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Malaysia Historical Salvors Sdn., Bhd. v. Malaysia: An End to the Liberal Definition of “Investment” in ICSID Arbitrations?

JOHN P. GIVEN*

I. INTRODUCTION

On March 5, 1817, the *Diana*, a British merchant ship bound for India, sunk off the coast of Malaysia in the Strait of Malacca carrying more than eighteen tons of fine porcelain from China.¹ It took Dorian Ball’s marine salvage company, Malaysian Historical Salvors (“MHS”), ten years just to find the wreckage of the *Diana*,² and four years for MHS to salvage and survey the approximately 24,000 recovered items of her cargo.³ Almost 178 years to the day after the *Diana* was shipwrecked, Christie’s Amsterdam sold much of the salvaged porcelain and other items at auction, fetching almost \$3 million.⁴

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1. Damon Vis-Dunbar, *British Investor Sues Malaysia Over Sunken Treasure*, Pleadings Posted by ICSID, Investment Treaty News, Apr. 11, 2006, available at http://www.iisd.org/pdf/2006/itn_april11_2006.pdf; See also *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*, ICSID (W. Bank) Case No. ARB/05/10, Award (May 17, 2007), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC654_En&caseId=C247 [hereinafter *Malaysian Historical Salvors Arb.*].

2. Rosemary McKittrick, *Deep-Sea Treasures*, LIVEAUCTION TALK, http://www.liveauctiontalk.com/free_article_detail.php?article_id=464 (last visited May 22, 2009).

3. *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶ 13.

4. *Id.* See generally DORIAN BALL, *THE DIANA ADVENTURE* (1995) (providing an

Nine and a half years later, a dispute between MHS and the Malaysian government over the salvage company's compensation was heard by the International Centre for Settlement of Investment Disputes ("ICSID").⁵ The sole arbitrator in the case, Michael Hwang S.C.,⁶ determined that the agreement between MHS and the Government of Malaysia did not satisfy the meaning of "investment" as required by Article 25(1) of the ICSID Convention, and ICSID, therefore, did not have jurisdiction to hear the dispute.⁷

This note discusses the arbitrator's decision not to extend ICSID jurisdiction to the MHS claim, in particular whether his interpretation of "investment" under the ICSID Convention was unnecessarily narrow. Part II summarizes the background and procedural history of the case, and also discusses why the *MHS v. Malaysia* award may be an important ICSID precedent. Part III discusses the meaning of "investment" in the context of the ICSID Convention and prior ICSID arbitral precedent. In Part IV, the arbitrator's analysis of "investment" is discussed and critiqued. Finally, Part V concludes that the arbitrator used an unnecessarily narrow definition of "investment" in deciding the question of ICSID jurisdiction. By overlapping the analysis of multiple factors on "investment" with a kind of "negative feedback" or "piling on"

interesting history of the *Diana* as well as detailing the complex process of finding and salvaging the wreck site).

5. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 18.

6. Mr. Hwang maintains a professional web site outlining the highlights of his legal career, including his numerous arbitration appointments. Welcome to Michael Hwang S.C., <http://www.mhwang.com> (last visited May 22, 2009).

7. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 146; International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules art. 25(1) Jan. 2003, available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf [hereinafter ICSID Convention]. Note that the award on jurisdiction was annulled in April 2009 by the two to one decision of a subsequent ICSID tribunal, following MHS's application for annulment. See *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*, ICSID (W. Bank) Case No. ARB/05/10, Decision on the Application for Annulment and attached Dissenting Opinion (April 16, 2009), both available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C247>. Damon Vis-Dunbar has written an excellent brief summary outlining the majority and dissenting views expressed in the annulment and dissent. Damon Vis-Dunbar, *Malaysian Historical Salvors Jurisdictional Award Annulled; Committee Split On Question of Economic Development as Criteria of ICSID Investments*, Investment Treaty News, Apr. 23, 2009, <http://www.investmenttreatynews.org/cms/news/archive/2009/04/23/malaysian-historical-salvors-jurisdictional-award-annulled-committee-split-on-question-of-economic-development-as-criteria-of-icsid-investments.aspx>.

effect, by minimizing some arguments of the Claimant, and by failing to fully consider that the economic contribution factor may sometimes require a broader factual context, the arbitrator's definition of "investment" is considerably more conservative than in previous cases.⁸

II. BACKGROUND, PROCEDURAL HISTORY AND RELEVANCE OF *MHS v. MALAYSIA*

A. *Background: The Marine Salvage Contract and the Dispute Over Payment*

Marine Historical Salvors Sdn. Bhd.⁹ entered into an agreement with the Government of Malaysia on August 3, 1991.¹⁰ The contract called for MHS to locate the wreck of the British merchant ship *Diana*, which had sunk off the coast of Malaysia in 1817, and to salvage, clean, restore, and catalog the recoverable cargo.¹¹ In exchange for MHS's services, and solely at MHS's risk and expense, the Government of Malaysia agreed to a sliding scale of compensation dependent on the total of the aggregate auction value and appraised unsold artifacts. MHS would receive 70% if the aggregate amount was \$10 million or less, 60% if the amount was between \$10 and \$20 million, and 50% if the amount was above \$20 million dollars.¹² Typical of many marine salvage contracts, the agreement was made on a "no finds-no pay" basis, meaning that MHS received no money in advance and would only profit from the complex salvage operation if both the recovery and auction were successful.¹³

8. ICSID arbitration is not subject to the doctrine of stare decisis, but decisions and awards can carry substantial precedential weight, particularly where they are considered well-reasoned. See Christoph H. Schreuer, *The ICSID Convention: A Commentary* 1082 (2001); See also Transcript of USCIB Young Arbitrator's Forum Panel Discussion at 3, Tai-Heng Cheng, *Is There a System of Precedent in Investment Treaty Arbitration?*, Oct. 22, 2006, available at <http://ssrn.com/abstract=1259943> [hereinafter Transcript of Tai-Heng Cheng].

9. Sdn. Bhd. ("Sendirian Berhad") is the Malaysian corporate extension for a limited liability company. CorporateInformation.com, *Company Extensions and Security Identifiers*, <http://www.corporateinformation.com/Company-Extensions-Security-Identifiers.aspx> (last visited May 22, 2009).

10. *Malaysian Historical Salvors Arb.*, supra note 1, ¶ 7.

11. *Id.* ¶ 7-8.

12. *Id.* ¶ 11. All dollar amounts mentioned in this note are in United States dollars.

13. *Id.* ¶ 10. See also *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*, ICSID (W. Bank) Case No. ARB/05/10, Claimant's Memorial on Jurisdiction, at 7, (Mar. 15, 2006) [hereinafter *Malaysian Historical Salvors Claimant's Memorial*]. Note that all *MHS v.*

After four years of salvage, inventory, and restoration work, items from the *Diana* were sold at auction in 1995 by Christie's Amsterdam, bringing in \$2.98 million. According to MHS, the Government of Malaysia withheld items from the auction valued at over \$400,000.¹⁴ Per the contract formula, MHS should have received 70% of the \$3.38 million, or \$2.37 million. Instead, the Government of Malaysia paid MHS only \$1.2 million, representing approximately 40% of the auction proceeds, and no payment at all for those items withheld from the auction.¹⁵

When MHS received substantially less than expected under the contract, the company initiated arbitration in Kuala Lumpur to recover the difference per the contract's arbitration clause.¹⁶ The result of this initial arbitration, as well as subsequent appeals to the Kuala Lumpur Regional Centre for Arbitration and then to the Malaysian High Court, was a denial of MHS's claim.¹⁷ An application to the Chartered Institute of Arbitrators alleging improprieties during the Malaysian arbitration proceedings was likewise denied.¹⁸

B. The Procedural History of the MHS v. Malaysia ICSID Arbitration

The International Centre for Settlement of Investment Disputes, part of the World Bank, was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was ratified in October 1966.¹⁹ The ICSID Convention is a multilateral treaty among more

Malaysia pleadings referred to in this note are available at <http://icsid.worldbank.org/ICSID/FrontServlet>.

14. Malaysian Historical Salvors Claimant's Memorial, *supra* note 13, at 10.

15. *Id.*

16. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 15.

17. *Id.* ¶ 16.

18. *Id.* ¶ 17. MHS explains the various attempts to recover its unpaid compensation through diplomacy and arbitration prior to seeking ICSID arbitration in its Memorial on Jurisdiction. See Malaysian Historical Salvors Claimant's Memorial, *supra* note 13, at 10-22. Malaysia's response is found in its own Reply Memorial. See Malaysian Historical Salvors Sdn., Bhd. v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, Respondent's Reply Memorial on Objections to Jurisdiction, at 30-43, (Apr. 19, 2006) [hereinafter Malaysian Historical Salvors Reply].

