. Article 2(2) refers to the protection of investment, fair and equitable treatment, unreasonable and discriminatory measures, and observance of obligations. These are matters not of domestic breach of contract remedies; these are matters that are governed by public international law, and that is why there is a very substantial part of the arbitration that will be dedicated to rules, established rules of public international law.

Listening to the arguments propounded by our Malaysian colleagues, it is our firm position that (1) MHS has local standing, or standing to prosecute this case; that (2) MHS's claim for money or to performance under the contract constitutes an investment; (3) the project to which the contract relates was an approved project, if for no other reason than through the application of the venerable doctrine of prescription.

There was nothing that prevented the Malaysian contracting party to mention to our client: hey, and do not forget to get yourself some approval. For three years they negotiated. Nobody mentioned it. All of

a sudden, nine years later, they say: ah ha, we have a defence, you did not get approval. That is not civilised law, to try to pull this kind of trick.

Fourth, MHS's claims are justiciable under the UK-Malaysia BIT, and they are not contractual claims governed by municipal law which does not exist.

Five, MHS has met and exceeded the required standards related to the issue of exhaustion of local remedies prior to instituting this arbitration.

Six, the Government of Malaysia's claim that there was no denial of justice is not a jurisdictional challenge, and is not to be resolved in our view at this stage of the proceedings. Thank you.

(12.37 pm)

THE ARBITRATOR: I think I have indicated in argument that I am tentatively agreeing with your last proposition that we are not going to argue the substance of denial of justice at this hearing because that is not truly jurisdictional. But you say that exhaustion of local remedies is not a jurisdictional point either.

MR RISTAU: Yes.

THE ARBITRATOR: And I suppose the Malaysians can reply to that when their turn comes.

Thinking out loud, I suppose what the claimant is saying, in language that perhaps the Malaysians

understand, is that -- what the Malaysians are doing by raising the exhaustion or legal arguments point is to raise a defence and, based on that defence, you are applying to strike out the claim on the basis that this is a defence that does not require a lot of fact proved, and that if that point is accepted then it disposes of the whole case, and you do not need to go and hear the allegations of denial of justice.

But what I think the claimant is saying is that that does not go to jurisdiction, it does not go to the right and duty of the arbitrator to hear the arguments, unless we deal with it not as a jurisdictional point but as a preliminary point, perhaps.

I do not know whether that is a quibble about words or whether there is a substantive point of procedure that ought to be addressed here. Maybe you can think about that over the lunch break and come back on that.

But assuming that we are here and I needed to write something about exhaustion of local remedies, I recall reading in your memorials the argument that exhaustion of local remedies was only available as a defence if the treaty specifically provided for it. Is that your position, Mr Eren or Mr Ristau?

MR EREN: Yes. I think we have to be guided by Article 7 of the treaty. The treaty does not impose an obligation to

exhaust local remedies that may be available. No. 1, we contend that no such remedies were available. And in any case, as mandated and provided for under the treaty, the requirement of the treaty is a mere three months, an attempt at three months to arrive at a settlement with respect to the dispute. The standard is not exhaustion of local remedies. This is something that was introduced by the respondent, but it is really a false premise here. We have to be bound by the treaty, the treaty governing this arbitration.

Article 7 says:

"If any investment dispute should arise and agreement cannot be reached within three months between the parties to the 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."

MHS tried for nine years, in earnest, in good faith, at great cost to itself, with great heartache, to resolve this matter in an amicable manner with your government, and at every turn it was shown the door, at every turn it was referred to another ministry or

another agency. The fact that Mr Ball may have tried to enlist the support of the Queen of England is not to be diminished. You cite that several times as if to give the impression that that was some kind of a silly act on his part. This is an example of how hard he tried to get the attention of your government.

The attention of your government has only been directed to this issue because we are here before it tribunal. Unfortunately, as Mr Ball stated to the honourable Attorney General during the first hearing in this arbitration, this is a matter which if taken up by serious parties could have been resolved in two hours. It is really that simple an issue. But Malaysia has unfortunately diminished and not respected Mr Ball in this regard, and diminished and continues to diminish his investment, for which he is still waiting a return. Mr Ball risked his life for this project. I think Malaysia should have accorded him a bit more deference and priority in hearing his complaints.

In any case, the bottom line is three months. Why three months? Because I think the treaty foresaw that exhaustion of local remedies might be a farce in a country such as yours. I am not saying that it necessarily was, but the treaty specifically foresaw and limited this issue to three months. Your government

signed the treaty, the UK Government signed the treaty.

So exhaustion of local remedies is not the standard or principle to be guided by; it is the amount of months. We have exceeded that time by eight years and nine months. We are here today still awaiting justice.

THE ARBITRATOR: If I can anticipate the Malaysians' response, there are two points. I will take up the last point that you are making, about exhaustion of remedies.

The jurisprudence that I recall reading says that the doctrine of exhaustion of local remedies does not require that a specific provision be inserted into the BIT for that principle to apply, because it is a principle of customary international law. Therefore you would presume that as between the host country and the investor that principle should apply, and that the investor should in the normal course of events exhaust local remedies before taking on the host country in an ICSID arbitration, with I think the proviso that if the words of the treaty are clear so as to exclude that doctrine of public international law then you can say that there is not.

So I understand your argument, Mr Eren, to say that actually the three-month provision and the language used here effectively excludes the principle of exhaustion of local remedies. Would that be a fair way of putting it?

MR EREN: Yes.

THE ARBITRATOR: So I understand you there. Mr Ristau, your observations on Ms Xavier's book I think were picked up in the arguments of Dato' Abraham just now. But -- and this is a new point; it may be in the memorials, but I think it has perhaps been a bit more sharply focused in this oral presentation. I was wondering where that observation led you in terms of your position.

Because if the true interpretation of section 34.1 of the Malaysian Arbitration Act is to exclude any form of court supervision of arbitrations held under the auspices of the KLRCA then there would be no recourse to the courts. And if there was no recourse to the courts then how do you ...

The basis for your claim for justice, as I understand it, is the events that occurred after the award in the way that you say the Malaysian courts treated the application for judicial review. And if there actually is no power, no legal power in the courts to review the particular arbitration that was held because it was held under section 34.1, then in so far as the arbitral award was flawed in some way the Malaysian Government would not be responsible for that because it would be held independently; and if there was no room for the Malaysian courts to intervene then how

does that affect your denial of justice claim? You know, the Malaysian Government says: I have no power, I did not even have the ability to get my courts to deal with this properly, the problem actually lay in the fact that the parties had opted for section 34 arbitration.

MR RISTAU: You may view the remedies that are normally available at two levels: (1) through municipal law; and (2) through international law at the different level. And if you do not have any remedy at the municipal level, because for whatever reason the legislature of that particular country decided to do away with it, then you still have the remedy, and more so in spades, at the international level.

THE ARBITRATOR: No, but the remedy at the international level, as I understand it, in the context of denial of justice is that the host country has abused its municipal law system so as not to give the investor a fair shake, and that is your complaint. If you now say that it now appears that the courts had no power to intervene at all, then in a sense does that not let the Malaysian Government off the hook, because they had no responsibility then?

MR RISTAU: No, no. You cannot immunise yourself that easily.

THE ARBITRATOR: No. First of all assuming that section 34

meant what Ms Xavier says -- and, as Dato' Abraham says, that is slightly controversial, but assuming that it did -- that the intention was to exclude international arbitrations from judicial review, are you saying that section 34 itself contravenes public international law? Is that your proposition?

MR RISTAU: I would not go that far. I would just cite Article 34 for the proposition that I do not have any remedy at the domestic level. That is why I am here, dear international tribunal, and I am seeking a remedy from you.

THE ARBITRATOR: But in order to come before an international tribunal you first of all have to establish a denial of justice. So where is your denial of justice, except by the introduction of section 34?

MR RISTAU: The denial of justice, my proof of it is section 34, the amendment to the domestic standard saying that there is no domestic remedy available to you if you have used the UNCITRAL Regulations and you have transmuted this arbitration into an international arbitration.

MR EREN: If I may, I think again we are getting the two concepts mixed up. The argument is really twofold. If this was an international arbitration there was no recourse to Malaysian courts. That in and of itself

leads to the exhaustion of local remedies. If this is, as I believe is contended by Malaysia, a domestic arbitration notwithstanding the fact of the law on the books under the auspices of KLRCA and UNCITRAL, because it was a domestic arbitration, MHS still maintained recourse to the courts.

But all of this is really irrelevant, because I hark back to the limitation in the treaty of three months. So if it was an international arbitration, which we believe it was, MHS nevertheless went to court, and Judge Azmel dismissed the case without anything in writing -- we have nothing to that effect -- which precluded further appeal in Malaysia.

So the fact that it is classified or categorised as an international arbitration and a domestic arbitration is really not relevant. Your argument is that it is domestic, therefore in addition to Judge Azmel you could have resorted to the Federal Courts, what have you, you could have taken it all the way up. So what? We did not need to because the standard in the BIT does not require that, because I think it foresees that the court systems of certain countries may not be worth that pain and effort.

That was certainly the case in Malaysia. Malaysia went through a period -- I think in your good hands it

has much improved -- where the judicial system was truly backlogged and not working. The requirement to go all the way to your highest courts, even if it is a domestic arbitration, is not required by the BIT. And even if it were, we respond by saying this is an international arbitration, and there is a wall erected in front of MHS by section 34. So both paths lead us to the same conclusion.

THE ARBITRATOR: So you are saying that Article 7(1) of the treaty gave MHS the option to start court action and, when it found that that was not satisfactory, to switch to the ICSID?

MR EREN: Yes. MHS in good faith tried to resolve its dispute with the government. After all, the government had considerable leverage with MHS.

THE ARBITRATOR: Okay. So everything turns really on Article 7(1). I understand you to be saying that whatever the objective jurisprudence is, all of it is subject to the terms of the particular treaty. If you look at the words of Article 7(1) that literally construed justifies the steps that MHS in fact took.

MR EREN: Right. Notwithstanding the period was three months, MHS again in good faith sought assistance. It was reaching for everyone, including the US-ASEAN Chamber of Commerce, as the Attorney General mentioned,

in an effort to resolve this problem without raising it to this level. But its hand was forced to come to ICSID, and MHS is incurring considerable costs in bringing this claim before ICSID.

