

## DISSENTING OPINION OF JUDGE MOHAMED SHAHABUDDEEN

### INTRODUCTION

1. I have signed the decision of the *ad hoc* Committee in authentication of its decision. I nevertheless have the misfortune to be of a different opinion on the outcome. I have reflected on whether it is possible to support the decision and to express my thinking in the form of a separate opinion. But such is the importance of the issues as I see them that that course is not credible.

2. Regretfully, I have to forego the company of my distinguished colleagues. The question which separates me from them is whether a contribution to the economic development of the host State is a condition of an ICSID “investment.” The Committee recalls the argument of the Applicant that it is not. The Committee’s decision agrees with the Applicant’s argument; I am of the opposite view.

3. There is a nuance to be noted. The Applicant accepts that international investment plays a role in the economic development of the host State but makes it clear that the playing of that role is not a condition of an ICSID investment. That may suggest that the Applicant is trying to have it both ways. In my opinion, the Applicant is to be acquitted of endeavouring to do so. The difference between the two propositions is small but definite. According to the Applicant (as I understand its case), the non-playing of a role in the economic development of the host State does not break a condition of an ICSID investment and so does not disentitle the investment to the protection of ICSID. And so the question remains whether a contribution to the economic development of the host State is a condition of an ICSID “investment.”

4. My main reasons for holding that economic development of the host State is a condition of an ICSID investment are these: (a). However wide is the competence of parties to determine the terms of an investment, that competence is subject to some outer limits outside of their will, if only to measure the width of their competence within those limits. (b). The outer limits in this case included a requirement that an investment must contribute to the economic development of the host State. (c). The Tribunal was correct in

finding that the contribution to the economic development of the host State had to be substantial or significant. (d). The Tribunal was also correct in finding that the Applicant's outlay did not promote the economic development of Malaysia in a substantial or significant manner. (e). It is a reversal of the logical process to begin the inquiry with a consideration of what is an investment under the 1981 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 (the "BIT"). And, (f), if the Tribunal erred in holding to these effects, it nevertheless did not manifestly exceed its powers.

**A. HOWEVER WIDE IS THE COMPETENCE OF PARTIES TO DETERMINE THE TERMS OF AN INVESTMENT, THAT COMPETENCE IS SUBJECT TO SOME OUTER LIMITS OUTSIDE OF THEIR WILL, IF ONLY TO MEASURE THE WIDTH OF THEIR COMPETENCE WITHIN THOSE LIMITS.**

5. During the meetings which took place on the preparation of the ICSID Convention,<sup>1</sup> the drafters omitted from the text a suggested minimum value to qualify as an investment. I have duly considered this but, for the following reasons, I am not persuaded that it means that it was agreed that there should be no outer limits to an ICSID investment or that jurisdiction depended on consent alone.

6. The Applicant submits that the discussions during those preparatory meetings demonstrated that "investment" was not being defined;<sup>2</sup> it was not desired to restrict the amplitude of the concept. There is indeed no stated definition of "investment" in the ICSID Convention; but is there no definition at all? It is agreed by the parties that Article 31(1) of the Vienna Convention on the Law of Treaties<sup>3</sup> applies. On "investment," what

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<sup>1</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 14 October 1966.

<sup>2</sup> See International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* ("Report of the Executive Directors"), para. 27: "No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))."

<sup>3</sup> 23 May 1969, 1155 UNTS 331 ("Vienna Convention").

is the “ordinary meaning to be given to the terms of the treaty in their context<sup>4</sup> and in the light of its object and purpose,”<sup>5</sup> within the meaning of that provision of the Vienna Convention?

7. The term “investment” bears some meaning: it is not meaningless. The Tribunal in *Pey Casado v. Chile* correctly held that “there exist a definition of an investment within the meaning of the ICSID Convention...”<sup>6</sup> This is consistent with the Applicant’s submission that it “is not arguing that there is no objective meaning to the word ‘investment’ in Article 25(1)”<sup>7</sup> of the ICSID Convention.

8. It is hard to think of an objective meaning of a term which is so amorphous as to be without any parameters. The discussions among delegates only signify that it was considered unwise to impose any rigidities on the coverage of the term within what Professor Christoph Schreuer correctly calls the “outer limits”<sup>8</sup> of an investment. Logic requires the existence of some “outer limits”; this is the main reason for comparative silence on the matter in the *travaux*. This is also why the ICSID Tribunal in the recent *Rompetrol v. Romania* case observed that, “as both Parties to this arbitration accept, Article 25 reflects objective ‘outer limits’ beyond which party consent would be ineffective.”<sup>9</sup> Parties are indeed free to agree on what constitutes an investment, but only within those “outer limits”; beyond those “outer limits” their consent is ineffectual to create an ICSID investment.