19. ICSID - International Centre for Settlement of Investment Disputes, <http://icsid.worldbank.org/ICSID/Index.jsp> (last visited May 22, 2009) [hereinafter ICSID]. The convention is known as either the ICSID Convention or the Washington Convention. See ICSID - International Centre for Settlement of Investment Disputes, About ICISD, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=Show>

than 140 nations, the purpose of which is to encourage investment in developing nations by providing an arbitration forum for settlement of investment disputes between contracting states and investors within those states.²⁰ ICSID is the “leading international arbitration institution devoted to investor-State dispute settlement.”²¹

In September 2004, MHS registered a request for arbitration with ICSID against the Government of Malaysia under the bilateral investment treaty (“BIT”) between the United Kingdom and the Government of Malaysia.²² As in the vast majority of cases brought under the 1965 ICSID Convention, *MHS v. Malaysia* began with a challenge to ICSID jurisdiction by the respondent.²³ Malaysia challenged ICSID jurisdiction on several grounds, arguing that: (1) both the Claimant and the claim fell outside the scope of Article 25 of the ICSID Convention; (2) both the Claimant and the claim fell outside the scope of Article 7 of the BIT; and (3) MHS’s claim was not an “investment” under the BIT.²⁴

The arbitrator agreed with Malaysia that the contract was “not an ‘investment’ within the meaning of Article 25(1) of the ICSID Convention,” and so dismissed the arbitration claim for want of jurisdiction.²⁵ Because the finding on “investment” was dispositive, the arbitrator did not consider the other jurisdictional challenges raised by the Government of Malaysia.²⁶

Home&pageName=AboutICSID_Home (last visited May 22, 2009) [hereinafter About ICSID].

20. See About ICSID, *supra* note 19.

21. *Id.*

22. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 18. Note that some arbitration documents refer to the bilateral investment treaty as the IGA rather than the BIT. For simplification this note uses the term BIT exclusively. See e.g., Malaysian Historical Salvors Sdn., Bhd. v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, Respondent’s Memorial on Objections to Jurisdiction, at 2, (Mar. 11, 2006) [hereinafter Malaysian Historical Salvors Respondent’s Memorial].

23. Eloise Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, 18 ICSID NEWS 2001, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewPublications&reqFrom=Main> (select “News from ICSID”, then select “Fall 2001”); Malaysian Historical Salvors Arb., *supra* note 1, ¶ 30.

24. Malaysian Historical Salvors Reply, *supra* note 18, at 4-5.

25. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 146.

26. *Id.* ¶¶ 148-49. Those arguments are also not discussed in this Note.

C. *The Relevance of the MHS v. Malaysia Award*²⁷

MHS v. Malaysia could have been a potentially important ICSID precedent for several reasons.²⁸ First, the arbitrator provided a detailed analysis of important existing ICSID precedent on “investment.”²⁹ Numerous arbitrations have addressed the meaning of “investment” under the ICSID treaty, and the arbitrator provided an excellent summary of current general practice in his extensive analysis of these cases. In addition, discussion of the *MHS v. Malaysia* facts and how they relate to precedent is clear and well organized.

Second, *MHS v. Malaysia* was the first marine salvage claim brought before ICSID.³⁰ As such, it stands to reason that resolution of the case could have significant weight in future marine salvage claim cases. The opinion might have even deterred the filing of future claims under ICSID. After all, if the largest contract within the marine salvage industry³¹ doesn't constitute “investment,” how could any other similar agreement?

Third, because jurisdiction was found to be lacking solely on the basis of ICSID Convention Article 25(1), there are no collateral issues clouding the analysis. Untangling the potentially complicated interplay of the differing meanings of “investment” under both ICSID and the BIT, for example, is not required to understand the arbitrator's holding.

Finally, *MHS v. Malaysia* was the first ICSID arbitration to make all pleadings publicly available.³² The availability of the pleadings allows for a more complete understanding of the process and context of parties' arguments by scholars, practitioners, and

27. This Article was written in the spring of 2008, long before the Award on Jurisdiction was annulled by a subsequent tribunal. *See* note 7, *supra*. Although the award, now annulled, can have no precedential value, the opinion of the Sole Arbitrator is still important as being a well written expression of a conservative approach to ICSID jurisdiction on investment.

28. There is no formal *stare decisis* in ICSID arbitration, however arbitrators frequently refer to previous arbitral decisions for guidance. *See* SCHREUER, *supra* note 8, ¶ 121; Transcript of Tai-Heng Cheng, *supra* note 8, at 3. Indeed, Michael Hwang S.C. relies heavily on arbitral precedent throughout the *MHS* Award. *See generally* Malaysian Historical Salvors Arb., *supra* note 1.

29. *ICSID Arbitration: What Is An “Investment”?*, PRAC. LAW COMPANY, Jun. 18, 2007, at 1, <http://dispute.practicallaw.com/2-368-0976> (last visited May 22, 2009) [hereinafter *What Is An “Investment”?*].

30. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 129.

31. *Id.* ¶ 134.

32. Vis-Dunbar, *supra* note 1, at 1.

future arbitrators than was previously possible looking only at the awards themselves. Practitioners will undoubtedly benefit from more fully understanding how the arbitrator addressed the jurisdiction issue, and the opinion may be a useful guide for parties desiring to either create or avoid ICSID jurisdiction when drafting future agreements. The practice of publishing all ICSID pleadings will hopefully become a common occurrence.

III. THE MEANING OF “INVESTMENT” IN THE ICSID CONVENTION

The concept of “consent” is central to the meaning of ICSID jurisdiction.³³ A Contracting State does not consent to ICSID jurisdiction in all cases simply by participating in the Convention.³⁴ Consent may be obtained through direct agreement of the parties, by legislation of the host State, or through an investment treaty.³⁵ For example, MHS argued that Malaysia’s consent to ICSID jurisdiction arose from the signing and ratifying of the UK/Malaysia BIT.³⁶ The investor may signal its consent to jurisdiction simply by instituting ICSID proceedings.³⁷ This is how MHS communicated its consent in *MHS v. Malaysia*.³⁸ Parties may also draft the Centre into their agreements as the arbitration forum for any disputes that might arise.³⁹

On the other hand, mutual consent of the parties to ICSID jurisdiction, however communicated, is not enough; the dispute must still satisfy the Convention’s “investment” requirement.⁴⁰ The rationale for this is clear: if parties could determine the meaning of “investment” completely on their own, then the independent jurisdictional requirements under Article 25(1) of the Convention would be meaningless.⁴¹

Article 25(1) of the ICSID Convention states, in part, that the Centre’s jurisdiction “shall extend to any legal dispute arising

33. See ICSID Convention, *supra* note 7, at Preamble; see also SCHREUER, *supra* note 8, at 89-90.

34. SCHREUER, *supra* note 8, at 11.

35. *Id.* at 126.

36. Malaysian Historical Salvors Claimant’s Memorial, *supra* note 13, at 28-31.

37. SCHREUER, *supra* note 8, at 207-08.

38. Malaysian Historical Salvors Claimant’s Memorial, *supra* note 13, at 29-30.

39. SCHREUER, *supra* note 8, at 126.

40. *Id.* at 125.

41. Joy Mining Mach. Ltd. v. Egypt, ICSID (W. Bank) Case No. ARB/03/11, Award, 50, Aug. 6, 2004, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListConcluded> [hereinafter Joy Mining Mach. Ltd.].

directly out of an *investment*, between a Contracting State . . . and a national of another Contracting State.”⁴² But although “investment” is fundamental to ICSID jurisdiction, there is no definition or description of “investment” contained within the Convention itself.⁴³ Efforts to define the term during drafting of the Convention were ultimately fruitless, despite much discussion.⁴⁴ Even an effort to limit jurisdiction to disputes with a minimum claim size was rejected, due to concern that important test cases falling below that threshold might be excluded.⁴⁵ This last point is important, because it suggests that at least some drafters of the ICSID Convention favored a liberal theory of jurisdiction, one that would provide a greater chance for novel claims of legal significance to be heard on their merits.

Not all claims are proper under the ICSID Convention. A typical commercial sale contract will usually not satisfy the ICSID “investment” requirement.⁴⁶ Other types of contracts, for example construction contracts, loans, contractual transfers of technical knowledge to a Contracting State, are generally found to be investments by ICSID tribunals.⁴⁷ But whether the contract at issue in *MHS v. Malaysia* should be considered a commercial contract or an investment contract is not immediately clear from the award. The arbitrator noted that contributions to the host state are “largely similar to those which might have been made under a commercial salvage contract.”⁴⁸ He also stated that the risks under the contract appeared to be “no more than ordinary commercial risks assumed by many salvors in a salvage contract.”⁴⁹ But had the arbitrator made a finding that the agreement was a commercial contract, it is unlikely, and illogical, that he would have made such an in-depth analysis on the “investment” factors, for if the contract

42. ICSID Convention, *supra* note 7, at art. 25(1) (emphasis added).

43. SCHREUER, *supra* note 8, at 121.

44. *Id.* at 122-125.

45. A minimum jurisdictional limit of \$100,000, though attractive to some delegates, was ultimately left out of the ICSID Convention. *Id.* at 123.

46. *Resolving Foreign Investment Disputes Using An ICSID Arbitration*, MALLESONS STEPHEN JAQUES, available at <http://www.mallesons.com/publications/update/2005/8151043w.htm> (last visited May 22, 2009); see also Joy Mining Mach. Ltd., *supra* note 41, ¶ 52 (citing I.F.I. Shihata and A. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Rev.—FILJ 299, 308 n. 27 (1999)).

47. *Resolving Foreign Investment Disputes Using An ICSID Arbitration*, *supra* note 46.

48. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 109.

49. *Id.* ¶ 112.

were merely commercial, no analysis of investment factors would have been necessary. That the “investment” analysis was done at all strongly suggests that the arbitrator was unable or unwilling to declare the contract to be merely a commercial contract.