So we have to bear all of these factors in mind. And again we are just constrained by the three-month limitation. Our argument and position is as clear as that, and I do not really think I can add anything more without undermining what we have already said.

THE ARBITRATOR: So that, Mr Eren, concludes your initial presentation?

MR EREN: Yes.

THE ARBITRATOR: I think we will take our lunch break now. We were planning for one and a quarter hours, just to give people a chance to get out and also to prepare their response. So shall we come back at 2.15. Thank you.

(1.00 pm)

(The short adjournment)

(2.15 pm)

THE ARBITRATOR: All right, ladies and gentlemen, we will recommence the afternoon session. Mr Attorney, are you going to start?

THE ATTORNEY GENERAL: Learned arbitrator, my colleagues

Dato' KC Vohrah and Dato' Cecil Abraham will make their first submissions, and subsequently I will do just a short summing-up. That is how we intend to proceed. Thank you.

THE ARBITRATOR: Fine.

Reply submissions by DATO' ABRAHAM

DATO' ABRAHAM: The first point is that, having listened to my learned friend from across the table Mr Eren, I want to emphasise the fact that at the end of the day what we are really dealing with is a contractual claim and not a treaty claim. For this reason, if we look at the contract, and if I could invite your attention once more to it, tab 6, in volume 1. If one looks at it, in particular clause 2, which deals with the scope of the contract, it says:

"The salvor shall carry out and complete all works in accordance with the terms and conditions of this contract and the instructions for the survey and salvage as issued by the principal receiver of wrecks, instructions for scientific excavation, restoration, preservation, as issued by the General Director of Museums, and as directed by the supervision team. The contract shall be on a no-finds-no-pay basis, and all expenses incurred shall be on account of the salvor."

I make the following points. Firstly, my learned

friend said that they had invested a lot of money and put life at risk, et cetera. This expenditure is pursuant to clause 2.2. It is by analogy like precontractual expenditure, and that would not be covered by the meaning of the word "investment". I will come to a case shortly.

So the first point is: all these expenses that they talk about are not an investment into Malaysia.

Secondly, this contract is no different from a salvage contract, and I say that for this reason: firstly, the Diana is a wreck for the purposes of the Merchant Shipping Ordinance 1952, and therefore the receiver of wrecks, Malaysia, is the custodian of that wreck, and the receiver of wrecks is actually the Director of Marine. So he has to give permission under the Merchant Shipping Act to salvage this wreck. Secondly, the wreck is an antiquity within the meaning of our Antiquities Act, and therefore the Director General of the museum has to issue a licence.

If I could very quickly take your Honour to the claimant's bundle 1.1, which is Exhibit A, which sets out the provisions of the claimant's memorial, volume 1/1 of the exhibits, and it is tab A which has the provisions of the Merchant Shipping Act. Your Honour will note section 367 which says:

"The Director of Marine shall be the principal receiver of wreck and shall have all powers of a receiver throughout the Federation."

"The principal receiver of wrecks shall exercise general direction and supervision over all matters relating to the wreck and salvage."

So that is the person that the claimants in this case would be answerable to.

Secondly, your Honour, in tab B, which is the Antiquities Act, section 2.1 defines what an antiquity is, and it covers moveable and immovable objects on the bed of the sea. And then section 3 says that the provisions of every antiquity shall be the absolute property of the government. Then section 9: no excavation except upon licence.

So, your Honour, what we are really dealing with is this: here is a situation where they want to salvage antiquities at the bottom of the Straits of Malacca, they need the permission of the receiver of wrecks, permission from the director of the museum, and therefore the salvage contract is entered into. So it is simply a straightforward salvage contract on a no-finds-no-pay basis. What is being attempted in this case is really to elevate this into an investment treaty claim.

Although this case has not been cited, there is the case of -- I will give the reference, if I could, Mihaly International Corporation v The Democratic Socialist Republic of Sri Lanka, ICSID case no. ARB/002. In that case there was a claim for reimbursement of expenditure made pursuant to a possible investment in a proposed power project in Sri Lanka that never happened. The tribunal on a jurisdictional issue held, at paragraph 51 -- and if I could just read:

"It is an undoubted feature of modern day commercial activity that huge sums of money may be needed to be expended in the process of preparing the stage for a final contract. However, the question of whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small. Ultimately it is a matter for the parties to determine at what point in the negotiation they wish to engage the provisions of the Convention by entering into an investment ...", and then it goes on.

So in this case the expenditure is pursuant to the provisions of clause 2.2, and therefore in my respectful submission it does not constitute the thing.

Your Honour, in passing if I could also mention -- perhaps your Honour would look at paragraph 52, because it covers the point which my learned friend Dato'

KC Vohrah will deal with. The Sri Lankan BIT with the US also envisaged as follows: investment authorisation granted by Sri Lanka's Foreign Investment Authority under clause B. So there is something like an approved project investment also referred to in paragraph 52, and I mention that purely in passing.

So that is the first point that I want to make in so far as --

THE ARBITRATOR: Before you pass on, I am still not immediately following your argument that the expenditure which MHS made on the project was pursuant to clause 2, and as such was not an investment. Were you trying to draw a distinction between pre-contract expenditure and post-contract expenditure? Because this thing went on for several years, and I suppose he is talking about his entire outlay over that period.

DATO' ABRAHAM: My answer is this: whether it is pre- or post-expenditure it is immaterial in the context of a salvage agreement of this nature, or for that matter any salvage agreement, because it is on that basis that the government contracts with the salvor. This is the sort of contract that would be entered into on ordinary commercial terms and commercial conditions, there is nothing special about it.

THE ARBITRATOR: That point I understand. But of course the

issue here is that MHS concedes that its investment is made by way of contract, but then many investments are made by way of contract. It has to be made pursuant to a contract with one party or another. So it still comes back to the "contract does not equal investment" point, that is where it fits in?

DATO' ABRAHAM: Yes.

THE ARBITRATOR: Okay. I understand you, then.

DATO' ABRAHAM: Maybe from that, your Honour, if I could conclude this part of the submission by referring to tab 80, in volume 3. This is the case of Robert Azinian and others v United Mexican States, which is a NAFTA claim dispute; it was also a jurisdictional issue. I just wanted to read paragraph 87, at page 25. I think this encapsulates what we want to say:

> "The problem is that the claimants' fundamental complaint is that they are the victims of a breach of a concession agreement [substitute salvage agreement]. NAFTA, however, does not allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities [in this case read Government of Malaysia] into potential international disputes. The claimant simply cannot

prevail merely by persuading the arbitral tribunal that ...", and I will not attempt to read that, that is the local tribunal breached the concession agreement.

So here the question is this: by them referring to the arbitral tribunal in Malaysia, has there been a breach, as it were, of the salvage agreement elevating it to a treaty breach? And if I could just rely on that passage as such.

Whilst I am on this point maybe I could deal with the question that your Honour asked us to deal with, namely the position in SGS v Philippines.

Firstly, if one looks at the case, the contracts that we are dealing with are quite different. Namely, here we have a salvage agreement; in the Philippines the investment was quite different. If I could invite your Honour's attention to the SGS case, which is in volume 4, tab 92. It says:

"SGS is part of a large group providing inter alia certification services on pre-shipment inspections carried out on behalf of government authorities of the importing country in the country of export. Pre-shipment inspection only covers ..." --

THE ARBITRATOR: Which paragraph, please?

DATO' ABRAHAM: Paragraph 12, page 5:

"... covers quality, quantity, export market price.

It also seeks to verify compliance with import regulations ..."

Then:

"In addition, SGS provides assistance in the modernisation of Customs and tax infrastructure in the country of import."

If one look at paragraph 19, where the appropriate contractual provisions were analysed, it will be seen that one is dealing with a contract which is not a simple service contract as such: there are training courses, provision of Customs equipment, consultants, Customs specialists, intelligence, et cetera. So I think these were some of the considerations that they took into account in coming to the conclusion that there was an investment, as it were. This is reflected in paragraph 62, where it says:

"SGS emphasises it made substantial investments in the territory of the Philippines through various channels."

And they set out three ingredients: there was a transfer of know-how, tangible investments, besides the claims to money. So there was this additional aspect to the claim. And then, of course, they disagreed with the reasoning in SGS v Pakistan, which we are relying upon, and they disagree for this reason, at

paragraph 111:

"The most relevant decision is that of SGS v Pakistan, where it is noted that the tribunal held that the equivalent pre-inspection services were provided in the territory of the whole state because there had been an injection of funds into the territory of Pakistan for carrying out SGS's engagement under the tribunal. The tribunal agrees with this reasoning. Indeed, the present case seems even stronger, given the scale and duration of SGS's activity and the significance of the activities of the Manila Liaison Office."

For that purpose, in 112 they concluded that there was an investment.

Also, your Honour, the umbrella clauses which were the subject-matter of construction -- and one can see that in paragraphs 119 and 120 -- were different in the Pakistan and the Philippines BIT. I think that the SGS case itself says that at the end of the day there is no question of a doctrine of precedent in ICSID, so your Honour must decide this case on an interpretation we say of the salvage contract in this case and to see what it is at all about.

I have actually set it out in paragraphs 60 onwards of my reply memorial where I have dealt with both the SGS v Pakistan and SGS v The Philippines, and I have

attempted to distinguish the cases and have submitted why your Honour should follow the SGS v Pakistan principles as such.

But I think perhaps one should look at Joy Mining, because Joy Mining considered both the two cases, and I have set it out in paragraph 64 of my reply, where they said this:

"In SGS v Pakistan the tribunal came to the conclusion that it did not have jurisdiction over contract claims which do not also constitute or amount to breaches of substantive standards. In SGS v The Philippines, where the contract claims were more easily distinguishable from the treaty claim, the tribunal referred to certain aspects of the contractual claim to local jurisdiction while retaining jurisdiction over the treaty-based claims. A further feature noted by the tribunal in the last two cases was that both treaties contain a broadly defined umbrella clause. In the present case the situation is rendered simpler by fact that a bank guarantee is clearly a commercial element of the contract."

I think this passage was read to you earlier. Then at paragraph 80:

"There has been much argument regarding recent cases, notably SGS v Pakistan and SGS v Philippines.

However this tribunal not called upon to sit in judgment on the views of the tribunal; it is only called to decide this dispute in the light of its specific facts and the law, beginning with jurisdictional objections.