9. It is easy to appreciate why it is necessary to have “outer limits” of an investment. The contents of jurisdiction have to be distinguished from the limits within which those

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<sup>4</sup> However it may be construed, the “context,” as stated in the Vienna Convention, cannot be entirely neutralised.

<sup>5</sup> Vienna Convention, Article 31(1), footnote not in original.

<sup>6</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision, 25 September 2001 (“*Pey Casado v. Chile*”), para. 232, translation of the original text by the Committee Member.

<sup>7</sup> Applicant’s Memorial, para. 62, footnote 70. The Applicant goes on to argue about the “subjective approach,” but this does not remove the effect of his earlier admission.

<sup>8</sup> CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, p. 91 (2001).

<sup>9</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, 18 April 2008 (“*Rompetrol v. Romania*”), para. 80.

contents exist. The contents of the jurisdiction may be very broad; but whether they are broad or narrow can only be determined by reference to the boundaries within which they exist. The arguments of delegates to the ICSID conferences about definition of an investment have to be understood as relating to the contents of an investment, not to the ultimate limits within which an investment, however broad, has to exist.

10. Professor Schreuer has pointed out that the fact that definitions “were not adopted was motivated less by the feeling that they were redundant than by an inability to agree on them.”<sup>10</sup> No doubt his statement focused on the contents of jurisdiction rather than on the outer limits within which they existed. But the intrinsic value of the statement will also apply to the outer limits.

11. Inability of delegates to agree on definitions does not mean that definitions were redundant, or that they do not exist; they encapsulate fundamental, if residual, ideas. Those ideas can be violated if the parties are free to decide that any outlay whatsoever is entitled to the protection given to an ICSID investment. Where it becomes necessary to find the outer limits, as it is here, they must be found – if necessary, by an implication that the parties accepted that their admittedly wide competence to agree on the contents of an ICSID investment assumed that that competence was nevertheless not limitless, that it was exercisable within some ultimate boundaries.

12. The position was accurately defined by the Chairman of the Regional Consultative Meetings of Legal Settlement of Investment Disputes when he reported on 9 July 1964 as follows:

The purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided the parties’ consent had been attained. Beyond these outer limits no use could be made of the facilities of the Center even with such consent.<sup>11</sup>

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<sup>10</sup> SCHREUER, *supra* note 8, p. 90.

<sup>11</sup> ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (“HISTORY OF THE ICSID CONVENTION”), Volume II-1, p. 566 (1968).

13. Of course there were other remarks in a wide ranging discussion, but I consider that the above represents the essential position, both in logic and in fact: there are outer limits of an ICSID investment which consent cannot breach.

**B. THE OUTER LIMITS OF AN ICSID INVESTMENT COMPRISE A REQUIREMENT FOR CONTRIBUTION TO THE ECONOMIC DEVELOPMENT OF THE HOST STATE.**

14. If it is agreed that there are outer limits to an ICSID investment outside of the will of the parties, it is not arguable that those limits do not comprise a requirement for contribution to the economic development of the host State. The opposite argument stresses that such a requirement is not expressly laid down in the relevant texts, but many a thing which is not expressly stated is yet law if it can be worked out from the context. And the context does speak. In my view, it shows that the parties fell to be considered as having impliedly accepted that an ICSID investment must contribute to the economic development of the host State.

15. The annulment Committee in *Patrick Mitchell v. DRC* cited with approval the statement of Professor Schreuer in which he regarded a “contribution to the economic development of the host State as ‘*the only possible indication of an objective meaning*’ of the term ‘investment.’”<sup>12</sup> The need for a contribution to the economic development of the host State is consistent with both the formative documents of ICSID and with case law.

16. As to the formative documents of ICSID, there is, first, the Preamble of the ICSID Convention. The Preamble states:

**Considering** the need for international cooperation for economic development, and the role of private international investment therein;

**Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

17. Thus, the purpose of the ICSID settlement mechanism was to resolve disputes which might arise in connection with “such investment,” that is to say, any “investment”

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<sup>12</sup> *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006 (“*Patrick Mitchell v. DRC*”), para. 31.

concerning “international cooperation for economic development.” Did “economic development” contemplate economic development of entities divorced from the economic development of States? I think not. An ICSID investment might indeed be made in favour of private entities but not for their own enrichment exclusively: only on the basis that, though made in favour of private entities, such an investment would – not might – promote the economic development of the host State.