Though the Convention itself contains no objective definition of “investment,” the first sentence of the Preamble to the Convention refers to the “need for international cooperation for *economic development*.”⁵⁰ This statement can hardly be considered even an incomplete definition of “investment.” But the Preamble wording suggests that whatever else “investment” may mean, for ICSID to have jurisdiction over a dispute, the result of the investment must be “some positive impact on [economic] development” in the host State.⁵¹

Accordingly, ICSID awards discussing the meaning of “investment” have frequently focused on economic development. For example, of the seven cases regarded by the arbitrator in *MHS v. Malaysia* as most important to the interpretation of “investment” under Article 25(1), all stress to some extent that economic development is a necessary component of investment, though the degree of economic development required among them varies.⁵² One tribunal required only that the investment contribute “in one way or another to the economic development of the host State.”⁵³ Another tribunal suggested that the economic development must be “significant.”⁵⁴ Other arbitral opinions on “investment” fall somewhere between these extremes, either suggesting that the notion of significance is subsumed within the typical characteristics of investment,⁵⁵ or finding that an

50. ICSID Convention, *supra* note 7, at Preamble (emphasis added).

51. SCHREUER, *supra* note 8, at 125.

52. See Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 56, 113-18.

53. *Id.* ¶ 96 (citing Patrick Mitchell v. Dem. Rep. Congo, ICSID Case No. ARB/99/7) (emphasis removed). Note that the *Patrick Mitchell* Award was subsequently annulled, so its value as precedent may be minimal; further, though the *Patrick Mitchell* Award was cited in *MHS v. Malaysia*, the Annulment was published prior to the issuance of the Award on Jurisdiction. See Patrick Mitchell v. Dem. Rep. Congo, ICSID (W. Bank) Case No. ARB/99/7, Decision on the Application for Annulment of the Award, Nov. 1, 2006, available at <http://ita.law.uvic.ca/documents/mitchellannulment.pdf> [hereinafter Mitchell v. Congo Annulment Decision]; see *id.* ¶ 90, n.12 (explaining that only the *Patrick Mitchell* award, and not the annulment, is relied on by the *MHS v. Malaysia* arbitrator).

54. Joy Mining Mach. Ltd., *supra* note 41, ¶ 53.

55. Consortium Groupement L.E.S.I.-DIPENTA v. Algeria, ICSID (W. Bank) Case No. ARB/03/8, Sentence Arbitrale, Part II ¶ 14(ii), Jan. 10, 2005, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListC>

investment was “significant” on the particular facts of the dispute without appearing to make significance a prerequisite to jurisdiction.⁵⁶ While economic development is but one of several characteristics important to the determination of jurisdiction, it was highly dispositive of the jurisdictional issue in *MHS v. Malaysia*.⁵⁷

Another approach used to determine if an investment qualifies for ICSID jurisdiction, initially suggested by then ICSID Executive Director Aron Broches during the draft discussions, is whether the investment is one that is “readily recognizable.”⁵⁸ This method seems most useful in cases where the nature of the investment suggests on its face that jurisdiction cannot be reasonably challenged solely on the basis of a lack of investment under the Convention.⁵⁹

A more common approach in determining “investment” under Article 25(1) is to compare the typical features of investment with the specific facts of the case at hand.⁶⁰ Using this approach, characterized in *MHS v. Malaysia* as the Typical Characteristics Approach, tribunals determine to what extent factors such as duration, regularity of profit and return, risk, substantial commitment, and economic development are present.⁶¹ The Typical Characteristics Approach is holistic in nature and is contrasted with the Jurisdictional Approach, where tribunals

oncluded [hereinafter *L.E.S.I-DIPENTA v. Algeria Sentence*]; Malaysian Historical Salvors Arb., *supra* note 1, ¶ 113.

56. Jan de Nul N.V. v. Egypt, ICSID (W. Bank) Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 90-96, June 16, 2006; Ceskoslovenska Obchodni Banka, A.S. v. Slovakia, ICSID (W. Bank) Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 64, May 24, 1999 [hereinafter *Ceskoslovenska Decision on Jurisdiction*]. Link to both files available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListConcluded>.

57. See *infra* Part IV, particularly discussion of the arbitrator’s justification for requiring a greater showing of economic development in Part IV.E.

58. SCHREUER, *supra* note 8, at 124.

59. See, e.g., PSEG Global Inc. v. Turkey, ICSID (W. Bank) Case No. ARB/02/5, Decision on Jurisdiction, at 1-52, June 4, 2004, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListConcluded>; see also Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 119-21 (explaining that the \$800 million build-operate-transfer contract for construction of a power plant in PSEG was so clearly a readily recognized investment for ICSID purposes that analysis of investment was simply not undertaken).

60. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 70; see also SCHREUER, *supra* note 8, at 140.

61. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 70; see also SCHREUER, *supra* note 8, at 140.

generally require all of the elements to be present in order to find jurisdiction.⁶²

The Typical Characteristics Approach can be regarded as more liberal and the Jurisdictional Approach can be regarded as more conservative. However, as explained by the *MHS v. Malaysia* arbitrator, the two approaches are properly regarded as two sides of the same coin and should generally lead to similar results.⁶³ Tribunals will likely invoke the Jurisdictional Approach when the classic hallmarks of investment are clearly present.⁶⁴ On the other hand, tribunals are likely to invoke the Typical Characteristics Approach in order to find that the investment requirement is met when the analysis is less clear.⁶⁵ In either case, the *MHS v. Malaysia* arbitrator noted that the classic hallmarks of investment “are not a punch list of items which, if completely punched off, will automatically lead to a conclusion that there is an ‘investment.’”⁶⁶

As with other international tribunals, and as the *MHS v. Malaysia* arbitrator correctly pointed out, “there is no doctrine of *stare decisis* in ICSID jurisprudence.”⁶⁷ However, prior arbitral awards can have a strong influence, even though they are subsidiary to customary law, treaties, and general principles.⁶⁸ The somewhat inconsistent application and influence of arbitral precedent can sometimes create strange and conflicting results.⁶⁹

It is important to keep in mind that, although each of the investment characteristics is analyzed separately, there is inevitably some overlap among them. According to arbitral precedent, this is to be expected, and is frequently pointed out in decisions.⁷⁰ The *MHS v. Malaysia* arbitrator acknowledged this in

62. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 70.

63. See *id.* ¶ 105.

64. See *id.* ¶ 71(a).

65. See *id.* ¶ 71(b).

66. *Id.* ¶ 106(e).

67. *Id.* ¶ 56. See also SCHREUER, *supra* note 8, at 1082.

68. See generally Transcript of Tai-Heng Cheng, *supra* note 8 at 2-6 (commenting on the blurring of this standard somewhat over time by arbitrators).

69. See *id.* at 3, n.2 (describing two ICSID arbitration results, which were decided within six months of one another, where the claimants in both cases were ironically the same company, and whose holdings were diametrically opposed).

70. See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID (W. Bank) Case No. ARB/03/29, Decision on Jurisdiction, ¶ 150, Nov. 14, 2005, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListPending> [hereinafter Bayindir v. Pakistan]; Salini Construttori S.P.A. v. Kingdom of Morocco, ICSID (W. Bank) Case No. ARB/00/4, Decision on

the award by citing the *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, *Jan de Nul N.V. v. Egypt*, and *Salini Costruttori S.P.A. v. Kingdom of Morocco* awards, which proposed that “the various elements or hallmarks of ‘investment’ must be ‘examined in their totality and will normally depend on the circumstances of each case.’”⁷¹ This somewhat fuzzy approach seems useful and fair when used positively to allow ICSID jurisdiction. The approach is open to criticism on fairness grounds, however, when an arbitrator finds that a deficiency of just one investment factor negatively impacts one or more additional factors.

For example, if the duration of the contract is thought of solely as a mechanism that determines the level of risk and falls below an arbitrary threshold, this may obscure the fact that the investor was at a considerable risk during that time. In order to avoid a “piling on” or “negative bootstrapping” effect, it is critical to distinguish between judging the investment facts in their totality and inadvertently blurring the lines between factors. Otherwise, a negative fact that properly goes to the satisfaction of one characteristic may be used repeatedly to undercut other characteristics with which it has no direct connection.⁷²

Moreover, it is important to remember that ICSID tribunals have generally construed the meaning of “investment” liberally, finding that the satisfaction of definitional elements is “not a formal prerequisite” to jurisdiction.⁷³ Tribunals have not required “clear evidence to establish a finding that each of the relevant hallmarks was present.”⁷⁴ The *MHS v. Malaysia* arbitrator found that the purpose of analyzing prior ICSID cases was “not slavishly to adhere to precedent, but rather to discern a broad trend which emerges from ICSID jurisprudence on the ‘investment’ requirement.”⁷⁵ In ICSID arbitration, the broad trend appears to be a preference for erring on the side of finding an “investment”

Jurisdiction, ¶¶ 43-58, July 23, 2001, *reprinted in* 42 I.L.M 609, at 622 [hereinafter Salini]; Joy Mining Mach. Ltd., *supra* note 41, ¶ 40.

71. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 101 (emphasis added) (citing *Jan de Nul N.V. v. Egypt*, *supra* note 56, ¶ 91).