"In this context, it could not be held that an umbrella clause inserted into the treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the treaty, unless of course there would be a clear violation of the treaty and obligations or a violation of contract rights of such a magnitude as to trigger treaty protection, which is not the case. The connection between the contract and the treaty is the missing link that prevents any such effect. This might be perfectly different in other cases, where the link is found to exist, but certainly it is not the case here."

So, your Honour, the question is this: the claimants must establish a link that the breach of contract in the salvage contract gives rise to a treaty claim, and we say that they have not overcome that obstacle that is in their path.

The next point, if I could deal with it, is the point that was raised with regard to section 34 of our Arbitration Act. I have already made a fairly substantive argument on section 34, but if I could just

address the point that was being made that section 34 -- it was argued that because we enacted section 34 it means that we are denying justice in an international arbitration. But the point I want to make is this: it was the claimants themselves, voluntarily, with the benefit of competent legal advice, who decided to take it from the domestic regime to the KL Regional Centre regime under the UNCITRAL Rules by means of a Consent Order.

The second point is this: as your Honour is aware, in international arbitration, which is what they claim it is, court interference is minimal, and the purpose of section 34 was sort of an ad hoc measure adopted by the Malaysian Government to encourage international arbitration into Malaysia, to say: well, if you arbitrate under UNCITRAL or you arbitrate under the rules of the Regional Centre then the Malaysia courts will not interfere. As I said, it was a stopgap measure, because we now have a new Arbitration Act, and section 34 no longer figures in our new Arbitration Act. You have a provision to opt in and opt out as to how much court interference you want.

So I think firstly it is wrong to say that by re-enacting section 34 we have denied justice; secondly, the point that your Honour made, once they opt for that

there is no question of denial of justice, because on one argument the courts are excluded from looking at any award, save for interim measures in the light of the DaimlerChrysler case, which is in our bundle.

I think the other point is this: the fact that section 34 exists does not mean that automatically every time there is an arbitration one can then take recourse to ICSID because they have failed in the arbitration. I think that is not the case.

The next issue that was raised was that of Article 7 and the exhaustion of local remedies. Now, as I read Article 7, all that is says is that one must attempt to settle the dispute. If I could take your Honour to Article 7 in volume 1, tab 38. It says in the fourth or fifth line:

"Any legal dispute arising between a contracting party and a national or company of that other contracting party concerning an investment of the latter in the territory of ..."

Then further down:

"If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through the pursuant of local remedies or otherwise then, if the national or company affected also consents in writing to submit the dispute

to the Centre for Settlement by Conciliation ...",
et cetera.

So both sides must agree. Firstly, there must be an attempt at negotiation, et cetera, it fails or they resort to local remedies, and if they fail then both must agree to submit the dispute to ICSID. But in this case it did not happen in that way. What happened is that the claimant decided to take his remedy to arbitration, so he elected, as it were. I would think that the argument which I addressed this morning on the fork in the road would apply in this case, in the sense that they have elected. Having elected to arbitrate, the same parties, the same subject-matter of the dispute, the same claim, they now come back to re-litigate this, as it were, before ICSID. In the light of the authorities which I have already cited earlier on, it is my respectful submission that one cannot do that.

Now, in so far as exhaustion of domestic remedies is concerned, I think your Honour said this morning that it is a rule of customary international law -- I do not know if you want me to re-emphasise this point, but as I understand it, under customary international law a claim cannot be interposed by an investor's home state unless and until the investor has exhausted local

remedies. This basic customary international law rule is that the respondent must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual. And there are various passages like that in various books as such.

Now, if an authority is needed, my learned friends across the room said that exhaustion of remedies is not a jurisdictional issue. With respect, I beg to differ, because in the Lowen case, which concerns the United States of America -- tab 81, volume 3. It was a jurisdictional issue. If I could just draw your Honour's attention to paragraph 41. In paragraph 41 it says:

"By its memorial on competence and jurisdiction, the respondent objected to the competence and jurisdiction of the tribunal on the following grounds ...

"2. The Mississippi court judgments complained of are not measures adopted or maintained by the party and cannot give rise to a breach of Chapter 11 as a matter of law because they were not final acts of the United States' judicial system."

Your Honour, here in this case was the court in Mississippi making the kind of remarks that, to use a phrase that my learned friend across the room used, no

civilised courts would make, yet it was held that local remedies must be exhausted. So it is the same situation here: assuming that the Malaysian courts had jurisdiction in this matter, they must exhaust those remedies by going up to the Federal Court and testing the provisions of section 34.

THE ARBITRATOR: But I was pointing out that I think there were some authorities which say that you can exclude the exhaustion of remedies by the appropriate language in the treaty.

DATO' ABRAHAM: I agree, but looking at our IGA that is not the case. Because the kind of clauses that you find in the IGA which exclude -- if I could just give an example, your Honour ... I think it has to be a very specific clause. To exclude local remedies the IGA or the BIT has to have a specific clause to say that they need not exhaust local remedies and they can go straight to an ICSID arbitration. I cannot find the clause. Perhaps if I can find the clause in an IGA I will do so.

In our IGA it does not say that that we do not have to exhaust local remedies. All that we have is Article 7.

THE ARBITRATOR: I think Mr Eren was referring to some words in that Article 7.

DATO' ABRAHAM: Sorry, your Honour?

THE ARBITRATOR: He was referring to some language in Article 7.

DATO' ABRAHAM: It is tab 38. Article 7 says this:

"If any such dispute arises and an agreement cannot be reached within three months between the parties to the dispute through the pursuant of local remedies or otherwise then, if the national or company affected also consents in writing to submit the dispute to the Centre for Settlement by Conciliation or Arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary General."

That is the wording of that. The way that I would interpret that is that it is not a unilateral reference to ICSID.

THE ARBITRATOR: There are two different aspects to that point. The unilateral part of it is that by signing this treaty the host country has a standing offer to accept ICSID arbitration, which is accepted, if you like, unilaterally by the investor when he commences ICSID arbitration. That is why in answer to Dato' Vohrah's point the authorities seem to say that the relevant time to ascertain nationality is the time when the invitation is accepted.

But leaving that aside, the other point is that on

exhaustion of local remedies, the question is whether this wording excludes the doctrine of exhaustion when it says: if after three months of negotiations or pursuit of local remedies or otherwise the investor cannot get satisfaction then he is at liberty to go to ICSID. So maybe he starts an arbitration, maybe he issues a writ in the local courts, but whatever it is, does this language suggest that he can abandon that, or even carry on with it and pursue ICSID in parallel, or abandon the original method of dispute resolution and opt for ICSID?

DATO' ABRAHAM: I think I answered that by saying that they came to the fork and they elected to go to resolve their dispute --

THE ARBITRATOR: Yes, but the problem with the fork in the road argument is that it is not the same road, it is a different road that he is on. Because essentially the fork in the road argument is just a way of expressing what in different contexts you would take as the res judicata argument, which is that you must have congruence of different parties, issues, and so on. The claim that MHS was running in the arbitration was a purely contractual claim; I think we all acknowledge that. Whether or not it is elevated by the umbrella clause is a separate issue.

After the award then the denial of justice elements

came in. So there was no fork. It was a new cause of action, which was a treaty violation which MHS claims. It then at that point invoked its right of ICSID arbitration, which was the first time that they had an opportunity of getting relief for that violation. You can say that the attempt to discipline Arbitrator Talalla was simply a false start, because everybody agrees that it had no impact on anything.

So in that sense it is not a fork in the road, the fork in the road argument does not apply to that part of his claim, although he is trying to maintain his contractual claim. To the extent that they are running the denial of justice argument, I am not sure that the denial of justice argument is met by the exhaustion local remedies, unless you say that the exhaustion of local remedies argument is this general principle of public international law, which is not by this language excluded.

So I suppose we have to go and look for examples of cases where the exhaustion of local remedies doctrine or principle has been found to have been excluded by appropriate words in some BIT, or even a multilateral treaty. If you cannot lay your hands immediately on that, by all means you can come back to me in writing later on. Because I will need assistance on these sorts

of points. After this discussion we may decide that some further research has to be done. So we can come back to that, but that is for the moment what I need resolved in my mind.

DATO' ABRAHAM: I will find the BIT where it has that clause very shortly.

THE ARBITRATOR: Do you want to move to another point now?

DATO' ABRAHAM: I think I am almost finished. The only other point that I wanted to make was this: I made reference to challenges, and the challenges under the UNCITRAL rule is Articles 9, 10, 11 and 12, and that challenge can be made during the arbitration hearing itself.

THE ARBITRATOR: Well, it has to be made during the arbitration hearing, because as I was saying, after his award --

DATO' ABRAHAM: In this case the argument is that they did not get justice in the arbitration because of the conduct of Arbitrator Talalla. So the answer is that there was a remedy there, namely the challenges, and they did not take advantage of that as such.

THE ARBITRATOR: To that extent. But I thought that they also had a complain about the award itself.

DATO' ABRAHAM: As far as the award is concerned, unfortunately the UNCITRAL Rules do not seem to make

specific provision. The nearest I can get to is Article 37, which is to ask for an additional award. Perhaps it could have been done to say: you ought to give reasons. Although the procedural direction does not seem to suggest that they had to give a reasoned award. But be that as it may, that would be the only remedy that they had under Article 37 of the UNCITRAL Rules.

Thank you, your Honour.

(3.00 pm)

Reply submissions by DATO' VOHRAH

DATO' VOHRAH: Your Honour, I will be taking three points: basically a point of clarification on some letters that have been addressed earlier on; then the Burmese case, which is quite a mouthful, the name; and the Gruislin case.

Now, on the issue of the letters, you had asked me certain questions in regard to these two letters; one was at annex 36. This is the letter of the British High Commission.

THE ARBITRATOR: Sorry, the tab reference again?

DATO' VOHRAH: The tab reference is 36, volume 1.

There was this query to the Deputy Secretary General by the Deputy High Commissioner in regard to queries from England asking whether Article 1(b)(2) could be

read as covering such investments:

"We would like to have confirmation of this meaning. In practice, approval has been sought and given for non-manufacturing investments such as services, plantations and portfolio investments."

And the answer was given in annex 37. It says:

"With reference to your letter dated ... I would like to reaffirm that Article 1(a)(2) as it stands covers non-manufacturing activities such as services, plantations, and portfolio investments as well, and that in practice approvals for such non-manufacturing activities have been granted by the government in the past."