18. The fifth preambular paragraph of the ICSID Convention states: “**Desiring** to establish such facilities under the auspices of the International Bank for Reconstruction and Development.” Development may indeed be widely construed, but its contents, however wide, must be capable of being regarded as contributing to the purpose of the development in view. Development of what? The reference to “Reconstruction and Development” leaves no reasonable doubt that it was the development of States which was being spoken of.

19. The Report of the Executive Directors on the ICSID Convention did indeed state that no attempt was made to define “investment,” but that statement was directed to the range of possible investments within a general field, not to the boundaries of the general field itself. The Report also states that “[i]n submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development.”<sup>13</sup> There is no logical ground for supposing that the economic development visualised was not the economic development of states: economic development of states was conceived of as the very rationale of the arrangements. This was recognized by the Tribunal in *Amco v. Indonesia* when it concluded: “[t]hus, the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.”<sup>14</sup>

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<sup>13</sup> Report of the Executive Directors, para. 9.

<sup>14</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 (“*Amco v. Indonesia*”). See also *id.*, Award, 20 November 1984.

20. The influence of the IBRD over ICSID is illustrated by Article 2 of the ICSID Convention which provides that “[t]he seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development.” The expenditure of the Centre is not a private matter; any excess in the expenditure which the Centre cannot meet “out of charges for the use of its facilities, or out of other receipts . . . shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank.”<sup>15</sup> Thus, states are to defray any operating deficits. Correspondingly, ICSID’s “assets, property and income, and its operations and transactions . . . shall be exempt from all taxation and customs duties”;<sup>16</sup> states are to forego these normal elements of their revenue.

21. A reasonable inference is that Contracting States did not agree that these burdens on them would apply to benefit transactions which did not promote the economic development of the host State. It is difficult to see how a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State. Schreuer notes that “it was always clear that ordinary commercial transactions would not be covered by the Centre’s jurisdiction....”<sup>17</sup> It is pedantic to spend time on the meaning of “ordinary commercial transactions.”

22. In this connection, it is possible to conceive of an entity which is systematically earning its wealth at the expense of the development of the host State. However much that may collide with a prospect of development of the host State, it would not breach a condition – on the argument of the Applicant. Accordingly, such an entity would be entitled to claim the protection of ICSID. Host States which let in purely commercial

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<sup>15</sup> ICSID Convention, Article 17. The full text of Article 17 provides: “[i]f the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.” See also ICSID Administrative and Financial Regulations, Regulation 18(1).

<sup>16</sup> *Id.*, Article 24(1).

<sup>17</sup> SCHREUER, *supra* note 8, p. 125.

enterprises would have something to worry about. Correspondingly, ICSID would seem to have lost its way: it is time to call back the organization to its original mission.

23. Economic development is referred to in the formative documents of ICSID – much more so than in the case of the opposite argument. One cannot behave as if these references did not appear in those documents, or seek to water them down by tedious argument. It is difficult to disagree with the remark of a student observer that “[n]otwithstanding the aforementioned doctrine and case law, ICSID’s Tribunals are currently following the stream towards minimizing the relevance of the development element, normally dismissing the Host State’s objections to jurisdiction without giving to the existence of development the rank of a formal ‘requisite.’”<sup>18</sup>

24. If it is true that the host State’s objections to jurisdiction on the basis that there is no economic development are “normally” dismissed, I can think of no defensible legal explanation.

25. As to case law, in *CSOB v. Slovak Republic* the Tribunal, referring to the Preamble of the ICSID Convention, said: “[t]his language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.”<sup>19</sup>

26. This was recalled by the Tribunal in the instant Award.<sup>20</sup> The language is permissive, but it is permissive of an inference which, in my opinion, reflects a requirement that economic development of the host State is a condition of an ICSID

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<sup>18</sup> Ignacio D’Alessio, *A Comment on ICSID’s Jurisdictional Issues*, University of Amsterdam, June 2008, p. 39, LL.M. paper. The consequences (as between traditional capital exporting countries and capital importing countries) are noticed in a short paper by Florian Grisel, *International Development and Investment Arbitration: Allies or Enemies? LASIL, PERSPECTIVES - 04/08*.

<sup>19</sup> *Československa obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 (“*CSOB v. Slovak Republic*”), para. 64.