72. This point is further clarified with a discussion and critique of the MHS investment analysis in Part IV.

73. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 98 (quoting *Ceskoslovenska Decision on Jurisdiction*, *supra* note 56, ¶ 90) (emphasis omitted).

74. *Id.* ¶ 103.

75. *Id.* ¶ 104.

under the Convention in close cases. As a result of this preference, disputes are more likely to be heard on the merits or, at least, other jurisdictional issues will be considered.⁷⁶

In his analysis of “investment,” the *MHS v. Malaysia* arbitrator used a hybrid of the typical characteristics and jurisdictional approaches.⁷⁷ One would expect this liberal approach to provide the best opportunity for a finding of jurisdiction. This was not the case.

IV. ARGUMENT: THE ANALYSIS OF “INVESTMENT” IN *MHS v. MALAYSIA*

The *MHS v. Malaysia* arbitrator’s analysis of “investment” is organized as follows: (1) consideration of regularity of profit and returns, (2) contributions of the investor to the host State, (3) duration of the contract, (4) risks assumed under the contract, and (5) economic development of the host State.⁷⁸ This section tracks the analysis in the same order.

A. Regularity of Profit and Return

The “[r]egularity of profit and return” is identified as one of the typical hallmarks of investment.⁷⁹ This requirement is prominently featured in several important arbitration decisions.⁸⁰ On the other hand, other classic and oft-cited cases in which the “investment” requirement is satisfied do not mention the regularity of profit and return at all.⁸¹

The arbitrator accepted the claimant’s reasoning that the regularity of profit and return during the course of the contract was immaterial to whether or not there was an “investment.” Likening its salvage of the *Diana* to the development of a new drug by a pharmaceutical company, MHS successfully argued that there are some cases where “investment” can be found even

76. See, e.g., *Fedax N.V. v. Venezuela*, ICSID (W. Bank) Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, at 1382-87, July 11, 1997, *reprinted in* 37 I.L.M. 1378, at 1381-84 (1998) [hereinafter *Fedax*].

77. See *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶¶ 65-106.

78. See *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶¶ 107-46.

79. See SCHREUER, *supra* note 8, at 140.

80. See, e.g., *Fedax*, *supra* note 76, at 1387; *Joy Mining Mach. Ltd.*, *supra* note 41, ¶ 53.

81. See e.g., *Salini*, *supra* note 70, ¶ 52.

though there is no regularity of return.⁸² In *MHS v. Malaysia*, there was a “regular and steady accretion of ‘investment’ . . . as work progressed” but no actual return to the marine salvage company until the auction of the recovered items.⁸³ The *MHS* arbitrator agreed that the regularity of profit and return was not a “classical hallmark” of investment.⁸⁴ Thus, the absence of the typical hallmark of the regularity of profit and return seems to have been excused by the arbitrator.

B. Contributions of the Investor to the Host State

The *MHS v. Malaysia* arbitrator’s analysis of MHS’s contribution to Malaysia in the award on jurisdiction occupies but one paragraph that contains all of three sentences.⁸⁵ The arbitrator found that there was no dispute regarding MHS’s contributions, noting that MHS “made contributions in money, in kind and in industry.”⁸⁶ At first blush, then, it appears that MHS satisfied this hallmark of investment because of the lack of dispute and minimal analysis. However, it is uncertain whether or not the arbitrator considered the contribution characteristic satisfied, as this was not clearly communicated in the award.⁸⁷

The *MHS v. Malaysia* arbitrator compared MHS’s contribution to Malaysia unfavorably to the contributions made in *Salini*, *Bayindir*, *Jan de Nul*, and *Joy Mining*.⁸⁸ The contracts in

82. See *Malaysian Historical Salvors, Sdn. Bhd. v. Malaysia*, ICSID (W. Bank) Case No. ARB/05/10, Claimant’s Post-Jurisdiction Hearing Notes & Points, at 28-29, June 26, 2006 [hereinafter *Malaysian Historical Salvors Claimant’s Notes & Points*].

83. See *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶ 108.

84. *Id.*

85. See *id.* ¶ 109.

86. *Id.*

87. The *MHS v. Malaysia* arbitrator does not provide a conclusion on “contribution.” See *id.* ¶ 109. Moreover, there is only a general holding at the end of the award, with no specific summary of the characteristics that passed and those that failed. See *id.* ¶ 146.

88. See *id.* ¶ 109. Granted, the comparison lacked specificity and the contract prices in those cases were all considerably larger in magnitude. In *Salini*, for example, a fifty kilometer Moroccan highway was constructed for a contract price of approximately \$30 million. See *Salini*, *supra* note 70, ¶ 2. In *Bayindir*, the contract was for an even larger highway project in Pakistan, where a 30% advance of approximately \$160 million was made by the contracting State prior to construction. See *Bayindir v. Pakistan*, *supra* note 70, ¶ 17. The *Jan de Nul* contract was for dredging work done in the Suez Canal, which was assessed a value of approximately \$130 million in the Egyptian administrative courts. See *Jan de Nul N.V. v. Egypt*, *supra* note 56, ¶ 17. The *Joy Mining* agreement related to a contract for phosphate mining equipment, which had an initial contract price of approximately \$22 million (and was later reduced to approximately \$16 million). See *Joy Mining Mach. Ltd.*, *supra* note 41, ¶¶ 15-17. Of these cases, jurisdiction was denied only

those cases all dealt in some way with the development of substantial infrastructure within the host State. This suggests that the arbitrator may have blurred or confused the characteristic of contribution by the investor to the host State with the characteristic of economic development of the host State. Professor Christoph H. Schreuer, a noted ICSID scholar, does not use the characteristic of “contribution,” but rather the similar characteristic of “substantial commitment.”⁸⁹ Professor Schreuer describes this characteristic as being distinct from economic development.⁹⁰

Despite the fact that MHS performed its part of the bargain without compensation for more than four years, MHS’s substantial contribution of time and money appears to have been disregarded due to the modest economic development obtained by Malaysia following the salvage operation and auction. Moreover, the arbitrator appears to have minimized the actual contributions of MHS because the perceived economic benefit to Malaysia was small. Since these very points were later used to undercut the economic development hallmark, this approach by the arbitrator is neither logical, nor equitable to MHS.⁹¹

An interesting question not addressed in the award is whether the parties’ expectations regarding the size of the contribution or economic benefit should have any bearing on the satisfaction of those characteristics. The contract terms contemplated a much greater potential return to Malaysia, as much as \$20 million or more.⁹² This figure is four to five times greater than the amount obtained, depending on whether or not the items that Malaysia held out of the auction are counted. This larger theoretical return might have occurred with the same contribution of time, materials, effort, and money by MHS, if the materials salvaged had simply returned more value at the auction or if more precious salvageable materials had been found. Marine salvage finds in the tens of

in *Joy Mining* because the dispute itself was for the release of bank guarantees and, in the context of the agreement, these were not considered “investment.” The *Joy Mining* Tribunal did not deny jurisdiction because of the relatively modest amount involved in the contract. *See id.* ¶¶ 41-45.

89. *See* SCHREUER, *supra* note 41, at 140; Christoph Schreuer, Professor at University of Vienna, <http://public.univie.ac.at/index.php?id=14319> (last visited May 22, 2009).

90. *See* SCHREUER, *supra* note 8, at 140.

91. In Part III, this is the phenomenon identified as “piling on” or “negative bootstrapping.”

92. *See* Malaysian Historical Salvors Arb., *supra* note 1, ¶ 11.

millions of dollars are rare, but they are not unknown. For example, an eighth century Chinese ship that was found in 1997 was worth an estimated \$40 million.⁹³ Moreover, salvage operations uncovered additional valuable recoverable vessels that were not covered under the contract, and MHS also found two additional shipwrecks as they searched for the *Diana*. One of these, the wreck of the *Kapal Sultan*, was valued at more than \$940,000 by Malaysia's own expert appraiser.⁹⁴ This additional find does not appear to have been considered a contribution of MHS by the arbitrator, as there is no mention of it in the brief discussion on contribution.⁹⁵

Furthermore, the amount raised at the auction could not have been known when the contract was created. Accordingly, contribution by MHS must be considered apart from any economic benefit received by Malaysia for the reason that the two characteristics describe two conceptually distinct hallmarks of investment. One wonders, had the final auction amount raised been much larger, whether this would have positively impacted the arbitrator's analysis of MHS's commitment. Logically, it should not have.

Conflation of the contribution and economic development hallmarks is further evidenced in the arbitrator's analysis of economic development. "[T]he Tribunal concludes that there was no substantial *contribution* because the nature of the benefits that the Contract offered to Malaysia did not provide substantial benefits in the sense envisaged in previous ICISD [sic] jurisprudence."⁹⁶ In fact, previous jurisprudence is largely in agreement with the notion that there is neither a fixed minimum economic benefit requirement nor a fixed minimum contribution requirement.⁹⁷ "[T]he 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."⁹⁸

93. See Raja M., *Shipwreck Salvors See Treasure for the Taking*, ASIA TIMES ONLINE, Sept. 17, 2004, http://www.atimes.com/atimes/Southeast_Asia/FI17Ae05.html.

94. See Malaysian Historical Salvors Claimant's Notes & Points, *supra* note 82, at 24.

95. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 109.