This would mean that obviously the practice, "... have been granted by the government in the past", must be in relation to other IGAs, obviously. Just a clarification that so far as the British were concerned there were no IGAs in issue, or getting approvals did not arise.

I now go to the Burmese case of Yaung Chi Oo.

THE ARBITRATOR: Sorry, but the problem of reading this correspondence is that the article numbers --

DATO' VOHRAH: Yes, are wrong.

THE ARBITRATOR: Well, they must refer to another draft that we do not have. So trying to reference them to the

final version of the treaty so that we know which articles they were talking about, can you help me here?

DATO' VOHRAH: Yes, that would be the letter of the British Deputy High Commissioner. I think the reference is very clear: 1(b)(2).

THE ARBITRATOR: So Article 1(a)(2) in the letter of 24th April 1978 is of the draft; it refers to Article 1(1)(b)(ii), is it?

DATO' VOHRAH: Yes, it should be, because it refers to the same letter of April 17th.

THE ARBITRATOR: Yes, I suppose throughout this correspondence the numbers will be constant. Do you have any evidence that there had been approvals under IGAs prior to 1978? I have no idea of the history of IGAs --

DATO' VOHRAH: Yes, we have those in regard to the US, Germany. If one turns to annex 42 there will be some sample letters of application and approvals as well, in this case between Malaysia and the Federal Republic of Germany.

As for the USA, can I refer your Honour also to our memorial where these things have been set out. This is in our memorial on objections to jurisdiction at paragraph 115.

THE ARBITRATOR: You have to show me the non-manufacturing

approvals.

DATO' VOHRAH: Yes, that is at annex 49, in respect of item D. This was an application from Deutsche Bank dated 21st September 1995. If one turns the page you see that there is an application from Deutsche Bank to the Ministry of Trade and Industry, and the approval is shown on the last page of that annexure D. This is a letter of 2nd September 1967. Paragraph 2 states:

"The Government of Malaysia has considered the application and has approved the investment made by the Bank in Malaysia for coverage under the agreement in accordance with the terms and conditions set therein."

This was a letter from the Ministry of Commerce and Industry. This is from a bank, investment by a bank.

Then again in E --

THE ARBITRATOR: Where is the treaty? Where is the Malaysia-Germany treaty?

DATO' VOHRAH: Volume 1, at annex 43. The agreement is shown after that. And Article 1 --

THE ARBITRATOR: Yes, page 16?

DATO' VOHRAH: Yes, page 16. It says the term, which is the term we are referring to, "investment":

"... shall refer in respect of investments in the territory of the Federation of Malaysia to all investments made in projects classified by the

appropriate Ministry of the Federation in accordance with the legislation and administrative practice as an approved project."

The same wording.

Annex E2 deals with an application from DaimlerChrysler regarding non-manufacturing activity. The approval was given on the last page, in the letter dated 23rd June 2003.

So actually our practice has been very consistent: you apply for approval; we give it to you after considering it. We even have a situation, your Honour, where there was an activity, a non-manufacturing activity in relation to reforestation, which is completely non-manufacturing, and that is in F. Again addressed to the Ministry of International Trade and Industry. The approval can be seen on the last page, in a letter dated 29th October 2003.

THE ARBITRATOR: Do you have any applications from British companies?

DATO' VOHRAH: No, I think they are quite comfortable with our investment climate.

THE ARBITRATOR: So you are saying that the British Government, having negotiated an investment protection treaty for its nationals, have not bothered to advise their nationals that in order to get this protection

they need to apply for registration? That is what you are saying, is it?

DATO' VOHRAH: Yes. Yes. When one considers the letters that Mr Ball has written to the High Commissioner, the Deputy High Commissioner, one would have thought they would have been alerted and they would have alerted their British investors to take advantage of applying for approval. They have not done it. Because I think --

THE ARBITRATOR: So currently you are saying that no British investor is protected?

DATO' VOHRAH: There is none. They have not applied.

THE ARBITRATOR: And if they do not apply they have no protection?

DATO' VOHRAH: Yes. But that is up to them, that is the whole point. The Americans have done it, the Germans have done it. It has to be an approved project, and I think it is borne out by the Gruislin case and the Burmese case.

THE ARBITRATOR: Are you going to take me to the Gruislin case? Because I cannot find any reasoning in the Gruislin case. What the arbitrator did in that case, as far as I can make out, is that he recited the argument of the Malaysian Government and he accepted it wholesale, without any discussion. If I am wrong,

correct me, but that is how I read his award.

DATO' VOHRAH: I think he made a distinction, did he not, that --

THE ARBITRATOR: Yes, but he accepted the submissions of the Malaysian Government wholesale, without discussion. So I do not find any reasoning.

DATO' VOHRAH: Well, would you not call that reasoning?

THE ARBITRATOR: You make a proposition, he agrees with you; that is not reasoning.

DATO' VOHRAH: What he says is that you apply to the CIC, which is a government committee. The government committee only regulates matters relating to what is required in respect of regulating the activity relating to the shareholding and equity participation. But beyond that, as regards approval on an approved project, there has been nothing.

The Gruislin case is in volume 4, annex 87, 24.1.

THE ARBITRATOR: The longest discussion I see is at page 39, 25.5.

DATO' VOHRAH: But I thought 25.3 is the one that really concerns us. Because it says -- he discusses Part 2 of the CIC Guidelines, which is to ensure the orderly development of the capital market, and he says you look at the content. The content of the CIC approval is for approving the orderly development of the capital market,

but it does not amount to approval by the government of the investment as an approved investment.

THE ARBITRATOR: I can read what it says. I am just telling you that that discussion is only relevant if he comes to the first conclusion that you need to have a separate approval. If you need to have a separate approval, that requires an interpretation of the treaty. What I am saying is that he does not discuss the interpretation of the treaty except at 25.5, and he simply discusses it as a conclusion without explaining how he comes to the conclusion. Unless I have missed something, which is why I ask you for assistance.

DATO' VOHRAH: Did you point out 25.5; is that what you are saying?

THE ARBITRATOR: Yes, 25.5. He says you got approval from the CIC, but that is not what the proviso requires. What the proviso requires is regulatory approval of the project --

DATO' VOHRAH: Right.

THE ARBITRATOR: That is a conclusion, not a discussion.

DATO' VOHRAH: Okay. Well, it is the only case.

THE ARBITRATOR: Sorry, I am holding you up, because you need to take me through the Burmese case. I know you rely on the Gruislin case, and I can read it further. As I said, if I miss something, please point it out, but

that was the part of the award that explained his reasoning.

DATO' VOHRAH: Well, in the Burmese case, first and foremost it does show that Malaysia is not the only one that has the mechanism for approval put in this IGA. Can I just deal with the facts so that --

THE ARBITRATOR: Do not worry about the facts.

DATO' VOHRAH: Okay. Well, Article 2.3 of the ASEAN agreement --

THE ARBITRATOR: Can I cut it short, because I have read this case, and what it says is that on the wording of the ASEAN Treaty -- which says that the investment must be specifically approved in writing and registered by the host country, and it has to be for investments prior to the date of the agreement coming into force, which was the case for this particular investment, it has to be registered subsequent to the entry into force. What was found as a fact was that there was no subsequent registration.

But what the tribunal found in this case was that prior to the coming into entry of the treaty there had been a registration because this particular investment had been registered with the Myanmar Government, although not specifically for purposes of investment treaty protection. You will find that there is a remark

by the tribunal that in their view, if the Myanmar Government approved the investment per se, that meant an approval for purposes of investment treaty protection. It was only in the case of this particular applicant, this particular claimant, because his investment was prior to the treaty, and the treaty specifically says after the treaty comes into force you must have a specific registration for purposes of the treaty, they could not point to any specific registration or application, that the applicant failed.

So in terms of general interpretation of words which are not dissimilar, in fact if anything stronger than the Malaysian-British treaty, the tribunal came to the conclusion that if a government approves an investment it is approving it for all purposes, not just for purposes of permission to come in, it also approves it for purposes of treaty protection. Paragraph 59.

So I mean, for what that is worth -- and I appreciate it is a different treaty, a different wording, you have to come and analyse each treaty's wording and come to a view about what it actually means. If you can help me with this, please do.

The words are these, at paragraph 59 of this Burmese award:

"In the tribunal's view if a State party to the 1987

ASEAN Agreement unequivocally and without reservation approves in writing a foreign investment proposal under its internal law ..."

Under its internal law, that is the general law:

"... that investment must be taken to be registered and approved also for the purposes of the Agreement. In other words, when a foreign investment brought into Myanmar by a national or company of a party to the 1987 ASEAN Agreement has been approved and registered in writing, as such, by the relevant authorities under the laws of Myanmar after the entry into force of the agreement for Myanmar this investment shall be deemed specifically approved in writing and registered for the purposes of Article 2.3 and is entitled to treaty protection."

So it did not require a specific approval under the treaty -- sorry, they do not have the words, Dato' Abraham?

DATO' VOHRAH: They do not have "approved project".

THE ARBITRATOR: "The investment must be specifically approved in writing and registered by the host country." So you have to tell me what is the difference between that and an approved project. An approved project is a project that is approved. That we can agree on. You are trying to read into those words "approved under the

treaty". That is what you are submitting?

DATO' VOHRAH: That is right. But that paragraph does say that it has legislation which allows for registration, and once it is registered it becomes part of --

THE ARBITRATOR: No, none of the ASEAN countries, apparently -- except for Singapore, which I have not had time to check up on -- had any legislation that specifically allowed for the registration of treaty protection agreements, treaty protected investments as such. So, I mean, we are perhaps talking a little bit up in the air.

DATO' VOHRAH: Can I bring you to page 553, the top paragraph.

THE ARBITRATOR: Paragraph 60.

DATO' VOHRAH: Paragraph 60. It says here in the second-last sentence:

"It is true that the procedure for giving approval under Article 2 is not spelt out and there appears to be no indication to be drawn from ASEAN practice on this point. But effect must be given to the actual language of 2(3) [which your Honour read], which requires an express subsequent act amounting at least to a written approval and eventually to registration of the investment.

"The mere fact that an approval and registration

earlier given by the host state continued to be operated after the entry into force is not sufficient."