<sup>20</sup> See *Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007 (“Award”), para. 66.

investment. The same thing was pointed out in *Patrick Mitchell v. DRC*,<sup>21</sup> where the annulment Committee referred to three ICSID cases to the same effect. As the annulment Committee in this case recalled, in *Biwater v. Tanzania*,<sup>22</sup> the Tribunal interpreted the Criteria for an “investment.” But the Tribunal’s interpretation did not relate to the question of the outer limits of an investment in the sense of a condition that an ICSID investment must contribute to the economic development of the host State. The question did not arise because the Applicant positively recognized a need to prove that its outlay promoted the economic development of the host State.<sup>23</sup>

27. By contrast, in *Pey Casado v. Chile*, the Tribunal said:

The requirement of a contribution to the development of the host State, which is difficult to establish, would pertain more to the merits of the dispute than to the Centre’s jurisdiction. An investment may prove to be useful or not to a host State without losing his quality of investment. It is correct that the Preamble of the ICSID Convention evokes a contribution to the economic development of the host State. This reference is however presented as a consequence, not as a condition of the investment: in protecting the investments, the Convention promotes the development of the host state. This does not mean that the development of the host State is a constitutive element of the notion of investment. This is the reason why, as noted by some arbitral tribunals, this fourth condition is in fact encompassed by the three others.<sup>24</sup>

28. Elegantly put, but, with respect, not convincing. It is not merely that the “[p]reamble of the ICSID Convention evokes a contribution to the economic development of the host State”<sup>25</sup>; the preamble reflects an inference that the very purpose of an ICSID investment is to contribute to the economic development of the host State. It is indeed the case that an “investment may prove to be useful or not to a host State without losing the quality of investment,” but that subsequent contingency has nothing to do with the

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<sup>21</sup> *Patrick Mitchell v. DRC*, para. 30. The case was criticised in Emmanuel Gaillard, *A Black Year: ICSID at Crossroads After Troubling Trend*, INTERNATIONAL ARBITRATION LAW NEWS, NYLJ, 1 March 2007, p. 3. As recognised in the article, Mr. Gaillard represented Mr. Mitchell.

<sup>22</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (“*Biwater v. Tanzania*”), paras. 233(e) – 240.

<sup>23</sup> *See id.*

<sup>24</sup> *Pey Casado v. Chile*, para. 232, translation of the original text by the Committee Member.

<sup>25</sup> *Id.*, translation of the original text by the Committee Member.

question whether the investment, in its origins, has to be for the purpose of the economic development of the host State; this question has to be answered at the time when the investment is made.

29. Building on the language used in *Pey Casado v. Chile*, the Applicant submits that the “Preamble’s statement should therefore be more properly read as merely reflecting the fact that international investment plays a role in economic development, and not, as the Tribunal concluded, that contribution to economic development is a *condition* for an activity to be considered an ‘investment.’”<sup>26</sup> In my opinion, it is not merely that “international investment plays a role in economic development” of the host State: international investment must play a role in the economic development of the host State if the investment is to rank as an ICSID investment and be entitled to the protection of the ICSID settlement procedures; that requirement is a condition of an ICSID investment.

30. Undoubtedly there are statements in the *travaux* which indicate that economic development of the host State was visualized but not as a condition of an investment. I have cited above a statement by Professor Schreuer in which he regarded a contribution to the economic development of the host State as “the only possible indication of an objective meaning’ of the term ‘investment.’”<sup>27</sup> I can only understand this as a recognition that economic development of the host State is a condition of an ICSID investment. If it is not, there is nothing to separate an ICSID investment from any other kind of investment; in the result, an ICSID arbitration would be indistinguishable from any other kind of arbitration (and there are several) concerning an investment dispute.

31. Concrete or imaginable ICSID cases may appear to lack the power to contribute to the economic development of the host State, *e.g.*, cases concerned with the dissemination of cultural ideas or with the improvement of the legal structure. Do such cases suggest that economic development was being set aside? Or, do they indicate that a broad view was being taken of the scope of economic development? I prefer to think that the latter represents the true position. The annulment Committee in *Patrick Mitchell v. DRC*

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<sup>26</sup> Applicant’s Reply, para. 20.

<sup>27</sup> SCHREUER, *supra* note 8; *see also* discussion at para. 15 above.

observed pertinently that “the concept of investment was somewhat ‘broadened’”<sup>28</sup> in some cases, but it added that “this does nothing to alter the fundamental nature of that characteristic.”<sup>29</sup> The fundamental nature of the requirement to prove that an ICSID investment is for the economic development of the host State stands.

32. The effect of reasoning opposed to that advanced above is that, if it happens that an investment does not play a role in the economic development of the host State, that investment is nonetheless fully entitled to claim the protection of ICSID if it meets dictionary criteria of what is an investment. That is strange: one would have thought that an ICSID investment was a special kind of investment. A microscopic approach could no doubt reach a different result, but such a result would be at variance with the discernible motivation of the ICSID scheme which, in my opinion, was designed to contribute to the economic development of host States. That purpose is not satisfactorily put by merely stating that an ICSID investment plays a role in the economic development of the host State; it has to be stated that such development is a condition of an ICSID investment.