96. *Id.* ¶ 143 (emphasis added).

97. See SCHREUER, *supra* note 8, at 123; Ceskoslovenska Decision on Jurisdiction, *supra* note 56, ¶ 66.

98. Mihaly Int'l Corp. v. Sri Lanka, ICSID (W. Bank) Case No. ARB/00/2, Award, Mar. 15, 2002, available at

The arbitrator clearly found that MHS's investment could not be considered substantial enough to satisfy the contribution hallmark.⁹⁹ In a paragraph discussing this finding the arbitrator referred to his later reasoning for economic contribution to the host State.¹⁰⁰ This shows that at least some blurring of the two hallmarks occurred. It may be the arbitrator's opinion that the economic benefit to Malaysia was not substantial enough. The economic benefit should have been considered separately from the contribution made by MHS, however, because roughly the same effort by MHS could have netted a very wide range of return for Malaysia under the contract, depending on auction returns. This expectation of the parties should have been considered, and likely would have weighed in MHS's favor given the possible much higher return to Malaysia.

C. Duration of the Contract

As Professor Schreuer noted, there is an expectation that investment requires some duration.¹⁰¹ Just as investment is not defined in the Convention, however, neither is an appropriate minimum contract duration specified. In practice, the minimum duration thought necessary to satisfy "investment" within ICSID jurisdiction, as discussed in *Salini* and accepted by the *MHS v. Malaysia* arbitrator, is from two to five years.¹⁰² The *Joy Mining Mach. Ltd.* tribunal agreed with this general approach, but found that duration was not of particular significance since the contract price in that case was "paid in its totality at an early stage."¹⁰³ As mentioned above, in the present case the situation regarding duration is almost the opposite of *Joy Mining Mach. Ltd.*: the contract was on a "no-finds, no-pay" basis, so MHS would only get paid upon completion of the contract, followed by successful auction of recovered items. These facts could make duration a particularly important characteristic in *MHS v. Malaysia*.

The contract term for duration between MHS and Malaysia was originally eighteen months, although the contract was

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListC> oncluded.

99. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 63.

100. Compare Malaysian Historical Salvors Arb., *supra* note 1, ¶ 63 with ¶¶ 125-44.

101. SCHREUER, *supra* note 8, at 140.

102. Salini, *supra* note 70, at 622-623.

103. Joy Mining Mach. Ltd., *supra* note 41, ¶ 57.

extended to four years by mutual consent of the parties.¹⁰⁴ Thus, the four-year term could be seen as satisfying the doctrinal requirement for duration on that basis alone.

Some contracts have satisfied the duration requirement partly on the basis that similar contracts are often extended. For example, the *L.E.S.I-DIPENTA v. Algeria Sentence* tribunal found that duration was satisfied in part because similar projects frequently have time extensions and warranties.¹⁰⁵ On the other hand, duration in the analysis of that case was primarily a measure of the significance of the economic commitment by the builder to the economic development of the project State.¹⁰⁶ In addition, the fifty-month term in *L.E.S.I-DIPENTA v. Algeria Sentence* alone would likely have satisfied the duration requirement. In *Bayindir v. Pakistan*, the initial three-year construction term was followed by a one-year term warranting defects and a four-year maintenance period.¹⁰⁷ The *Bayindir v. Pakistan* tribunal agreed with the *L.E.S.I-DIPENTA v. Algeria Sentence* tribunal that the bar for duration need not be set particularly high for certain types of contracts, such as construction projects, because such contracts frequently require time extensions. The *MHS v. Malaysia* arbitrator did not extend this lowered expectation for certain types of contracts to marine salvage contracts, though it seems obvious on the facts of the case that marine salvage contracts might also frequently require time extensions for completion of the work, as actually happened during performance of the *Diana* salvage contract.¹⁰⁸

Though the arbitrator cited both the *L.E.S.I-DIPENTA v. Algeria Sentence* and *Bayindir v. Pakistan* tribunals for the proposition that contract extensions can be considered when determining whether duration was satisfied, he nonetheless found that duration was not satisfied.¹⁰⁹ In coming to this conclusion, the arbitrator used two related and inventive theories to minimize the actual length of MHS's performance under the contract.

104. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 110.

105. *L.E.S.I-DIPENTA v. Algeria Sentence*, *supra* note 55, Part II, ¶ 14(ii).

106. *Id.*

107. *Bayindir v. Pakistan*, *supra* note 70, ¶ 133. As in *L.E.S.I-DIPENTA v. Algeria Sentence*, the initial contract term in *Bayindir v. Pakistan* would have satisfied the two to five year *Salini* duration requirement.

108. As noted above, the salvage operation was extended from 18 months to four years. See also *supra* Part II.A.

109. Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 110-111.

First, he divided the duration requirement into two components, quantitative and qualitative, both of which require satisfaction.¹¹⁰ The arbitrator found that MHS satisfied the quantitative requirement, because performance of the contract actually took four years.¹¹¹ The qualitative requirement, however, was not satisfied. The arbitrator reasoned that “[o]ne might well argue that the Contract was only able to meet the minimum length of time of two years because of the element of fortuity.”¹¹² In fact, neither party made this argument, nor cited precedent suggesting that satisfying duration fortuitously rather than intentionally ought to somehow negate actual satisfaction of this requirement.¹¹³

The arbitrator further found that the salvage contract could theoretically have been completed in eighteen months, and moreover that MHS was obligated to have completed the work within that time.¹¹⁴ Nothing in the record suggests that Malaysia sought to enforce any contract rights relative to the initial term of eighteen months. On the contrary, the arbitrator’s award clearly indicates that the contract between MHS and Malaysia was “extended by *mutual consent*.”¹¹⁵ The arbitrator did not cite any precedent embracing his new quantitative/qualitative approach to the duration hallmark, nor did the respondent, Malaysia, suggest that such an approach should be taken in any of the publicly available pleadings and communications.¹¹⁶

110. *Id.*

111. *Id.* ¶ 110.

112. *Id.*

113. An interesting question is how the arbitrator might have handled fortuity in a slightly different context. Had the contract called for a term of thirty-six months (therefore facially satisfying the duration hallmark), but through fortuity the wreck was found on the very first day of searching and the contract work actually completed before two years’ time, would this sort of fortuity also cut in a negative direction, or would it make no difference to the analysis?

114. *Id.*

115. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 110 (emphasis added).

116. *Id.*; see also Malaysian Historical Salvors Respondent’s Memorial, *supra* note 22; Malaysian Historical Salvors Reply, *supra* note 18; Malaysian Historical Salvors, Sdn. Bhd. v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, Respondent’s Post-Hearing Brief, June 26, 2006 [hereinafter Malaysian Historical Salvors Respondent’s Brief]; Malaysian Historical Salvors, Sdn. Bhd. v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, Respondent’s Comments on the Issue of “Investment” Within the Meaning of Article 25(1) of the ICSID Convention, Dec. 13, 2006 [hereinafter Malaysian Historical Salvors Respondent’s December Comments]; and Malaysian Historical Salvors, Sdn. Bhd. v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, Respondent’s Comments on the Issue of “Investment” Within the Meaning of Article 25(1) of the ICSID Convention, Mar. 22, 2007 [hereinafter Malaysian Historical Salvors Respondent’s March Comments].

Second, the arbitrator once again used the economic development of the host State as an associated factor to negatively impact the distinct duration requirement. Rationalizing that if the “underlying contract does not promote the economy of the host State, there may be less justification to factor in the extensions granted under the Contract,” the arbitrator heavily discounted the actual length of performance under the contract by MHS.¹¹⁷

Taken together, these two novel approaches by the arbitrator resulted in a showing of, at best, weak satisfaction of the duration requirement. Though the language used in the award is not explicit, the implication is clear that something more than quantitative satisfaction of the duration hallmark is necessary; qualitative satisfaction is also required.¹¹⁸

As discussed in Part IV.B, this “piling on” approach, using one hallmark of investment to defeat another, is neither logical nor equitable. The arbitrator so closely associated satisfaction of the economic development hallmark with satisfaction of the duration hallmark that it was all but impossible for MHS to satisfy the duration factor. In addition, and as will be discussed below, this circularity contributed significantly to the arbitrator’s decision to require an even greater showing of economic contribution than might otherwise have been necessary if the actual contract term had been thought to satisfy the duration characteristic.

D. Risks Assumed under the Contract

Previous tribunals have established that participation by the investor in the risks of the transaction is one of the primary hallmarks of “investment” for purposes of ICSID jurisdiction.¹¹⁹ According to Professor Schreuer, contract risks are usually assumed by both parties.¹²⁰ In *MHS v. Malaysia*, the marine salvage company not only participated in the risks under the contract, it assumed *all* of the risks. As even the arbitrator acknowledged: “[i]t is not in dispute that all the risks of the Contract were borne by the Claimant,” and “not in any way borne by the Respondent.”¹²¹ One would think that brief analysis of risk in the MHS case would necessarily result in a finding that MHS

117. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 111.