THE ARBITRATOR: That is why this particular claimant failed, you see. What the tribunal said is: if you take it from this day on, then if you apply for permission and you are given permission to invest that permission is taken to be approval for the purposes of the treaty. But because in this case he had his approval before the coming into force of the treaty, there needed to be another, a new application and a new approval, which was not found in this particular case. That is what made this claim fail, you see. So I do not know whether or not that might somehow assist us in interpreting a Malaysian treaty.

DATO' ABRAHAM: That is our case, in the sense that what they are saying is that because the three ministries were involved and the salvage agreement was approved, therefore it has been approved as an investment. What we are saying is: no, it has to be specifically approved as an approved project within the meaning of the IGA.

THE ARBITRATOR: I know that is what you are saying. I am just asking you from where you get the authority for that interpretation, that is all.

DATO' ABRAHAM: It is a plain reading of that section.

THE ARBITRATOR: It is not that plain, but ...

DATO' ABRAHAM: I think we come from this position, your Honour. You can come and invest in Malaysia, but you then take the risk: if your project is not approved then you do not get the protection of clause 1(b) because we have put in the words "approved project" for a specific purpose, and that is to be found in 47 of our BITs. Otherwise we --

THE ARBITRATOR: All I am saying to you is that if you wanted that interpretation you could have used the same wording as appears in the 1987 ASEAN agreement, then it would have been quite clear. Even then a tribunal has said that approval for one purpose covers another purpose, but that is it.

Okay, is there anything else you want to tell me about the Burmese case?

DATO' VOHRAH: I do not think I want to say any more.

THE ARBITRATOR: Okay, that is fine.

The secretary is pointing out that the Malaysians took a little longer than their allotted time, so if you want a little longer, Mr Eren, you are welcome.

Ten minutes or so, if you want to go over your time.

MR EREN: I prefer to stick to the schedule.

THE ARBITRATOR: Try to wrap up quickly. We will extend the time for Mr Eren.

THE ATTORNEY GENERAL: I am very much obliged.

Reply submissions by THE ATTORNEY GENERAL

THE ATTORNEY GENERAL: Your Honour, I just wanted to point out that if you look at the contractual agreements, there is basically the first contractual agreement, and then after one there is a variation agreement, followed by two extension agreements. Now this was signed between the claimant and of course, on behalf of the government, by the Marine Department, which is of course obviously the supervising authority. Those documents are found in respondent's bundle 1, items 6-8. I will not go into that.

The relevant agency that represented the government in signing those agreements was from the Marine Department, which was the supervising authority, which was looking into all the salvage claims obviously because it is in the sea.

When we go further we look at the next item, that would be item 10 in the bundle, and that is the agreement for an auction signed between the claimant, the Government of Malaysia, and also the other parties, this Christie's of Amsterdam. Who signed on behalf of the Government of Malaysia? It was a representative of the Ministry of Finance, not the Marine Department. Why? Simple reason: because every ministry, every department's own agencies sign with certain authorities

and powers, and they cannot be overriding any other department's powers. They have to sign within their authority.

Having pointed that out, of course the Government of Malaysia has its own respective departments and ministries which are in charge of specific matters within the ambit of their authority. They cannot go further. One cannot sign for another.

THE ARBITRATOR: I am sorry, Mr Attorney. I understand full well the argument. What you are saying is that whatever was done on the part of the Malaysian Government was done by the appropriate ministry or officer in charge of that function. They are not quarrelling with you about that. The quarrel is not about whether or not the appropriate officer in the Malaysian Government dealt with them. The question is whether or not that is sufficient for their purpose.

We get back to this question of interpretation: do you need an extra layer of approval? Which is nothing to do with whether or not the officers that have dealt with them are the correct officers. Both sides are agreed on that.

THE ATTORNEY GENERAL: What I am saying here is that -- of course I am repeating what I said -- it must be confined to the particular article which talks about the

appropriate ministry and talks about, of course --

THE ARBITRATOR: You have to satisfy me that the treaty requires a separate layer of approval, that is all. Once you satisfy me, that is the end of it. They do not have that separate layer of approval; that is not in dispute. The question is whether the treaty requires a second approval, other than the approvals that they have already got. That is the issue.

THE ATTORNEY GENERAL: Obviously we have shown from all the documents that we have produced, for instance the approvals given by the ministries to the investors from the United States and Germany and so on, that is the practice in our country, and everybody knows that. You go through the relevant authority --

THE ARBITRATOR: I cannot accept statements from the bar that "everybody knows that". Frankly, I do not think that really counts. We are here concerned with an issue of law. It is not whether they know it or do not know it. If that is the law and they do not know it, that is too bad; and if it is not the law and you publicise it, it still does not affect what the law says. So it gets down to what is the law, what is the correct interpretation of the treaty.

THE ATTORNEY GENERAL: I will not go further than that. The only thing that I mention is what I have mentioned: that

that is the practice that has been done, and we have shown that through the articles. I will not go further than that.

Now, the other matter that I want to raise here is that learned counsels for the claimant have made arguments on investment that may amount to the fact that every single contract entered into between a private entity and the Government of Malaysia must be automatically accorded that particular protection under the IGA.

Now, if that is the correct interpretation, which of course we deny, that is our stance -- I will not enter into arguments about it -- it would automatically render Article 1(1)(b)(ii) superfluous. Then what is the point of having that protection? Because if you enter -- if any private entity that enters an agreement with the Malaysian Government is immediately accorded that kind of protection then there is no necessity at all for that Article 1(1)(b)(ii).

THE ARBITRATOR: I think that is meant to cover unlawful investments --

THE ATTORNEY GENERAL: Maybe. At the most it could -- what they are contending is at the most it covers unlawful investment. But we will be looking at unlawful investments in that manner; we do not look at it in

terms of investment. Any unlawful investment automatically becomes an offence. It must breach some kind of laws or something. But I will not go further than just stating that. That is the position of the Malaysian Government: we cannot accept that as an automatic kind of grant.

Now the other issue that I want to raise is that both parties accept that section 34 of the Arbitration Act of 1952 does not accord judicial review for international arbitrations. I believe that is their understanding. But this is what I have to say: the claimant entered into an agreement with the Government of Malaysia with a provision under clause 32 which was providing an agreement that definitely allows protection -- well, reference for judicial review for domestic arbitrations but not for international. They knew about it, and that provision was allowed in, clause 32.

Now, what I really like to know is why the claimant, being represented by able legal experts, opted for international arbitration with their eyes wide open. They went into that and were fully aware of the provisions that were quoted to them. With all these legal experts, they opted for this international arbitration.

Now, with respect, of course, to learned counsels cross the table, of course I would not think that it would be that civilised to accuse Malaysia of being uncivilised for having that section 34. I also complement my learned friend's argument on this matter, because there was actually a reference to these as -- you know, that it may not be civilised. But I do not think it would be right to say that.

At page 63 of the claimant's reply the claimant chronicled and described in their own words the ineffectiveness and corruption within the Malaysian legal system. I am not arguing on the issue of the judiciary, but I am just making a reference. Why on the one hand they are saying I should be allowed to have this provision to appeal for a judicial review before the courts? You must have that provision; they are saying that. Section 34 should not be there; that is what they are saying. They are saying just now what they have contended is that they should be allowed even for international arbitrations to refer the matter for judicial review. If you are not allowed then you are denied justice. Basically that is what I understand them to have said.

My contention is simply this: if on the one hand you have argued to us that our legal system is fraught with

corruption and being ineffective -- that is their submissions in the reply to the memorial on the question of jurisdiction, not on the substantive case -- why are they now arguing this matter before us here?

Now, the way I look at it is this: if what they are saying is true, what I fail to comprehend is why my learned friends across the table are complaining about section 34, in this sense: because section 34 would definitely lend assurance to the claimants that they shall -- that the courts, or rather the Malaysian judiciary, shall in no way interfere with their matters. Because they have said our legal system is fraught with corruption, then section 34 lends them assurance, or rather a guarantee, that the Malaysian judiciary will not interfere.

I cannot help but also understand that the claimant is actually hanging on to these allegations, whether it is hearsay or not it does not matter, but merely to defend the present position, even at the expense of contradicting their earlier statements. That is all I have to say.

THE ARBITRATOR: Thank you. We will now take our break and after that Mr Eren can conclude.

(3.40 pm)

(A short break)

(3.55 pm)

DATO' VOHRAH: Your Honour, can I just intervene for two minutes, because I just found a document which may be useful in the context of what we were discussing on approved projects.

Can I refer to volume 2, annex 50. There is this document called Investment in Malaysia Policies and Procedures, published by the Malaysian Industrial Development Authority, and it appears from pages ... and it lists 16-18. Now I realise that I need to probably produce the whole document for the purpose of this thing, and I undertake to do that. But what is important is that at page 16, somewhere near the bottom, it says "investment guarantee agreements", and it says:

"Malaysia's readiness to conclude investment guarantee agreements, despite the existence in the Malaysian constitution of a guarantee against nationalisation ...", et cetera.

If we turn on to the next page, the bottom of the page:

"The Ministry of Trade and Industry issues letters of coverage under respective investment guarantee agreements to approve projects in Malaysia. Applications for letters of coverage should be made to the Director, Industries Division, Ministry of Trade and

Industry."

I just thought I should bring it to your attention. Of course, on the next page is the reference to the Convention on the Settlement of Investment Disputes.

That is all. I undertake to produce the full text of this document. I am sorry for this interruption.

THE ARBITRATOR: I think you are really wanting to draw my attention to the bottom of page 16; yes?

DATO' VOHRAH: Yes.

THE ARBITRATOR: And the top. The question really is whether that is directory or mandatory. What is the date of this document?

DATO' VOHRAH: I will give you that.

THE ARBITRATOR: Okay, thank you. Right, Mr Eren.

(3.56 pm)

Reply submissions by MR EREN

MR EREN: I would like to dive directly -- if you forgive the pun -- to the respondent's issues that were raised in the previous seance.

There is this repeated insistence that we are here on a pure contractual claim. As we have said before many times, we are alleging violations of the BIT, we are saying breach of treaty, not breach of contract. And that is really all we have to stay at this moment. We are not at the merits stage where we have to prove

that that is in fact what occurred. It does not really take too much to separate these two concepts.