**C. A CONTRIBUTION TO ECONOMIC DEVELOPMENT OF THE HOST STATE HAS TO BE “SUBSTANTIAL” OR “SIGNIFICANT.”**

33. The Tribunal found that contribution to the economic development of the host State has to be “substantial” or “significant.” Nothing in the texts says so, and the Applicant challenges the proposition. I understand the Applicant to contend that economic development of the host State is not required but that, if it is, some contribution, however small, is enough. The Respondent supports the contrary position taken by the Tribunal. Which position is correct?

34. As recalled above, Article 31(1) of the Vienna Convention enjoins a search for the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Whatever the strict sequence of the statutory steps, the search for the “ordinary meaning” of “investment” sooner or later throws the searcher back on the understanding of the international legal community. The international legal community

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<sup>28</sup> *Patrick Mitchell v. DRC*, para.30.

<sup>29</sup> *Id.*

would have rejected out of hand the idea that any contribution to the economic development of the host State, however miniscule that contribution is, is sufficient to qualify the whole outlay as an “investment” within the meaning of Article 25(1) of the ICSID Convention. I am confident that the common understanding would have preferred the notion of a “substantial” or “significant” contribution, as the Tribunal did.

35. There is no basis for contending that the general understanding supports the opposite principle that effect has to be given even to minor but negligible matters – unless such a reading is required by the text. There is nothing to that effect in the governing text; Article 25(1) of the ICSID Convention does not indicate the improbability of a very tiny contribution to economic development being sufficient to qualify the whole outlay as an ICSID investment. In my opinion, the concept of *de minimis* is a familiar and universal principle; it applies generally – barring a provision to the contrary.

36. There is some dispute about whether this is the law. The way to look at it is in the reverse. Is it the law that an infinitesimally small development suffices to convert the whole outlay into an ICSID investment which is designed to foster the economic development of the host State? I have no doubt that the law is not to that effect. The governing principle is good faith. *Ex re sed non ex nomine* has been appealed to. So too have the concepts of proportionality and abuse of rights.<sup>30</sup> A precise statement on the position cannot be located, but applicable guiding principles are not wanting.

37. Decisions favouring the view that a contribution to economic development has to be substantial or significant are to be found in *Joy Mining v. Egypt*;<sup>31</sup> *L.E.S.I. – DIPENTA v. Algeria*;<sup>32</sup> and *Bayindir v. Pakistan*.<sup>33</sup>

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<sup>30</sup> See generally BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, pp. 122,133 (1987).

<sup>31</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (“*Joy Mining v. Egypt*”), paras. 49, 53.

<sup>32</sup> *Consortium Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005, (“*L.E.S.I. – DIPENTA v. Algeria*”), Section II, para. 14(i) – (ii).

<sup>33</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (“*Bayindir v. Pakistan*”), para. 137. See also *Franz Volk v. S.P.R.L. Ets J. Vervaecke*, 9 July 1969, 1969 European Court 00295, holding, on a question

38. Obviously, there must come a point where the contribution to economic development is so marginal that the Tribunal is competent to disregard it on the safe assumption that the law is speaking only of a substantial contribution. Pronouncements to the contrary would be difficult to appreciate; they would overlook the circumstance that no specific statutory mandate is required to enable a judicial body to understand the concept of a contribution as meaning a substantial contribution, absent any contrary indication in the governing text. In paragraph 123 of the Award, the Tribunal correctly observed, “Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an ‘investment.’”

**D. THE APPLICANT’S OUTLAY DID NOT PROMOTE THE ECONOMIC DEVELOPMENT OF MALAYSIA IN A SUBSTANTIAL OR SIGNIFICANT MANNER.**

39. The Tribunal was entitled to find that the Claimant’s outlay did not promote the economic development of Malaysia in the sense that it did not substantially or significantly contribute to it. The Committee cannot reverse that finding without assuming the forbidden functions of a court of appeal.

**E. THE BIT DID NOT HAVE TO BE CONSIDERED.**

40. The Applicant objected that the Tribunal failed to consider whether the Contract was an investment under the BIT. Under the BIT, “investment” was expressly defined by the United Kingdom and Malaysia to be extremely broad – encompassing “every kind of asset.” I understand the Applicant’s suggestion to be that an investment within this broad definition governs the scope of an investment under Article 25(1) of the ICSID Convention regardless of whether the investment falls within any outer limits of an investment and in particular meets a condition that it contributes to the economic development of the host State.