118. *Id.*

119. See, e.g., Salini, *supra* note 70, at 622.

120. SCHREUER, *supra* note 8, at 140.

121. *Id.* ¶ 112.

easily satisfied the risk requirement. Unfortunately for MHS, the arbitrator seemed unwilling to concede even this small point. Just as he distinguished between quantitative and qualitative satisfaction of the duration requirement, the arbitrator also distinguished between quantitative and qualitative satisfaction of the requirement of risks assumed under the contract by MHS.¹²² And as with the duration hallmark, there appears to be no prior arbitral precedent for making such a distinction.¹²³

In addition to creating a new methodology for determining satisfaction of the risk hallmark, the arbitrator made much of the fact that “salvage contracts are often on a ‘no-finds-no-pay’ basis,” as was the case in *MHS v. Malaysia*.¹²⁴ Because salvage contracts are usually “no-finds-no-pay,” the arbitrator found that risks under such contracts should be considered “normal commercial risks.”¹²⁵ The arbitrator stated that MHS did not provide convincing reasons why this should be otherwise.¹²⁶ In its pleadings, however, MHS suggested that its risks included much more than the notion that the wreck site would not be found. The risks not only included the commercial risk as noted by the arbitrator, but also “financial/enterprise risk, political risk, currency risk, legal; [sic] risk, as well as risk of life and limb.”¹²⁷ Despite identification by MHS of numerous substantial risks beyond any commercial risks that were also present, the arbitrator found that all risks in the contract fell under the “no-finds-no-pay” heading, and were therefore all “normal commercial risks.”¹²⁸ Making the same quantitative/qualitative distinction as he had in the duration

122. *Id.*

123. Review of all the ICSID cases cited within this note, for example, discloses no discussion of a qualitative/quantitative distinction of the risk (or any other) hallmark, let alone any reliance on it to justify denial of ICSID jurisdiction. Note that these include the seven cases cited by the arbitrator as most important on the issue of “investment:” *Salini, Joy Mining Mach. Ltd., Jan de Nul N.V. v. Egypt, L.E.S.I.-DIPENTA v. Algeria Sentence, Bayindir v. Pakistan, Ceskoslovenska Decision on Jurisdiction*, and *Mitchell v. Congo Annulment Decision*. See Malaysian Historical Salvors Arb., *supra* note 1, ¶ 56.

124. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 112.

125. *Id.*

126. *Id.*

127. Malaysian Historical Salvors, Sdn., Bhd. v. Malaysia, ICSID (W. Bank) Case No. ARB/05/10, Claimant’s Supplemental Comments on the Issue of “Investment”, at 10, Dec. 17, 2006 [hereinafter Malaysian Historical Salvors Claimant’s Comments].

128. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 112.

hallmark, the arbitrator found only quantitative, and not qualitative, satisfaction of the risk requirement.¹²⁹

More fundamentally, the arbitrator's analysis of risk suggests that he conflated this specific criterion of "investment" with the much broader general proposition that "an ordinary commercial contract cannot be considered as 'investment.'" ¹³⁰ The arbitrator made clear that the contract between MHS and Malaysia was "not a 'readily-recognizable' 'investment.'" ¹³¹ It is far from clear, however, that the arbitrator's intention was to deny jurisdiction to MHS on the basis that "no-finds-no-pay" marine salvage contracts are necessarily ordinary commercial contracts, or even that the specific agreement between MHS and Malaysia was an ordinary commercial contract. Had the arbitrator made this finding, detailed analysis of the various investment criteria would have been unnecessary. ¹³² Perhaps more importantly, new limitations on the doctrinal definition of "investment" requiring both quantitative and qualitative satisfaction of both duration and risk, as well as the introduction of a theory of fortuitousness within the analysis of the duration hallmark, were also unnecessary. That the arbitrator provided in-depth examination of the important "investment" cases and also a detailed analysis of the individual hallmarks as they apply to the facts of *MHS v. Malaysia* in his award strongly suggests that this was not his intention. If "no-finds-no-pay" marine salvage contracts are not, by definition, commercial contracts, then the matter of whether risks under the contract were typical within the salvage industry seems quite unimportant.

The risk category for "investment" was found to be satisfied in *Salini*, for example, and the fact that other construction contracts might or might not allocate risks in a similar manner was simply not at issue in that case. ¹³³ On the other hand, the *Joy Mining Mach. Ltd.* tribunal, heavily relied on by the *Malaysian Historical Salvors Arb.* arbitrator, found that risk under the contract at issue in that case "[was] not different than that involved

129. *Id.*

130. *Id.* See also *Joy Mining Mach. Ltd.*, *supra* note 41, ¶ 58; SCHREUER, *supra* note 8, at 139 ("Non-recurring transactions such as simple sales and purchases of goods or short-term commercial credits clearly do not qualify as investments.").

131. *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶ 129.

132. See *supra* note 130 and accompanying text.

133. See *Salini*, *supra* note 70, at 622-23.

in any commercial contract.”¹³⁴ The *Joy Mining Mach. Ltd.* panel forcefully cautioned against allowing normal sales contracts in the international marketplace to be thought of as investments “for the sake of a stable legal order.”¹³⁵

Of course, *MHS v. Malaysia* is easily distinguished from *Joy Mining Mach. Ltd.* In *Joy Mining Mach. Ltd.*, the agreement was, at heart, a sales contract, albeit a quite complex one, which required some additional activities by the company that were ancillary to the contract’s primary purpose (to procure mining equipment).¹³⁶ The MHS contract with Malaysia was a service contract (marine salvage), not a procurement contract.¹³⁷ In *MHS v. Malaysia*, the sale of salvaged items was executed by the host State, and Christie’s Amsterdam auctioned items on Malaysia’s behalf only after MHS’s primary obligations under the contract (salvage, recovery, and restoration of items from the shipwreck site) were complete. By improperly equating the criterion of risk assumed under the contract with the broader principle that ordinary commercial contracts are not investments, the arbitrator vastly undervalued the substantial weight that should have been afforded to the risk component of the *Diana* salvage contract. This is particularly puzzling, since there was no dispute that MHS bore *all* of the risk under the contract. The effect of the arbitrator’s finding that all of the contract risks were ordinary commercial risks, coupled with the innovation that the risk hallmark must be satisfied qualitatively, led to a most illogical conclusion: even though MHS bore *all* of the risk, it somehow did not adequately satisfy the ICSID requirement that an investor merely *participate* in the risk of the agreement.

E. Justification for Greater Emphasis of the Economic Development of the Host State

The final category considered by the sole arbitrator in determining whether the salvage contract in *MHS v. Malaysia* constituted an “investment” under the ICSID Convention was the economic development of the host State, Malaysia. Because he found that MHS could “only superficially satisfy the so-called

134. *Joy Mining Mach. Ltd.*, *supra* note 41, ¶ 57.

135. *Id.* ¶ 58.

136. *Id.* ¶ 55.

137. *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶¶ 7-10.

classical *Salini* features of investment,” referring to his analysis of the four previously discussed categories, the arbitrator determined that this last category should assume much greater emphasis than if the *Salini* hallmarks had been qualitatively satisfied.¹³⁸

On its face, this may seem reasonable. A weak showing of one or more factors in a multi-factor test often justifies requiring a stronger showing of remaining factors. For example, an ICSID tribunal used a multi-factor test based on international law in this way to determine whether a corporation was a State entity for jurisdictional purposes.¹³⁹ In *MHS v. Malaysia*, however, it is worth reflecting on the manner in which the arbitrator determined that the previous factors were only met superficially. Recall that the first factor, regularity of profit and return, was not considered by the arbitrator to be one of the classical *Salini* hallmarks, but in any event its absence was excused, as discussed in Part IV.A. Thus, on the *MHS v. Malaysia* facts, the profit and return factor may not have contributed toward a finding of investment, but neither should it have detracted nor required MHS to make a stronger showing of the economic development factor.

The arbitrator’s very brief analysis of the second factor, contributions of the investor to the host State, found that there was no dispute that MHS had contributed time, money, and effort in completing its work.¹⁴⁰ On the other hand, the award is somewhat vague as to whether the arbitrator considered the requirement to be substantially satisfied, though the negative comparison to prior ICSID cases strongly suggests that he did not.¹⁴¹ In addition, comparing the *MHS v. Malaysia* facts with previous cases having to do with large, infrastructure-oriented projects such as *Salini*, where the contract involved the construction of a highway, indicates that the arbitrator likely blurred the line considerably between the contribution and economic development factors.

Some overlap of the “investment” requirements is to be expected. But it is an odd exercise in circular logic to blur the lines

138. *Id.* ¶ 112.

139. See *Maffezini v. Spain*, ICSID (W. Bank) Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 71-89, Jan. 25, 2000, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListC> oncluded.

140. *Malaysian Historical Salvors Arb.*, *supra* note 1, ¶ 109; see discussion *supra* Part IV.A.

141. See discussion *supra* Part IV.B, especially note 88 and accompanying text.

such that the economic development factor negatively impacts the contribution factor, only to require a greater showing of economic development because the contribution factor is not adequately met. As previously noted, it seems more equitable to use the holistic, overlapping approach to *extend* jurisdiction than to deny it.¹⁴²

Similarly, though the contract with time extensions actually took four years to complete, and though existing precedent suggests that it is entirely appropriate to consider these extensions when determining whether the duration hallmark was satisfied, the arbitrator chose not to take the extensions into account.¹⁴³ This is so even though the extensions were made by mutual consent of the parties.¹⁴⁴ Thus, instead of focusing on the actual duration of work performed by MHS, the arbitrator found that this third factor was only quantitatively satisfied, because the underlying contract failed to promote the economy and development of the host State, and because it was only a matter of “fortuity” that it took longer than the original eighteen-month term to complete the work.¹⁴⁵ And as with the contribution factor, there appears to be no precedent for distinguishing between qualitative and quantitative satisfaction of the duration factor.

