

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

DEUTSCHE BANK AG

v.

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA
ICSID CASE No. ARB/09/02

DISSENTING OPINION OF MAKHDOOM ALI KHAN

Table of Contents

I. Introduction.....	2
II. Does the Hedging Agreement constitute an “investment”?	3
A. The Treaty	4
(i) Claim to Money Used to Create an Economic Value	9
(ii) Associated with an investment.....	11
B. The ICSID Convention.....	12
(i) Substantial Commitment or Contribution	18
III. Expropriation	28
IV. Fair and Equitable Treatment	40
A. Interim Order of the Supreme Court	40
B. Actions of the Central Bank	46
V. Capacity of CPC to enter into the Hedging Agreement.....	48
VI. Attribution.....	49
VII. Conclusion.....	50

I. Introduction

1. I have had the benefit of reading the majority award (“**Majority Award**”) authored by my distinguished colleagues. I have respect for their erudition and experience. I regret, however, that I find myself unable to agree with some of the reasons given and conclusions reached by them. I am, therefore, compelled to write this dissent.

2. In particular, I do not agree that:
 - (i) the Hedging Agreement (“**Hedging Agreement**”) constitutes an investment for the purposes of the Germany-Sri Lanka BIT (“**Treaty**”), I discuss this in Section II. A;
 - (ii) the Hedging Agreement (“**Hedging Agreement**”) constitutes an investment for the purposes of the ICSID Convention (“**Convention**”), I discuss this in Section II. B;
 - (iii) the debt owed to the Claimant by the Ceylon Petroleum Corporation (“**CPC**”) was expropriated in violation of Article 3 of the Treaty and that the Claimant is, therefore, entitled to damages, I discuss this in Section III;

- (iv) the Interim Order issued by the Supreme Court of Sri Lanka (“**Supreme Court**”) on 28 November 2008 violated the Respondent’s obligation under Article 2 of the Germany-Sri Lanka BIT to accord fair and equitable treatment to investments under the Treaty, I discuss this in Section IV.A; and
 - (v) the actions of the Central Bank of Sri Lanka (“**Central Bank**”) violated the Respondent’s obligation under Article 2 of the Germany-Sri Lanka BIT to accord fair and equitable treatment to investments under the Treaty justifying an award of damages of USD 60,368,993 plus interest in favour of the Claimant, , I discuss this in Section IV.B.
3. The identification of these five areas of disagreement does not mean that I agree with the Majority Award in all other respects. For instance, while I agree with the finding that CPC had the capacity to enter into the Hedging Agreement, I am not in agreement with some of the reasons offered to support this conclusion. I discuss this in Section V. Similarly, while I agree with paragraph 404 of the Majority Award that this Tribunal is not required to decide the issue of attribution, I disagree with the observations made in paragraph 405 and some of the observations made in paragraph 407 of the Majority Award. I address this in Section VI.
 4. My conclusions are in Section VII.
 5. The Majority Award sets out the facts, as stated by the parties, I, therefore, do not restate these here.

II. Does the Hedging Agreement constitute an “investment”?

6. In order to determine whether the Hedging Agreement constitutes an investment, the majority employs the double-barrel test. First, it considers whether the Hedging Agreement falls within the definition of the term “investment” in the Treaty, and then whether it falls within the scope of the term as used in the Convention. I follow the same order.

A. The Treaty

7. The preamble to the Treaty states that its purpose is “*to create favourable conditions for investments by nationals and companies of either State in the territory of the other State*”. The term ‘investment’ is defined in Article 1 of the Treaty:

1. *The term “investments” comprises every kind of asset, in particular:*

...

(c) claims to money which has been used to create an economic value or claims to any performance having an economic value and associated with an investment;

8. The definition of “investment” in the Treaty as comprising every kind of asset is followed by a partial list which enumerates some assets “*in particular*”. According to the Majority Award, “[t]he categories enumerated are just an illustrative list of assets, every kind of which is considered to be an investment.”¹ I am of the view that for a harmonious construction of Article 1, the general description of “investment” as comprising “every kind of asset” must be read with the categories enumerated in the partial list.² As stated by Kenneth J. Vandeveld, such a “list provides an irreducible core of meaning while indicating through illustration some sense of the overall scope of the term.”³
9. Further, Article 1.1 (c) of the Treaty requires that a claim to money must have been “*used to create an economic value*”. As such, simply showing that the Claimant has a claim to money will not be enough to qualify it as an investment, given the language of the Treaty.

¹ Majority Award, para.286.