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whether a trade agreement is capable of affecting trade contrary to a certain prohibition, that “regard must be had to the proportion of the market which the grantor controls or endeavours to obtain” and that “an agreement falls outside the prohibition ... when it has only an insignificant effect on the markets.” And see the review in Maija Laurila, *The de minimis Doctrine in EEC Competition Law: Agreements of Minor Importance*, E.C.L.R. 1993, 14(3), 97-104.

41. Incidentally, nothing brings out so much as this argument that the Applicant's real contention is that the consent of the parties is enough, by itself, to clothe the Tribunal with jurisdiction. In my view, that contention is mistaken.

42. The question is and remains whether an outlay is an "investment" within the meaning of Article 25(1) of the ICSID Convention. The reference to an "investment" in Article 25(1) of the ICSID Convention is not made subject to any definition in another instrument. The ICSID provision is controlling. It is therefore logical to begin with the question whether the Applicant's outlay is an investment within the meaning of that provision.

43. As has been argued, the answer turns on whether the Applicant's outlay is within the outer limits of an investment and, in particular, on whether it meets a condition for contribution to the economic development of the host State. These limitations are inapplicable to an investment under the BIT since this extends to "every kind of asset" that the parties may agree on. In effect, under the BIT the parties are free to choose whatever they desire to be regarded as an investment; that unanchored fluctuation in the nature of an investment gives no weight to the formative documents of ICSID.

44. In *Joy Mining v. Egypt*, the Tribunal noted: "[t]he fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention."<sup>34</sup> And Professor Schreuer writes:

The fact that most of the proposed definitions for the objective criteria for jurisdiction were not adopted was motivated less by the feeling that they were redundant than by an inability to agree on them. It would be inaccurate to assume that the general phrasing of these objective criteria in Art. 25 gives the parties complete freedom to determine, by the terms of their consent, which disputes they wish to submit to the Centre. This fact is borne out by the Report of the Executive Directors:

While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the

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<sup>34</sup> *Joy Mining v. Egypt*, para. 49.

purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Consequently, it is necessary to take a closer look at the meaning of the objective jurisdictional requirements set out in Art. 25. The interpretation by the parties of these objective requirements is given great weight. Nevertheless, there are outer limits to the Centre's jurisdiction that are not subject to the parties' disposition. This conclusion is borne out by Rule 41 of the Arbitration Rules and Rule 29 of the Conciliation Rules of 1984: a conciliation commission or an arbitral tribunal will not only take note of an objection to jurisdiction filed by a party but may also consider on its own initiative whether the dispute before it is within the Centre's jurisdiction (citations omitted).<sup>35</sup>

45. The two provisions last cited in the excerpt from Schreuer empower an arbitral tribunal (or a conciliation commission) to raise "on its own initiative" a jurisdictional question, even though other provisions empower a party to raise jurisdictional questions. An objection to jurisdiction may be raised by a tribunal even if the parties consent to jurisdiction and do not question it. Jurisdiction is not entirely left to the will of parties. Therefore, to start with the consent of the parties (as if that is self-sufficient) inverts the logical process.

46. As was observed by the annulment Committee in *Patrick Mitchell v. DRC*:

[T]he parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.<sup>36</sup>

47. To return to *Joy Mining v. Egypt*, the Tribunal in that case said:

The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.<sup>37</sup>

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<sup>35</sup> SCHREUER, *supra* note 8, pp. 90 – 91.

<sup>36</sup> *Patrick Mitchell v. DRC*, para. 31.

<sup>37</sup> *Joy Mining v. Egypt*, para. 50.

**F. EVEN IF THE TRIBUNAL ERRED IN HOLDING THAT THE APPLICANT’S OUTLAY WAS NOT AN ICSID INVESTMENT, THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS.**

48. In this case, the Tribunal found that the Centre had no jurisdiction. It held that it was a condition of an ICSID investment that the investment must contribute to the economic development of the host State, and that indeed it must do so substantially or significantly; in its view, the Claimant’s outlay did not contribute to the economic development of Malaysia and, if it did, did not do so substantially or significantly.

49. Challenging this holding, the Applicant contends that the Tribunal “has manifestly exceeded its powers” within the meaning of Article 52(1)(b) of the ICSID Convention, which sets out an exhaustive list of grounds for the annulment of an award. Assuming, but not finding, that the Tribunal exceeded its powers in concluding that the Claimant’s outlay was not an ICSID investment, did the Tribunal manifestly exceed its powers within the meaning of Article 52(1)(b) of the ICSID Convention?

50. As recalled in the Committee’s decision, the Applicant contended that, under Article 52(1)(b) of the ICSID Convention, the Tribunal does not have to find that there was an excess of powers and then go on to find that the excess was manifest; the Tribunal was required to answer a single question: Was there a manifest excess of powers?