Finally, recall that MHS assumed *all* of the risks under the contract, even though the risk characteristic merely requires that the investor *participate* in the risk.¹⁴⁶ Because these risks were borne in the context of a “no-finds-no-pay” salvage contract, however, the arbitrator treated them as “ordinary commercial risks.”¹⁴⁷ Once again, though prior precedent provided no real guidance on this point, the arbitrator focused on whether the risk characteristic was satisfied qualitatively, and found that it was not. With the arbitrator’s justifications for requiring greater emphasis on economic development in mind, we proceed to his analysis of this final investment hallmark.

142. See discussion *supra* Part III.

143. See discussion *supra* Part IV.C.

144. Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 110-111; see discussion *supra* Part IV.C.

145. Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 110-111.

146. See discussion *supra* Part IV.D.

147. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 112; see discussion *supra* Part IV.D.

F. Determination that "Significant" Economic Development of the Host State is Required

The very first line of the Preamble to the ICSID Convention suggests that one of the underlying purposes of the Convention is to promote economic development.¹⁴⁸ As a result, economic development of the host State is generally considered the fifth factor for determining whether there is "investment" under the Convention.¹⁴⁹

As the arbitrator correctly noted, there is a divide within ICSID jurisprudence as to whether contracts need to make a *significant* contribution to the economic development of the host State.¹⁵⁰ Some important cases, such as *Salini*, do not mention that the contribution must be significant.¹⁵¹ The *MHS v. Malaysia* arbitrator hypothesized that the *Salini* tribunal would likely have found the contractor's contribution to be significant had they considered the question.¹⁵² Other panels, such as those in *L.E.S.I.-DIPENTA* and *Bayindir*, ruled that the notion of significance is already present where the classical *Salini* criteria of investment are satisfied.¹⁵³ On the other hand, the *Joy Mining* tribunal found that investment for purposes of ICSID jurisdiction requires that "the contribution to the economic development of the host State must be "significant." "¹⁵⁴

The arbitrator found that "the weight of authorities cited swings in favor of requiring a significant contribution" to the economic development of the host State.¹⁵⁵ The arbitrator expressed the concern that if *significant* economic development were not required, then every contract would satisfy "investment," regardless of the quantum of benefit to the host State's economy.¹⁵⁶ Of course, this logic fails to take into consideration the arbitrator's own admonition that ordinary commercial contracts are not considered investments for ICSID jurisdiction.¹⁵⁷ In addition, the

148. ICSID Convention, *supra* note 7, at Preamble. See SCHREUER, *supra* note 1 at 124-25.

149. SCHREUER, *supra* note 8, at 140.

150. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 113.

151. *Id.*

152. *Id.*

153. *Id.* ¶¶ 113, 115.

154. *Id.* ¶ 114.

155. *Id.* ¶ 123.

156. *Id.*

157. *Id.* ¶ 112.

arbitrator neglects to recall that the other investment factors also must be satisfied, at least to some extent. In other words, contracts that fail to satisfy the duration requirement, that do not subject the private investor to significant risk or require substantial contribution by the investor, might not qualify as “investments” in the judgment of tribunals even if “significant” economic contribution were not a requirement.¹⁵⁸

Further, States have additional opportunities to define investment in order to avoid jurisdiction. Contract terms negotiated between the parties can spell out more specifically whether consent to ICSID jurisdiction is intended.¹⁵⁹ Contract durations can be set below the necessary threshold, and extensions can be denied or qualified. Bilateral and multi-lateral investment treaties between and among States contracting to the Convention, as well as national legislation of a contracting state, can provide a more specific definition for investment than the default multi-factor approach otherwise used by tribunals.¹⁶⁰ In addition, Article 25(4), which has been used by numerous countries, including Jamaica and Turkey, “opens the possibility to Contracting States to notify the Centre of classes of disputes that they would not consider submitting to the jurisdiction of the Centre.”¹⁶¹ Finally, Article 26 allows contracting States to “require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under [the] Convention.”¹⁶² In short, there are a variety of ways for contracting States to avoid or delay ICSID arbitration. Although the *MHS v. Malaysia* arbitrator determined that it was necessary to show “significant” economic development, the numerous ways that contracting States can avoid or delay ICSID arbitration all could cut against requiring “significant” economic development and were not considered.

Moreover, not all contracts that satisfy the minimum economic development of the host State will satisfy the entire multi-factor standard. Even for those cases that do meet minimum jurisdictional requirements, it is important to remember that a

158. See discussion on the characteristics of “investment” in Part III.

159. SCHREUER, *supra* note 8, at 126-28.

160. *Id.* at 128-34.

161. ICSID Convention, *supra* note 7, at art. 25(1). See SCHREUER, *supra* note 8, at 134.

162. ICSID Convention, *supra* note 7, at art. 26. See generally SCHREUER, *supra* note 8, at 390-91 (providing the broad outline for this practice).

finding of jurisdiction does not preordain a particular outcome – the claimant must still prevail on the merits.

G. Is There “Significant” Economic Development of the Host State?

Accepting, for purposes of discussion, the arbitrator’s decision that economic development of the host State must be “significant,” the question is whether the economic development of Malaysia due to MHS’s performance under the contract was significant. MHS claimed twenty-seven different bases for finding economic development, clearly hoping that these might cumulatively be regarded as significant.¹⁶³ Unfortunately, likening the salvage contract to “any normal service contract,” the arbitrator found that any economic benefit conferred to Malaysia was short-term and thus not significant enough to be considered “investment” for ICSID jurisdiction.¹⁶⁴

MHS showed some temporary benefits to the Malaysian economy, stating that Malaysian locals were employed and trained to do some of the salvage and restoration procedures.¹⁶⁵ In addition to these temporary benefits, MHS claimed that it imparted some knowledge to the host State by instructing Malaysian museum officers and marine salvors in methods of marine salvage and artifact restoration.¹⁶⁶ As a result of this training, “the Malacca Museum set up its own shipwreck and salvage company.”¹⁶⁷

According to a maritime archaeologist with particular expertise in the Southeast Asia region, the Malaysian government used some proceeds from the *Diana* salvage to further the archaeological excavation of the *Nasau*, a Dutch ship that sunk off of Port Dickson, Malaysia.¹⁶⁸ The *Nasau* wreck is historically

163. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 134. In fact, it was a list of seventeen items. See Malaysian Historical Salvors Claimant’s Comments, *supra* note 127, at 7.

164. Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 145-46.

165. *Id.* ¶¶ 132-33.

166. Malaysian Historical Salvors Claimant’s Comments, *supra* note 127, at 7.

167. *Id.*

168. *Id.* at 19. Michael Flecker, *The Ethics, Politics, and Realities of Maritime Archaeology in Southeast Asia*, 31 INT’L J. NAUTICAL ARCHAEOLOGY 12, 19 (2002), available at <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1095-9270.2002.tb01397.x>. Michael Flecker was one of the three partners, along with Dorian Ball, originally contracted by Malaysia to search for the *Diana*. Flecker eventually sold his interest to Ball, who subsequently found and salvaged the ship.

significant to Malaysia, as the *Nasau* was engaged in a battle for control of the chief trading post located along the Malacca coast during a battle in the early 17th century.¹⁶⁹ Also, Muzium Negara Malaysia, a national museum located in Kuala Lumpur, housed a special maritime archaeological exhibition for at least two years between 2001 and 2003, and the Malacca Maritime Museum permanently houses Malaysian maritime exhibits, including some items retrieved from the *Diana*.¹⁷⁰ The Malacca Maritime Museum serves an educational purpose, but is also a tourist destination.¹⁷¹ The Malaysian government has acknowledged that the Malacca region has great tourist potential and created a multi-year plan to restore local historical sites.¹⁷² The magnitude of any tourist benefit to the Malaysian economy creditable to MHS is obviously not comparable, at least not in dollars, to the large infrastructure projects that have featured in other prominent cases such as the Moroccan highway construction in *Salini*.¹⁷³ On the other hand, cultural and historic resources will likely be available in museums for many decades or even centuries, and may continue to draw tourist revenue long after large infrastructure projects become obsolete or are replaced. Further, it is not fair to consider only the pure transactional worth of contributions by contractors like MHS. National pride, cultural identity, and archaeological/historical value may be less tangible than money, but they nonetheless have real meaning to groups that treasure and benefit from them, including States contracting on behalf of their people.

As the arbitrator himself noted, “[i]t should not be thought that investments of relatively small cash sums can never amount to ‘investment.’ Investments can be valued in ways other than pure cash, e.g. as human capital or intellectual property rights.”¹⁷⁴ Despite acknowledging that it is theoretically possible to have a case with “significant” economic development through a small investment, the arbitrator went on to compare *MHS v. Malaysia*

169. Malaysian Historical Salvors Claimant’s Comments, *supra* note 127, at 19.

170. See Muzium Negara Malaysia, <http://www.muziumnegara.gov.my> (last visited May 22, 2009); Syed Abdul Haris Bin Syed Mustapa, *Showcasing Maritime Heritage Artefacts for the Benefit of the Tourist Industry in Malaysia*, 34 INT’L J. NAUTICAL ARCHAEOLOGY 211, 213-14 (2005), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1095-9270.2005.00055.x>.