You talked about the Sri Lanka case, ARB/002. This talked in terms of a possible investment. These were pre-contract expenditures; there was no binding contract pursuant to which expenditures were made. That is clearly not the case here. Mr Ball's company expended funds pursuant to a contract and, as the honourable arbitrator articulated, all investments are made pursuant to a contract. So the Sri Lanka case is not on point at all; it actually defeats your argument.

You next talked about the NAFTA case, again advancing the point of the elevation of mere contractual claims to the international plane. Again, whether we succeed in this argument or not is a merits issue. We have several causes of action for breach under the BIT. All may succeed; one may succeed. All we need is one. So the emphasis put on that issue is really misplaced during this phase of the arbitration.

THE ARBITRATOR: Mr Eren, sorry, can I just interrupt you. I just want to mention it before I forget. I believe you have set it out in your memorial, but as a result of today's submissions if you want to say anything different from what you are saying in your memorial -- because I got the impression from your memorial that

there were only about three ways in which you were framing your claim, and from what you are saying now, if that is not the case, if you actually have a more expanded basis for alleging breaches then could you either set it out now or in a note later on, so that I will be sure that I understand the basis for your claims very clearly?

MR EREN: Sure.

THE ARBITRATOR: Since I am on this, I was intending to say this at the end but I might as well say it now, to the extent that anything has been said today by any counsel that is not in the memorials, could I ask both sides eventually to let me just have a short note to identify the new points or the new cases that have been raised, so that I can be sure that when I come to write the award I will have taken into account all the arguments.

I can read the memorials again, and to the extent that you have been summarising those arguments to me, that is fine. But obviously there has been some new material introduced, new arguments raised. Probably the simplest way would be to wait for the WordWave record to arrive, and then to just give me in bullet point form: these are the new points that our side made at the oral hearing, and you will find the arguments at the following pages of the transcript. And that could apply

to both sides. So that I make sure that to the extent that I take your arguments from the memorials I will supplement it where necessary by anything new that has been said today. I just want to make sure that I have a record of that, or it is brought to my attention, otherwise it might slip my attention when I am reading the record.

MR EREN: We will be sure to bring it to your attention, I am sure. To the extent that what we are saying here is in addition to that, we will definitely supplement the record in that regard.

You cited next the SGS v Philippines case again. There the tribunal found that there was an investment, the tribunal found that nonpayment of invoices did not amount to expropriation. But the tribunal did hold -- and I am reading from the award:

"The tribunal held that SGS's claim for nonpayment of invoices fell under Article X(ii) which provides that each contracting party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other contracting party."

So the tribunal in Pakistan held that the nonpayment of invoices was not expropriation, but it could rise to the level of a BIT claim pursuant to this observance of the all-obligations provision, which is similar to the

provision that we have in the UK-Malaysia BIT.

The Joy manufacturing case: again we covered that territory this morning. The facts here are quite dissimilar. The essential and material element being that MHS took risk in investing, whereas the facts in Joy were merely a bank guarantee, and moreover Joy did not take part in the enterprise risk associated with the mining of phosphates in Egypt.

Second, section 34. Again I am hearing contradictory statements from the respondent in this regard. You are saying that the law is unsettled, yet there seems to be a firm conviction of what the law provides, and there are arguments to that effect. Again I do not think that is something reserved for the merits phase.

The third item: exhaustion of local remedies. Well you pointed to the fork in the road argument, and I think as the tribunal has observed, as the tribunal in Azurix v Argentina, there is no fork in the road issue here. This is not the same claim, as we have reiterated and continue to reiterate. We are not seeking to arbitrate the breach of contract claim that was arbitrated in Malaysia.

Moreover, again on the issue of exhaustion of local remedies, the point is that it is limited to three

months. The treaty is quite separate on this point. The words have very plain meaning; they are not ambiguous. I do not think we need to look outside the four corners of the treaty to understand what the treaty means in light of the clear language.

So we should limit ourselves to the language of the treaty. But if in fact we need to look outside -- and this is a case that you cited in your submissions supporting your proposition, but as we found out, that case actually supports our proposition that there is no additional registration requirement. There just is not. Approval means approval for all purposes.

You know, that would stand to reason. Can you imagine what you are proposing and what you are advancing? First of all, you have said that there are no British investments covered by the UK-Malaysia BIT, no one has applied. This is a dangerous statement for your own government, not for us. I would seriously consider retracting that statement, otherwise it is a part of the record.

Article 7 in the BIT is sufficient. Again the fork in the road argument is specious. This came after the dispute arose. And there is the res judicata argument that Arbitrator Hwang referred to.

THE ARBITRATOR: Mr Eren, can I just clarify with you. Just

now when you were talking about the exhaustion of local remedies and you said three months, do I understand you to say that what that sentence requires is that you have three months in which to exhaust the local remedies and after that you are freed of the local remedies?

MR EREN: No, I think it says you have three months to do whatever you can. You have three months; you need to exercise a good faith effort in trying to come to resolution. And it does not say court remedy, it says "or otherwise".

I think at least the United Kingdom probably foresaw that the exhaustion of local remedies might not really serve anyone's interest, so I think the treaty drafters were deliberate in putting the language in the limitation of the three months.

The ASEAN case involving Burma: as I said, if the drafter wanted to be specific, I think they could have been. They could have been inserted a registration requirement. There is no such requirement in our BIT. We do not see it.

What you are saying is that although we the Government of Malaysia approved -- you did approve the contract -- MHS should have somehow applied to MITI or another ministry -- I guess it would be MITI in this case, based on what you have said. There was some

possibility that MITI or another ministry would possibly withhold approval of this, even though the government itself had entered into the contract. It just does not make sense. For what good reason are you erecting this very technical and formalistic argument that has no authority in law or administrative practice? There is no legislation on this point in Malaysia, and the administrative practices that you are advancing are merely examples.

The administrative practice, as far as I can see with respect to the UK, there is none that are required. Again you are supporting our argument.

The Lowen case: again, there I think the standard was the exhaustion of local remedies. The tribunal held that the Missouri court's actions were not final acts of the judiciary. We agree. If the standard is exhaustion of local remedies, I think you have to take it to the maximum extent provided under the local law. So we do not disagree with Lowen; again it is a question of the facts.

With respect to the exchange of letters, you have summed it up by saying there are no British investments in Malaysia, even though Britain I believe is the largest investor in your good country, none of their investments are protected by the UK-Malaysia BIT. That

is interesting.

The Deutsche Bank and other examples of letters from MITI or other industries, these are examples of where the government itself is not a party to the contract. It would be somehow redundant for the Ministry of Finance or the committee comprised of several ministries, having negotiated something for three years, entered into it, separately to somehow seek another layer of authorisation. Why would you? It would be inconsistent with your policy, I think, for your right hand to do one thing but your left hand not to.

I mean, why would ... If another layer of authorisation were required, which it is not, why would it not have been forthcoming? It would have been. Because of that there is no need to apply, it is just utterly redundant, especially if the application is to be made to a subordinate ministry whose jurisdiction does not include marine matters.

Again, the Gruislin case you raised. We have no quarrel with the holding in Gruislin. Gruislin was investment in securities trading on the secondary market, and it is argued that it was an investment in something that had already been invested in, it is secondary market trading. Gruislin was unknown. The CIC approval, as you say, was a general approval for the

operation of your capital markets -- which is a great thing, it was a regulatory action -- so it was not specific to Mr Gruislin; it was open to the public. In any event, the tribunal held that if there was a cause of action, Gruislin's recourse was to the fund manager or the mutual fund rather than to Malaysia itself, because of investment control reasons.

I think we can bottom-line it by saying that there was no separate approval required. We see no authority in law or otherwise that would require British investors to seek separate approval, especially in the light of the circumstances of this case. It is just mind-boggling to me that your good selves would come to this tribunal and advance this argument.

We think that the Burma that case is instructive, it is persuasive. But again I do not think we need to resort to cases outside where the language is clear. But the Burma case is nevertheless instructive, and I think it advances our arguments as to why no separate or further approval was required.

I mean, why would Malaysia enter into any agreement for which it would not give BIT protection? That is basically what you are saying: we enter into agreements, but they are not protected by the BIT. I do not think you can have it both ways.

Mr Ball, perhaps you would want to answer: why did you opt for international arbitration pursuant to the rules of UNCITRAL and KLRCA?

MR BALL: We had a very bad experience with the government up to the middle of 1995, we had had an enormous amount of trouble getting paid --

THE ARBITRATOR: Do you want to take a procedural objection?

DATO' ABRAHAM: I think he is represented by counsel and I think counsel should speak.

THE ARBITRATOR: Mr Eren, is it possible for you to convey Mr Ball's sentiments on his behalf?

MR EREN: Well, I guess it is. But I think he would be more effective in doing that, and I do not see any reason why he should not.

THE ARBITRATOR: It is just that if you have a representative normally you operate through the representative. We have not gone into this, but I am not paying any attention to any form of witness evidence at this hearing, and although I have not said so, I am not going to pay attention for example to the witness statements of the auditor general and so. It is really documents that are not statements concocted for the purposes of this hearing. So by this token I should not also consider statements made by Mr Ball in that regard. I am perfectly willing to hear what Mr Ball has to say

through you, Mr Eren.

MR EREN: Okay, sure. MHS had suffered enough at the hands of the Malaysian Government. The last thing it wanted was the interference or the lack of independence of the Malaysian judiciary with respect to its quest to resolve the dispute through arbitration. In arbitration, MHS deemed, through the KLRCA process, that it would have a fair hearing which would not be interfered with by the Malaysian court system. This is the primary reason why they chose the KLRCA route.

THE ARBITRATOR: Sorry, I may have missed something there. It was possible, was it not, to go to the KLRCA without invoking section 34?

MR EREN: Well, I think they were bound under the contract to pursue the dispute resolution that they had agreed to, and through a consent decree both parties agreed to submit the matter to international arbitration under the KLRCA and the UNCITRAL Rules. They did that for the good reason that they did not trust the Malaysian courts, they thought that they would get a fairer hearing. Because if they were left with the dispute resolution pursuant to the contract, the intervention of the Malaysian courts in the process was always possible.

The matter could have been dragged out instead of in arbitration at the courts, to the extent that the

government would opt for that. So it wanted a stronger arbitral forum in which to have its claims heard, but unfortunately that did not come to pass.

THE ARBITRATOR: Mr Ball, did you want to add anything to that? I thought you --

MR BALL: Yes, Mr Arbitrator, I am really upset that I am not allowed to have my say. I have been muzzled, bullied and abused by this government for eleven years. I really object to having brought this matter to this hearing, the highest possible commercial court in the world, and I am still not allowed to have my say.