51. I am not sure what turns on the point, but, at any rate, it appears to me that all it does is to conceal an analysis which shows a clear distinction between there being an excess of powers and a manifest excess of powers. The law obviously contemplates that not all and every case of excess of powers will lead to annulment; that result will only come about if there is both an excess of powers and an excess of powers which is manifest. The reverse will only be true if it were the case that every excess of jurisdiction is a manifest excess of jurisdiction. But, for reasons which need not be rehearsed, that is not true.<sup>38</sup>

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<sup>38</sup> See *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for the Annulment of the Award, 5 June 2007 (“*Soufraki v. UAE*”), para. 118: “[t]he *ad hoc* Committee sees no reason why the rule that an excess of power must be manifest in order to be annulable should be disregarded when the question under discussion is a jurisdictional one.” See also the *ad hoc*

52. This is an arbitral process; a high threshold is required to show that the Tribunal manifestly exceeded its powers. A manifest excess of powers is an excess of powers that is easily perceived or discerned by the mind, without the need for deeper analysis.<sup>39</sup> The annulment Committee in *Wena Hotels v. Egypt* adopts this approach when it states, “[t]he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.”<sup>40</sup>

53. That position recalls the restricted circumstances in which a state is entitled to refuse recognition to an arbitral award given in a dispute with another state. What the ICSID Convention has in substance done is to institutionalize that principle in relation to parties to an ICSID arbitration, including the concept of there having to be a “manifest” breach of competence before there can be judicial intervention.<sup>41</sup> Thus, the jurisprudence does distinguish between a breach of competence and a ‘manifest’ breach of competence.

54. Plainly, then, the Committee is not empowered to intervene if all that it finds is that the Tribunal exceeded its powers; it must go on to find that the Tribunal manifestly exceeded its powers, a manifest error not being necessarily the same thing as a manifest excess of powers, there being an obvious distinction between them. An annulment committee is not a court of appeal. The Award is unimpeachable if all it does is to exceed the Tribunal’s powers.

55. The object of the requirement that the Committee can only act if the Tribunal has manifestly exceeded its powers is to maintain the integrity of the arbitral process. If there was a manifest excess of powers (including a jurisdictional excess), the Committee can intervene. But I do not think that that threshold can be passed in this case without

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Committee’s ruling in *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007 (“*Lucchetti v. Perú*”), para. 101.

<sup>39</sup> See SCHREUER, *supra* note 8, p. 934.

<sup>40</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002 (“*Wena Hotels v. Egypt*”), para. 25; see also *Repsol v. Ecuador*, *infra* note 44.

<sup>41</sup> See the position as it later came to be set out in *Arbitral Award of 31 July 1989*, *ICJ Reports 1991*, 53, at paras. 47, 56, 60.

converting the limited grounds of annulment into the ampler grounds of an appeal. Considerations of finality showed that the Tribunal was entitled to err within its boundaries even if it exceeded its powers – provided that the error was not manifest.

56. Of course there can be argument that a mistaken interpretation of a law means that the law is not being applied, the proposition being that failure to exercise a jurisdiction which exists is a manifest excess of powers. The answer suggested by the jurisprudence is this: if the Committee finds that the Tribunal applied the law, a misinterpretation of the law does not matter. The result would be different if the mistake led the Tribunal not to apply the law, it being assumed that the law was decisive. The position was encapsulated by the annulment Committee in *MTD v. Chile*, reading:

An award will not escape annulment if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be ‘manifest,’ not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough (citation omitted).<sup>42</sup>

57. In *Repsol v. Ecuador*, the annulment Committee cited with approval Professor Schreuer’s statement to the effect that “[a]n excess of powers is manifest if it can be discerned with little effort and without deeper analysis.”<sup>43</sup> It held that, in that case, the law had been applied even if it was misinterpreted. In effect, it preferred the cognitive to the analytical approach. In *CMS v. Argentine Republic*,<sup>44</sup> the annulment Committee found that the Tribunal had misinterpreted a provision of the applicable law but had nevertheless

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<sup>42</sup> *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on the Application for Annulment, 21 March 2007 (“*MTD v. Chile*”), para. 47.

<sup>43</sup> *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, 8 January 2007 (“*Repsol v. Ecuador*”), para. 36, citing SCHREUER, p. 933. See also Carlos Ignacio Suarez Anzorena, *Vivendi v. Argentina: on the Admissibility of Requests for Partial Annulment and the Ground of a Manifest Excess of Powers*, in ANNULMENT OF ICSID AWARDS, Gen. Ed. Emmanuel Gaillard (New York, 2004), 123 at 172.