171. Mustapa, *supra* note 170, at 215.

172. *Id.* at 214.

173. See *supra* note 88.

174. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 139.

unfavorably with *Jan de Nul* and *Bayindir*, two cases featuring large public infrastructure projects of “permanent value,” and *CSOB*, where the contract resulted in development of the host State’s “banking infrastructure.”¹⁷⁵ In *MHS v. Malaysia*, the arbitrator summarily dismissed the benefits of tourism and marine salvage training as “speculative.”¹⁷⁶ Future tribunals should take the longer view, and allow for accrual of economic benefits to host States over time. Combined with some multiplicative or additive calculation representing cultural and historical value to the host State, this might allow a finding of significant economic contribution on similar facts.

One final consideration is whether the relative size of the host State’s total economy should be a part of the calculus of significant economic development. Suppose that a salvage contract of a similar nature and dimension to that in *MHS v. Malaysia* were made between a marine salvage company and a country with a substantially smaller economy than Malaysia, a country with a 2006 gross domestic product (GDP) of approximately \$313.2 billion.¹⁷⁷ Further imagine that the only factor requiring satisfaction was significant economic development. Two contracting States, located not too far from Malaysia, make good examples for this hypothetical: the Solomon Islands and Micronesia.¹⁷⁸ It is easy to understand how an ICSID tribunal might find a total project value of approximately \$4 million to not be “significant” when compared to Malaysia’s GDP of more than \$300 billion dollars. If the same project were to occur within the Solomon Islands, where the GDP is several magnitudes lower than in Malaysia, or in Micronesia, where the GDP is smaller still, the same project would take on much greater significance proportional to the host State’s economy.¹⁷⁹ If cultural, historical, and other

175. *Id.* ¶¶ 141-43.

176. *Id.* ¶ 144.

177. CIA – The World Factbook: Country Comparisons – GDP (purchasing power parity), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited May 22, 2009) [hereinafter World Factbook].

178. *Id.* (The Solomon Island’s GDP was estimated at \$800 million in 2002; Micronesia’s GDP for the same year was estimated at \$277 million). *See also* ICSID – International Center for Settlement of Investment Disputes, *List of Contracting States and Other Signatories of the Convention*, ICSID, at 3-4, Nov. 4, 2007, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=S howDocument&language=English> [hereinafter List of Contracting States].

179. World Factbook, *supra* note 177.

value were also factored in, contractors working with smaller nations would have a much greater chance of having their projects deemed investments.

But would this be fair for investors to larger countries? If relatively small GDP contracting States like Micronesia or Solomon Islands are hypothetically subject to jurisdiction, why should a much wealthier contracting State like Malaysia not be subject to ICSID jurisdiction on the same facts but for its larger economy?¹⁸⁰ The hypothetical suggests that a more fair approach would be to find some absolute value representing a minimum economic development requirement, perhaps relative to the size of the project, but not to the size of the host State's GDP.

Alternatively, using the broader approach to economic development which "simply requir[es] some form of contribution to the economy of the host State in one way or another" might be best.¹⁸¹ It is important as well to consider that the economic development hallmark of ICSID "investment" remains but one characteristic of a multi-factor test, subject to appropriate balancing. Lastly, as previously noted, jurisdiction itself is not dispositive. In the end, claimants must still win on the merits of their cases. The most just approach would allow close cases on the jurisdictional question of investment to proceed to other jurisdictional issues or to be heard on the merits.

V. CONCLUSION

The award on jurisdiction in *MHS v. Malaysia* is a frustrating read. On one hand, the award provides an excellent selection and analysis of major cases on the meaning of "investment" under the ICSID Convention. The cases are well organized, clearly presented, and the major approaches to the meaning of "investment" in ICSID jurisprudence are thoroughly analyzed.¹⁸² On the other hand, it is troubling to read a case where the components of a multi-factor test are so blurred that they cut against one party at virtually every turn when applied to the facts. Perhaps the most troubling aspect of the award was the finding

180. Particularly when there are so many potential "outs" to ICSID jurisdiction. See discussion in Part IV.F.

181. Malaysian Historical Salvors Arb., *supra* note 1 ¶ 126.

182. *Id.* ¶¶ 73-106.

that ICSID lacked jurisdiction on the "investment" question when that seemed a fairly close call, while there were jurisdictional issues other than "investment" that might have better justified the arbitrator's decision. For example, there might not have been jurisdiction because the contract did not satisfy the meaning of "investment" under the Malaysia/UK BIT.¹⁸³ Or perhaps the dispute did not concern an "approved project" within the BIT.¹⁸⁴ Because the case is one of first impression, the award may set an influential precedent that "no-finds-no-pay" marine salvage cases do not constitute "investment" for ICSID purposes.¹⁸⁵

The arbitrator makes a strong argument that the differences between the typical characteristics and jurisdictional approaches are largely academic.¹⁸⁶ His analysis, however, shows that in close cases, the specific approach taken may be determinative. If the more holistic typical characteristics approach is used and too great an overlap is made among the characteristics that cut against jurisdiction, a "negative feedback," or "piling on" effect, may occur. This seems to be precisely what happened in *MHS v. Malaysia*.

Briefly reviewing the analysis of the five "investment" characteristics (profit and return, contribution of the investor to the host State, duration, risks assumed under the contract, and resulting economic development of the host State), one sees this negative feedback affecting multiple relationships between and among factors. For example, the arbitrator found contributions "in money, in kind and in industry."¹⁸⁷ Because the contract value was not large, as it would be for construction of a major public infrastructure, lack of significant economic development appears to have undercut the facial satisfaction of the contribution requirement, and the arbitrator required a stronger showing of the economic development factor. Similarly, duration was unquestionably met in a purely quantitative sense.¹⁸⁸ However, the arbitrator determined that lack of *significant* economic development meant that the voluntary extension of the contract by

183. *Id.* ¶ 41.1.

184. *Id.* ¶ 41.2.

185. Though as noted above, the award was annulled, and in any case future tribunals are not bound to follow it. *Supra* notes 7, 67; 68.

186. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 105.

187. *Id.* ¶ 109.

188. See discussion in Part IV.C.

mutual consent of the parties should not be considered, and thus, qualitative satisfaction of the duration criteria was not satisfied.¹⁸⁹ This quantitative/qualitative distinction was also introduced into the risk characteristic.¹⁹⁰ The arbitrator found that MHS did not satisfy the risk requirement even though MHS bore *all* of the risk, and although the classical hallmark only requires the investor to *share* the risk.

Further amplifying the negative feedback effect, the arbitrator chose to require “significant” economic development of the host State, at least in part, because the economic development factor had already undercut several of the other “investment” factors. The arbitrator’s decision to require “significant” economic development on the *MHS v. Malaysia* facts made it all but impossible for the claimant to satisfy the ICSID “investment” requirement, crippling any opportunity MHS might have had to have the case heard on its merits, or at least proceed to other jurisdictional questions.

It would likely make little difference so long as “significant” economic development were needed, but if an elevated showing of economic development had not been required, one cannot help but wonder whether the outcome would have been different. MHS contributed substantially to at least one new industry in Malaysia, the marine salvage industry, and made positive contributions to the country’s cultural and historical identity.¹⁹¹ By recovering and restoring numerous materials for Malaysian museums, MHS also contributed meaningfully to the growing tourism industry.¹⁹² If “significant” economic development means that only substantial monetary contributions allow ICSID jurisdiction, perhaps this important investment factor should be recalibrated to allow for longer term and cumulative positive effects from cultural, historical, archaeological, and other development.

Considering the alternative approaches to measuring economic development, the ease with which Malaysia could have limited ICSID access in advance, and the other jurisdictional deficiencies that were not investigated by the arbitrator, *MHS v. Malaysia* may signal a substantial narrowing of the historically

189. Malaysian Historical Salvors Arb., *supra* note 1, ¶¶ 110-11.

190. *Id.* ¶ 112.

191. See *supra* note 170 and accompanying text.

192. Malaysian Historical Salvors Arb., *supra* note 1, ¶ 215.

liberal definition of “investment” in ICSID arbitration, among at least some ICSID arbitrators.

Fortunately, a more liberal trend could be emerging that places the investment requirement in its proper context, one which will allow more cases to be heard on their merits. This is illustrated not only by the annulment of the *MHS v. Malaysia* award, but also by an award released the day before the annulment.¹⁹³ In that award the tribunal expressed the view that because there are

highly diverging views on what constitutes ‘development’ . . . [a] less ambitious approach should [] be adopted, centered on the contribution of an international investment to the economy of the host state, which is indeed *normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed.¹⁹⁴

A rebuttable presumption in favor of finding economic development would likely be warmly greeted by international investors, but such an investor-friendly jurisdictional approach is not in keeping with arbitral precedent, as discussed above, and should not be needed if tribunals simply embrace a less restrictive definition of “investment.”

193. See Vis-Dunbar, *supra* note 7.

194. Phoenix Action, Ltd. V. Czech Republic, ICSID (W. Bank) Case No. ARB/06/5, Award (April 15, 2009), ¶ 85, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C74> (emphasis in original).