I feel this is just another tactic on the part of the government, the very tactics that have brought us to arbitration in the first place, fundamentally dishonest tactics. If you have nothing to hide then let me speak; if you want to cheat and suppress and bully me, continue the way you are.

THE ARBITRATOR: Mr Ball, I was not expressing a general invitation to you to give vent to your feelings. I just wanted to be sure that I understood all that had to be said on your side. That is why you engage professional representatives, because they can sift out from your instructions what is relevant. That is why I preferred Mr Eren to make that submission, because he could see what could be relevant. I know that you feel strongly

about it, but right now this is -- how shall I put it? -- rather dry, boring legal stuff where I need dry, boring legal lawyers to help me, rather than the emotional side of things. That probably would be relevant if we were going into the merits of it.

In so far as there was a reason why you did not elect to go for the contractual route I think Mr Eren has given an explanation which I can well understand. I just wanted to make sure that that was a complete explanation, and if there is something else that you would like to add to it I will listen to you.

MR BALL: I would like to add something. Much has been made of the fact that we employed very competent counsel to advise us before going to arbitration. We had Mr Davidson as our counsel, and he said to us that we had these two routes in arbitration: either to go to arbitration under the UNCITRAL Rules or the Rules of the KLRCA. And he did point out to us that one gave us and the government the right of appeal and the other did not. We were at that stage so exasperated with the government that we did not want them then to have the right of appeal, because we feared that they would drag out the appeal for another ten years. So we said: no, we want an arbitration where it is cut and dried, we get a decision within a year, and it is all over.

So that is why we elected to go with the no appeal type arbitration, on the assumption that the arbitration would be done correctly. And the disappointment was of course that it was not done correctly.

MR EREN: I would add to that that I think that was a legitimate expectation on the part of MHS.

The Attorney General has made a comment about how on the one hand we say that the system was corrupt and on the other hand we were denied justice. We were denied proper justice. It is not simply a question of access. We want access to courts that are independent, that work, and that do not drag people through the court system for ten to twelve years. Your court system -- and this is, I think, widely recognised -- has some shortcomings. It is these shortcomings which bring us to this tribunal. It is those shortcomings that we are complaining about, not the breach of contract. We are talking about a breach of a minimum standard of international law, and that cause is action is provided to us under the UK-Malaysia BIT. Again, it is not a contractual claim.

THE ARBITRATOR: Sorry, I just need one point of clarification before I forget. At the hearing before the High Court, did the government take the position that the court had no jurisdiction because of

section 34?
THE ATTORNEY GENERAL: Yes.
THE ARBITRATOR: So that was raised. And we do not know whether that was the divisive factor because he did not give any reasons.
MR EREN: We object. We do not know that. We do not know what the court said. The court dismissed the case; we do not know why.
THE ARBITRATOR: I did say that since the judge did not give any reasons we do not whether or not that argument was decisive. I just wanted to know from the government whether they raised that argument.
MR EREN: Oh, okay.
THE ARBITRATOR: It is a question of consistency --
MR EREN: Whether the argument was raise, fine.
THE ARBITRATOR: Yes. To that extent I assume that we can allow the Attorney General, since his department ran that case, I assume.
THE ATTORNEY GENERAL: Just one word. In fact, we have the submissions of both sides actually that were made at the court there. We objected, and we said that it does come within the ambit of section 34, and they agreed that however -- as I said earlier this morning, they went into the argument that there is this issue of inherent jurisdiction of the court despite section 34.

THE ARBITRATOR: I do not really want to get into that because I do not think at this stage my decision is going to turn on anything that happened in the court, at this stage, because to me that is a merits issue. Again before I forget, I think later on both sides might want to -- I might need you to help me on this to identify -- I do not think this is in your memorial, Mr Eren, when for example you said that some of the points taken by the government in trying to stop this arbitration, on six or so grounds, you say that some of those grounds are not true jurisdictional grounds. So you might want to identify those either now or later. I would expect the government again to help me on that.

MR EREN: Well, we are going by the challenges raised in their memorial.

THE ARBITRATOR: Yes, as it were you have taken them on on merits, you have responded to them on merits. But I do not recall you saying that they were not true jurisdictional challenges. Because I have to apply my mind to that later on.

MR EREN: Sure, okay, we will clarify that, definitely.

We would like to, if we may, give a short presentation which goes to the issue of the investment activity involved in the Diana project.

THE ARBITRATOR: To the extent that it is going to be

evidence, again I do not want to receive evidence in a jurisdictional hearing, particularly without notice. What will the presentation show or demonstrate?

MR EREN: Basically it is a short presentation of the activity of MHS from start to finish. It is a condensed version of that. With respect to evidence, we received a bundle of documents this morning, and we did not object to that, we accepted it. I think this is analogous --

THE ARBITRATOR: That is really documentary evidence like statutes and things.

MR EREN: We can leave you a copy of the slide presentation; would that be satisfactory?

THE ARBITRATOR: Let us put it this way. I am happy to watch it. I have given you my views that for purposes of this hearing I do not feel that I want to rely on anything which is in the nature of evidence which is not accepted by one side or the other. So if you accept that that is the way I am going to approach things, since we are here and this thing has been set up, let us watch it for what it is worth, and the other side can always say what they want to say about it.

MR EREN: Sure.

DATO' ABRAHAM: Your Honour, we really do not see the need for slides at this stage, because we are dealing with

a pure issue of jurisdiction, which is a question of law. This is something that should come up at the merits stage if necessary.

MR EREN: The issue of whether there was an investment is at issue, the investment is at issue. This demonstrates and goes to the issue of investment. You have questioned whether an investment occurred, and this is just merely a service contract. Salini, the SGS v Philippines case all held that even a mere service contract was an investment, even one performed outside the Philippines.

So just like we have readily accepted what you have thrust upon us this morning without objection, we would like this presentation to occur. It is not irrelevant; it goes to the issue of establishing investment.

THE ARBITRATOR: Sorry, who is going to make the presentation? You?

MR EREN: Mr Ball.

THE ARBITRATOR: How long do you think it will take you, Mr Ball?

MR BALL: Seven minutes.

(4.27 pm)

Presentation by MR BALL

MR BALL: Shipwrecks are important to the study of history because they have been the most widely used form of

travel for centuries before aircraft came in, and all sunken ships provide a snapshot of human life at the time. So they provide an important means of recording what our predecessors did, and give rise to the study of archaeology.

Based in Singapore, of course, our primary interest is the trade of South-East Asia. You will see up in the top left-hand side the Port of Canton from which the Diana sailed, and on the next slide you will see the port of Madras, on the east coast of India. The Diana sailed from Canton to India, and it was purely incidental that she stopped in Malacca, in present day Malaysia, to take on firewood in the course of her journey.

Whilst the bulk of the trade in the Far East was carried in Far East junks, starting in 1500 European vessels started to arrive and carry more of the traffic. A dangerous activity: many vessels were wrecked in typhoons in the China seas, others were driven ashore or went ashore on navigational errors, and still others still founded at sea.

A wooden wreck never lasts for long once it has gone ashore. Everything above the sand level is destroyed, carried away by currents, waves; and the wrecks that sink in deeper water break up in exactly the same way.

Very seldom is anything more than the absolute bottom of the hull left from a wooden shipwreck.

What really sparked interest in South-East Asian shipwrecks was the discovery in 1984 of the Nanking cargo of porcelain gold. That got everybody interested in shipwreck salvage, and brought a number of people to Malaysia making applications for shipwreck salvage. I had worked on the Nanking cargo salvage, and consequently wanted to do another wreck myself. I went researching other ships in libraries around the world and very fortunately found a record of a ship that had sunk very close to Malacca, in Malaysia, quite close to where I lived in Singapore.

Now, the salient thing about this wreck was that, although it falls under the control of the Marine Department or the receiver of wreck, the receiver of wreck was not even aware of the existent of Diana, and even less was he aware of the position of the wreck.

So when we applied to the government for a licence, they considered our application for three years, and finally gave us a contract for 18 months. But that contract was not just a salvage contract: it was to research, to survey, to excavate, salvage, market, promote, et cetera. Many more aspects of shipwreck excavation than just salvage.

So what we did is we purchased a survey vessel -- this was the first of our investments -- and we equipped her with all sorts of navigational aids and electronic detection aids like magnetometers, side-scan sonars, in order to find the shipwreck somewhere under the sea. She lay of Malacca somewhere, and this is an idea of the kind of extent of sea we had to search. We drove our vessel up and down the sea with the instruments going all the time, and each we detected an anomaly on the seabed we had jump over board, go to the bottom of the sea and check out what was down there that had triggered the anomaly. More often than not it was junk and nothing of interest to us, though I must say we found 12 other shipwrecks before we located Diana.

The water was really deep, 37 metres, and, being close to Malacca and the Malacca River, very, very dirty. So at the bottom it was always dark. Even with a torch you could hardly see a foot in front of your face. It not only increases the danger of diving but of course also exposes you to all sorts of unseen and real and imagined dangers.

We searched the day and night, and it was finally at 5 o'clock in the morning of December 1993 that we came across the remains of Diana. This is exactly what she looked like. There was no visible sign of any ship, no

mast, no sails, no anchors, no canon, just a barely buried pile of plates. Here are some more photos, and this is all that existed of Diana at the time that we found her. As reported, these are the first two plates recovered from the ship.

She was indeed 3 miles off the shore, just north of Malacca, and we set up our base in a place called Tan Jung Bidara. The ship itself was buried completely under the sand. All the top-hamper, the mast, the hull, had gone, and all that remained of the ship was completely buried and had to be excavated 3 metres down into the sand.

This was our shore base, the closest point to the wreck. It was very peaceful and very rustic, but it was 120 miles away from the nearest source of supply, and everything for the salvage and the survey had to be brought in, mostly from Singapore.

After the first month of excavation of the wreck we managed to get more samples of the porcelain. This is Mr Colin Sheaf of Christie's, who flew out from London to come and examine our finds and confirm that the wreck that he had found was indeed Diana. With his confirmation we were able to proceed with the salvage, secure in the knowledge that we had the right wreck. So we mobilised a complete salvage barge, decompression

chambers, accommodation, compressors, all paid for by MHS, with no participation at all from the Government of Malaysia.