<sup>44</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 (“*CMS v. Argentine Republic*”), paras. 128 – 136.

applied it, though “cryptically and defectively.”<sup>45</sup> It held that there was “no manifest excess of powers.”<sup>46</sup>

58. There are of course various ways of putting the position, but that which seems most in keeping with common sense was set out some years ago by the annulment Committee sitting in *Amco v. Indonesia*. It said:

The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention. The ad hoc Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.<sup>47</sup>

59. Questions of judgment are obviously involved in determining whether the Contract in this case was an investment within the meaning of Article 25(1) of the ICSID Convention; the matter turns largely on facts. Take the Tribunal’s concession (much emphasized by the Applicant and apparently also by the Committee) that to some extent the Applicant did contribute to the economic development of Malaysia. The Tribunal proceeded to disregard the contribution as not being substantial or significant. It was probably applying the principle that (unless the contrary is indicated in the governing texts) the law disregards very minor matters. Cases on the point have been cited above.

60. On the principle of substantiality, who is to say that the Tribunal was manifestly in excess of its powers either in adopting that principle or in applying it? The question is not

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<sup>45</sup> *CMS v. Argentine Republic*, para. 136.

<sup>46</sup> *Id.* In paragraph 130, the annulment Committee found that “the Tribunal made a manifest error of law,” but it obviously did not consider that this was the same thing as saying that the Tribunal “manifestly exceeded its powers” within the meaning of Article 52(1)(b) of the ICSID Convention.

<sup>47</sup> *Amco v. Indonesia*, para. 22.

whether the Tribunal's interpretation is expressly articulated in the formal texts but whether it is inconsistent therewith or with the context. I am not persuaded that there is any inconsistency in this case.

61. I agree that the Arbitral Tribunal would have manifestly exceeded its powers if the Applicant is correct in arguing that the Tribunal should have considered the BIT definition of "investment,"<sup>48</sup> but, for the reasons given, it appears to me that to begin the inquiry with the BIT is to stand the analysis on its head.

## CONCLUSION

62. What this case hinges on is a perception of the objectives of ICSID: Was the jurisdiction of ICSID meant to be solely dependent on the will of the parties? Or, was it meant to be dependent on the will of the parties subject to conformity with the overriding objectives of ICSID as a body concerned with the economic development of the host State? The former may be referred to as the 'subjectivist' view, the latter as the 'objectivist' view. The cleavage marks a titanic struggle between ideas, and correspondingly between capital exporting countries and capital importing ones.<sup>49</sup>

63. This opinion is based on the objectivist view. But, as today's decision demonstrates, the subjectivist view is probably in the ascendant; if it continues to prosper, I see no answer to the observation that, by "promoting an extension of ICSID jurisdiction to any kind of economic operation, even those without any connection to 'authentic' investment . . . ICSID may well become just another arbitration institution, competing with a range of others (ICC, LCIA, AISCC, etc.)."<sup>50</sup>

64. The formative instruments of ICSID do not justify the view that ICSID was meant to be just another arbitration institution. The reasons for the change in direction are not to

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<sup>48</sup> Claimant's Memorial, p. 7, footnote 32.

<sup>49</sup> The fact that some traditional capital importing countries are now, to an extent, capital exporting ones is scarcely relevant. On this phenomenon, see Florian Grisel, *International Development and Investment Arbitration: Allies or Enemies?* LASIL, PERSPECTIVES, April 2008.

<sup>50</sup> Farouk Yala, *The Notion of 'Investment' in ICSID Case Law: A Drifting Jurisdictional Requirement?* JOURNAL OF INTERNATIONAL ARBITRATION 22(2) (2005), 105-126, at 125.

be found in any known legal rationale. The change is not compatible with the original objectives of the institution. On the available material, there is no question of the Washington Convention having been impliedly amended by a practice of accommodating so fundamental a departure. Besides, there has been no argument about an implied amendment of the Convention.

65. These considerations lead me to support the view of the Tribunal that there could only be an ICSID investment if the investment was intended to promote the economic development of the host State, and that indeed that economic development had to be substantial or significant. The Tribunal was right in its holdings; alternatively, if there was error, the error did not lead it into a manifest excess of its powers. No doubt, the opposite view is strongly supported in the literature<sup>51</sup> and I am aware of the Committee's preference for it, but, with respect, I do not consider that it is ironclad.

[signed]

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Mohamed Shahabuddeen

Date: [19] February 2009

Washington, D.C.

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<sup>51</sup> See, e.g., the interesting article by Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 7 (2008) 161-175.