² As McLachlan, Campbell, Shore, Laurence and Weiniger, Matthew note in their book *International Investment Arbitration: Substantive Principles*, OUP, NY, 2007, p. 172,

“Tribunals have been reluctant to base decisions solely on the wide inclusive phrase of definitions of ‘investment’. *Petrobart v Kyrgyz Republic and Jan de Nul v Egypt* are two cases where tribunals have found an investment to exist by reference to the detailed criteria contained in the ECT and *Belgo-Luxemburg Economic Union-Egypt BIT* respectively. It is, however, noteworthy that in neither case did the Tribunals base their decisions on the wide opening words of the treaty definitions, ‘every kind of asset’ and ‘any kind of assets’ respectively. Before deciding that the asset in dispute was an ‘investment’, the Tribunals sought confirmation from the non-exhaustive list following the introductory phrase.”

³ Vandeveld, Kenneth, J., *U.S. International Investment Agreements*, OUP, N.Y, 2009, p. 115.

To succeed, the Claimant must also establish that this money was used to create an economic value.⁴

10. This is not the end of the matter, however. In my opinion, not only does the Treaty require that the claim to money must have been “*used to create an economic value*” but also that it be “*associated with an investment*”. The Majority Award does not accept that clause (c) requires a claim to money, which has been used to create an economic value, to be “*associated with an investment*”. It states that “[d]efining an investment by reference to an investment would be a circular reasoning”⁵. In my opinion such an interpretation seeks to read away a key phrase of Article 1.1 (c) of the Treaty. In effect, the majority is positing that the entire phrase “*associated with an investment*” is redundant.
11. Words are the means by which a State party to a treaty communicates its intention. As stated by the *Wintershall* Tribunal “[t]he carefully-worded formulation in Article 31 [of the Vienna Convention on the Law of Treaties] is based on the view that the text must be presumed to be the authentic expression of the intention of the parties.”⁶ Every word or phrase must, therefore, be given its ordinary meaning. None can be disregarded or held redundant.⁷ The phrase “*associated with an investment*” cannot, therefore, be regarded as superfluous. It has to be given a meaning.
12. A departure from this norm may be justified may be justified in circumstances where it would lead to absurd results or make a provision of the treaty meaningless or defeat the

⁴ This is a more stringent requirement than that stated in a large number of other bilateral investment treaties (“**BITs**”) executed by Germany. For instance in the Agreement between the Federal Republic of Germany and the People’s Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments (entered into force on 14 September 1986) and Treaty between the Federal Republic of Germany and the Republic of Turkey concerning the Reciprocal Promotion and Reciprocal Protection of Investments (entry into force, 16 December 1965) Article 8.1(c) in both treaties uses the words “*claims to money or to any performance having an economic value*”. As is obvious, the words “*claims to money*” have been used without any qualification and are of much wider import... See also: Agreement between the Federal Republic of Germany and the Arab Republic of Egypt concerning the Encouragement and Reciprocal Protection of Investments (entered into force on 16 June 2005) Article 1.1(c) to the same effect. See also Dolzer, R. and Stevens, M., *Bilateral Investment Treaties*, Kluwer, The Hague, 1995, pp. 28-29.

⁵ Majority Award, para. 286.

⁶ *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award, 8 December 2008, para. 78.

⁷ Jennings, Sir Robert and Watts, Sir Arthur, *Oppenheim’s International Law*, 9th ed, vol 1, Parts 2 to 4, pp.1271-2 refer to the “*many pronouncements of the International Court of Justice, which has...emphasized that:*

...interpretation is not a matter of revising treaties or reading into them what they do not expressly or by necessary implication contain or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the treaty’s text.”

object and purpose of the treaty. That not being the case here, the phrase “*associated with an investment*” cannot be regarded as redundant.

13. An examination of the language of some of the earlier BITs, to which Germany was a party, as well as the later German Model BITs, establish that this phrase was used intentionally in the Treaty and is not superfluous. The 2005 and 2008 German Model BITs,⁸ and many BITs concluded by Germany,⁹ do not use the phrase “*associated with an investment*” to qualify “*claims to money which has been used to create an economic value*”. This suggests that the Contracting Parties to the Germany-Sri Lanka BIT were familiar with an expansive version of clause (c). They chose not to use it in this case. The use of limiting language in this clause is not without significance. It suggests that the qualifying phrase “*associated with an investment*” was deliberately inserted. It confirms that the State parties intended clause (c) of the Treaty to have a relatively narrower meaning.
14. Alternatively, the Majority Award states that if the phrase “*associated with an investment were to receive the meaning proposed by Respondent...[it] would only apply to claims to performance and not to claims to money*”.¹⁰ The Majority Award, however, does not explain why, applying the phrase “*associated with an investment*” to claims for money would lead to circular reasoning, but applying this phrase to claims to performance would not.
15. In the Treaty, the two kinds of claims, *i.e.*, for money and for performance, have been separated with the word “*or*”. The word “*or*” has been used to link two alternatives. The phrase “*associated with an investment*” has been used after the second alternative but separated from it by the use of the word “*and*”. The use of the word “*and*” is not without significance. It demonstrates that the phrase “*associated with an investment*” applies to both “*claims to money which has been used to create an economic value*” and “*claims to*

⁸ Germany Model BIT (2005):

“(c) *claims to money which has been used to create an economic value or claims to any performance having an economic value;*”

Germany Model BIT (2008):

“(c) *claims to money which has been used to create an economic value or claims to any performance having an economic value*”.