We took her out to the site and moored her over the wreck, and we worked for three months on this site, the divers going down every day, down to the wreck. Because of the dirty water they had to wear lights on their helmets, TV cameras -- and these are all oilfield professional divers. Only one diver from the Government of Malaysia once made a dive on the wreck, and he fled back to the surface after 10 minutes and said it was too dangerous to work down there. No other Malaysian Government representative ever came down under the water.

The divers excavated the porcelain in the silt, loaded it into these baskets and sent it up to the surface, where it was unloaded on to the barge, and the silt and mud were washed off on the barge before the porcelain was carried ashore, where it was one again washed, but this time in fresh water, and laid out to dry. We employed almost the entire kampong -- "kampong" means a village -- of people to wash, pack, inventorise and photograph the porcelain, all paid for by MHS.

The boxes in which the porcelain had been packed were recovered, and those that were still intact were

reconstructed on shore. In addition to the blue and white porcelain we discovered many other artefacts, including these sounding weights, and you will see some broken porcelain artefacts which we called "shards". We kept these separate, and ended up with a large quantity of them that were ultimately handed over to the National Museum in Malaysia. You will see that some of the boxes still had the original writing on them.

These very special plates were found with the packing still on them. It is straw, and when the straw was washed off we found underneath the coat of arms of the honourable East India Company. But these plates were what we call overglaze enamels. After they were fired in the kiln they were painted over, and they do not survive underwater because the salt penetrates the paint that is on top of the glaze and it turns into a very soft putty, whereas the blue and white plates which are underglaze survive for hundreds of years under the water completely undamaged.

Twice during the course of the salvage the entire Salvage Committee of government officials came down to the site and inspected everything that we were doing. We took them out to the barge, we showed them the diving operations, we showed them the porcelain recovery operations, we brought them on shore, showed them

everything we were doing with regard to conservation, packing, inventorising, photographing, and not once did they make any complaint about the way we were carrying out the salvage. In fact, when we asked them directly many months later, they declared that they had absolutely no complaints about the way in which the salvage had been carried out.

Many different shapes and sizes of porcelain are shown in this photograph, all in outstanding condition; they do not look at all as if they have spent 175 years under the seabed. These remarkably delicate fruit baskets were recovered by our divers intact and without damage, testimony to the careful handling that they were given. We recovered what were called ginger jars, with still the original fruits packed inside, samples of which were kept for the museums.

Many different shapes and sizes of porcelain. The government kept 650 items of these pieces of porcelain for their National Museum, and of course the payment for that is still in dispute, and the government also kept 30 per cent of the auction proceeds. So there was a substantial local benefit to the host country.

These remarkable plates are chafing dishes. They are actually double-walled plates. One puts hot water in through the ear on the right-hand side and the hot

water inside the plate keeps the food warm. This very famous pattern is called the Fitzhugh, and you will see examples of it in the Philadelphia Museum. I think we are the only other source of it, apart from that museum. Many remarkable heart-shaped dishes, also very popular at auction, and huge quantities of coffee cups, tea cups and these starburst dishes.

The entire collection was ultimately sent to auction at Christie's in Amsterdam, and it was laid out in their warehouse. This is actually a picture of the Nanking cargo, but our cargo was laid out in exactly the same way, on exactly the same shelves, and people queued outside Christie's in exactly this manner to come and see the Diana cargo prior to the auction.

During the auction itself we had a similar setup like this, with the buyers sitting in the rows and each buyer holding his bidding paddle. The auctioneer, when he puts a piece up on offer, people who wish to bid raise their paddles, and he keeps going round the room taking bids until all except one bidder has dropped out, and he finally knocks the piece down to the highest bidder. It is not a case of the first person who bids getting the plate; it is the highest bidder, the one who lasts longest, who gets the item.

That was the highlight of the entire Diana

operation, the Christie's auction. They did a fabulous job of promoting it, and they sold every piece except the armorial plates, which had been given a reserve price by the government, against Christie's advice, which did not sell. They were later sold by private treaty. Apart from that, everything sold at the auction, and Christie's considered it a success. Thank you.

(4.42 pm)

THE ARBITRATOR: Thank you, Mr Ball.

MR EREN: Buttressing our arguments that there was investment. There is additional information for the tribunal to consider and for the respondents also to consider in this regard.

I would just like to sum up. MHS has locus standi. The argument was made that Mr Ball had to be a majority owner of MHS prior to or at the time of the execution of the contract. That is clearly not the standard. The standard is before the dispute arose. There is no dispute that he was the majority owner of MHS before this dispute arose. He continues to be the majority owner of MHS.

There is no doubt that MHS's claim is to money under the contract which constitutes an investment. It is clearly defined as such in the BIT. We do not

necessarily need to go out of the four corners of the BIT, but in case the tribunal seeks further support in this regard, the cases of Salini v Morocco and SGS v Philippines support this contention. Where in Salini the construction of a road for the Moroccan Government was seen to be an investment; and in SGS v Philippines the rendition of certificate services was also seen to be an investment by the tribunal. We have --

THE ARBITRATOR: Sorry, before you move on from there, because I might forget if I do not ask, one of the features or characteristics that has been identified as being a requisite of an investment is that it must contribute some substantial economic benefit to the host country. I do not have immediately in my head the kind of value of the whole project. Is it anywhere in --

MR EREN: It is several millions of dollars --

THE ARBITRATOR: Yes, I have some idea because of the amount that is claimed. But is there somewhere where the total value of the wreck appears and --

MR EREN: Yes --

THE ARBITRATOR: Or the amount that was invested by Mr Ball's company?

MR EREN: Not the total amount of the recovered items. But we do have information, but it is not part of our memorials. We can supplement the memorials to that

effect, if you wish.

THE ARBITRATOR: Yes, because just thinking out aloud, it might be useful to compare it with the amounts in the Salini case and the Philippines case. Of course, in those two cases, while they were contracts for services, in a way they contributed to the infrastructural development of the countries concerned, so you might want to address that point, in what way you meet that criteria.

MR EREN: Sure, absolutely we can address that. I think, suffice it to say that the projects in question were of sufficient importance to Malaysia for them to have authorised MHS to conduct the salvage operation, and their museums as well as their own treasury benefited from the auction proceeds, to the maximum extent that you can benefit from a salvage operation.

THE ARBITRATOR: Except that, unlike I think the Salini case, and perhaps the Philippines case -- I have not gone into facts -- on the face of things it would appear that the Malaysian Government had nothing to lose. This is the point that Mr Ball is advancing in his own cause, because they are not out of pocket, all the risk is on him, if he does not recover it he does not recover it, and there it lies, and they do not lose anything, except maybe opportunity cost.

MR EREN: Right. Malaysia had everything to gain, and luckily for Malaysia as well as for MHS the salvage operation, the location, the survey, the salvage and the subsequent sale were a great success.

The third item: again I think we have gone over and belaboured the issue of approved project. We look to the four corners of the BIT. It is unlike the Burma case, where there is a specific requirement of registration. If the situation is, as the respondents contend, that there is another level of authorisation required, I think it would have been spelt out in the UK-Malaysia BIT. It is not.

The claims that we are advancing, again, are not breach of contract claims; they are claims justiciable under the UK-Malaysia BIT and international law. They include expropriation and denial of justice, but are not limited to those.

Five, MHS has met the standard with respect to the issue of the exhaustion of local remedies. The BIT provides for three months. Clearly, nine years have passed.

The Government of Malaysia's claim that there was no denial of justice or that somehow contractual claims cannot be elevated to the level of BIT claims is a merits matter, and not for the jurisdictional phase of

these proceedings.

For all of those reasons, and all of the reasons stated which are not challenged in our memorials, this tribunal has jurisdiction and it should decide so.

Thank you very much for your consideration.

THE ARBITRATOR: Thank you, Mr Eren.

(4.46 pm)

THE ARBITRATOR: I just want to discuss with you whether or not we need post-hearing briefs as such. I was not intending to ask for it; I think your two rounds of memorials are very full, very clear. There are some new elements added by both sides today, and that is the only issue that I thought maybe you could just help me with by putting on a piece of paper or two the new points that you have raised, and if you think you have developed them adequately in oral submission then all you have to do is give me the references in the transcript. If that is all that is going to happen then I would have thought perhaps within two to three weeks of today -- because you are going to get the record next week, and you can have one or two weeks after that to just tidy up, if you like, so that I have all the arguments on record.

Because I assume that both parties are satisfied with their memorials --

MR EREN: Just to clarify, we are limited to a one or two-page bullet point to supplement what we have already submitted? Is there a limitation?

THE ARBITRATOR: The idea actually was for you. It was an identification of the arguments you have already made, just something that points me to the transcript, so that when I read the memorials, which will be the main source of my award, I am sure that I will not have left out any arguments that I have to consider.

The idea was not to have another round of elaborate arguments which then would impel the other party to say that they needed to reply --

MR EREN: And could be inconsistent with what we have said here. We have no objection to that. We support it and we shall follow.

THE ARBITRATOR: Mr Attorney, are you comfortable with that?

THE ATTORNEY GENERAL: Yes, the respondent is fine.

THE ARBITRATOR: It is simply to point me to any new arguments that were made today that are not in the memorials. Unless I think of anything within the next week on which I need your help.

MR EREN: And you would like to have these submitted by ...?

THE ARBITRATOR: Well, we can agree a date that everyone is comfortable with. I was thinking roughly three weeks from now, but if you wanted it to take another week, by

all means.

MR EREN: Could we say by June 25th at the latest?

THE ATTORNEY GENERAL: It would be better to put two weeks upon receipt of the documents.

MR EREN: That is fine. Two weeks after receipt of the documents. Perfect. How about the date of transmission? Shall we make a date of transmission?

MR ONWUAMAEGBU: Transmission by email, so it will be received on the same day by both sides. So two weeks from the date of transmission by email.

THE ATTORNEY GENERAL: My colleagues are asking for three weeks, as they are engaged on other matters.

MR EREN: That is fine. Three weeks from the date of transmission by email?

THE ATTORNEY GENERAL: Yes.

MR EREN: Okay, that is fine.

THE ARBITRATOR: Ladies and gentlemen, thank you very much for your assistance, I think we can terminate today's proceedings.

(4.55 pm)

(The hearing concluded)

INDEX