⁹ See for instance the Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments (entry into force on 12 October 2007) Article 1.1 (c) which uses language identical to the 2005 and 2008 German Model BITs.

¹⁰ Majority Award, para.286.

any performance having an economic value". If the word "and" in Article 1.1 (c) of the Treaty was intended to apply only to the second limb and not the first, it could have been omitted and the provision could simply have read as "*any performance having an economic value associated with an investment*". Both Sri Lanka and Germany are parties to BITs where the word "and" has not been used.¹¹ In the Treaty, both State Parties chose to use this word and its inclusion must, therefore, be regarded as intentional. The conclusion reached in the Majority Award makes the word "and" in clause (c) redundant which, in my opinion, is simply not permissible.

16. Any claim to money used to create an economic value must, therefore, be associated with an investment to fall within Article 1.1 (c) of the Germany-Sri Lanka BIT. Even the Claimant admits as much,¹² though it disputes the significance and interpretation of this phrase.
17. I am of the view that the two Contracting States, having the latitude and authority to restrict the meaning of the term "*investment*"¹³ in the Treaty, decided to exclude certain economic activities from its scope. They made it clear that a claim for money which has not been "*used to create an economic value*" or lacks the essential connecting feature of being "*associated with an investment*" will fall outside the Treaty's definition of "investment". The use of restrictive language by the two State Parties to the Treaty was intentional. These words, therefore, have to be given due weight. They cannot be stripped of their ordinary meaning.
18. The Tribunal in the *Global Trading* case was called upon to interpret similar language in the Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment (entry into force 16 November 1996). Article I(1)(a)(iii) of that Treaty reads as follows:

¹¹ See for instance Agreement between the Federal Republic of Germany and the United Arab Emirates for the Promotion and the Reciprocal Protection of Investments (entry into force 2 July 1999) Article 1.1 (c):
claims to money or to any performance having economic value associated with an investment.

See also Agreement on the Promotion and Protection of Investments between the Democratic Socialist Republic of Sri Lanka and the Government of the Arab Republic of Egypt (entry into force 10 March 1998) Article 1.1 (c):
Claims to money or to any performance having an economic value associated with an investment.

¹² Claimant's Post-Hearing Brief, para. 68.

¹³ *Phoenix Action Limited v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, para. 96.

a claim to money or a claim to performance having economic value, and associated with an investment;

19. After an examination of this provision the Tribunal observed that it:

... does not find that it needs to go beyond the text itself of Article I(1)(a) of the BIT. And, under the text of Article I(1)(a), the Tribunal finds that (as here) claims to money alleged to be due can only fall within the scope of Article I, and therefore of the BIT as a whole, whatever the circumstances, if they are (as sub-paragraph (a)(iii) says in plain words) “associated with an investment.”¹⁴

20. The claim was rejected with the observation that “[i]n the Tribunal’s view, the Claimants’ case under this sub-paragraph founders on the fact that their contracts were simply contracts which lacked the essential connecting factor of being ‘associated with an investment.’”¹⁵ That reasoning, in my opinion, applies to the language of this Treaty and therefore, this case.

21. While Article 1 of the Treaty lists other categories of investments such as:

- (a) moveable and immoveable property and other rights *in rem*;
- (b) shares, stocks, debentures and other similar interests in companies;
- (d) intellectual property rights; and
- (e) business concessions under public law or contract;

the Hedging Agreement clearly does not fall within any of these categories. Neither the parties nor the Majority Award suggest otherwise. The only clause in Article 1.1 which may accommodate such a claim is clause (c) and that too if the Claimant establishes that it has been used to create an economic value and is associated with an investment.

22. In accordance with Article 1.1 (c), a “*claim to money*” can only be considered to be an “*investment*” under the BIT if it meets two criteria. The claim must be:

¹⁴ *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* (ICSID Case No. ARB/09/11), Award, 1 December 2010, para. 50.

¹⁵ *Ibid*, para.51.

- (i) for “*money used to create an economic value*” and
- (ii) it must be “*associated with an investment*”.

The Claimant’s claim to money is for a debt arising out of the Hedging Agreement. The first question, therefore, is whether this debt was used to create an economic value. In order to answer this question, we have to examine the Hedging Agreement and the claim being made by the Claimant.

(i) Claim to Money Used to Create an Economic Value

- 23. The Majority Award states that “*the Hedging Agreement is an asset. It is a legal property with economic value for Deutsche Bank. It is a claim to money which has been used to create an economic value for Deutsche Bank.*”¹⁶ It does not state how or why that is so. Article 1.1 (c) does not require that the “*claim to money*” have an economic value for the Claimant. All claims, made by any person, will always have an economic value for that person. That is not the requirement of the Treaty. The requirement is that the claim should be for “*money used to create an economic value*”.
- 24. At the time the Hedging Agreement was executed, no money was paid by either party to the other. The outcome of the Hedging Agreement, and any payments to be made by one party to the other, were contingent on the price of oil on each payment date.
- 25. The Strike Volume or the number of barrels of oil that the Hedging Agreement applied to was set at 100,000 barrels for each of the parties. The agreed strike price was USD 112.50 per barrel. Where the Monthly Oil Price was greater than the Strike Price, the Claimant was to pay CPC the difference between the Strike Price and the Monthly Oil Price (up to a maximum price difference of USD 10 per barrel) multiplied by the Strike Volume. Where the Monthly Oil Price was lower than the Strike Price, CPC was obliged to pay the Claimant the difference between the Strike Price and the Monthly Oil Price multiplied by the Strike Volume. CPC’s Target Price Level was set at USD 2,500,000 and the trade terminated if payout by the Claimant reached that level.¹⁷ The Hedging Agreement limited

¹⁶ Majority Award, para. 285.

¹⁷ Majority Award, para. 30.

the payments to be made by the Claimant to CPC. If the price of oil fell, there was no limit on the payments, which CPC had to make to the Claimant.

26. The price of oil fell and, therefore, on 17 October 2008 and 14 November 2008, CPC made payments of USD 1,659,636.36 and USD 4,597,857.14 respectively to the Claimant. On 3 December 2008, the Claimant terminated the Hedging Agreement on the ground that CPC had failed to execute the ISDA Master Agreement within 90 days of the Trade Date as defined in the Confirmation.¹⁸ By its letter of 10 December 2008, the Claimant, based on the early termination, calculated the close-out amount payable to it by CPC as USD 60,368,993.¹⁹
27. This amount, which the Claimant now seeks to recover, is the sum calculated on the basis of the Early Termination. It is not the money that the Claimant paid to CPC. It is also not the current economic value of any money that the Claimant has ever used or that it paid to CPC. Had the Claimant used a smaller amount, and its economic value had grown to USD 60,368,993, then it could be argued that this amount was the current economic value of the money, which the Claimant had earlier invested. That is not the case here.
28. The Claimant only made a payment of USD 35,523.81 to CPC on 19 September 2008 as the price of oil was above USD 112.50. The current economic value of that payment is not USD 60,368,993. The sum of USD 35,523.81 was not “*used to create an economic value*” of USD 60,368,993. Even if the price of oil had remained above USD 112.50 for the duration of the Hedging Agreement, the Claimant’s payment to CPC would not have exceeded USD 2,500,000. The Hedging Agreement could not have possibly created an economic value in excess of this amount. It is, therefore, difficult to see how the current claim of USD 60,368,993 is for money used to create an economic value.
29. The claim to money by the Claimant, therefore, does not meet the first criteria of Article 1.1 (c) of the Treaty.

¹⁸ Core Bundle 5, Exhibit 246. The letter mentioned 9 December 2008 as the Early Termination Date.

¹⁹ Core Bundle 6, Exhibit 256. The Claimant followed this by a letter of demand of 13 January 2009: Core Bundle 6, Exhibit 284

(ii) Associated with an investment

30. I now turn to the second criteria. The Claimant's claim to money is a debt arising out of the Hedging Agreement. For this debt to qualify as an investment under the BIT, it must be "*associated with an investment.*" The debt is associated with the Hedging Agreement. The question then is whether the Hedging Agreement itself constitutes an investment, which is separate and distinct from the debt arising thereunder. For this, I proceed to examine the definition of "*investment*" in the Treaty.
31. Article 1.1 of the Treaty lists several categories of investments. These are:
- (a) moveable and immovable property and other rights *in rem*;
 - (b) shares, stocks, debentures and other similar interests in companies;
 - (c) claims to money which has been used to create an economic value or performance having an economic value and associated with an investment;
 - (d) intellectual property rights; and
 - (e) business concessions under public law or contract.
32. The Hedging Agreement clearly does not fall within categories (a), (b), (d) or (e). Neither the parties nor the Majority Award suggest otherwise. With regard to category (c), it is the debt arising out of the Hedging Agreement, which is a claim to money. The Hedging Agreement itself is not a claim to money. It is a financial instrument. The Hedging Agreement is a contract and a contract without more (for instance unless it is related to moveable, immovable or intellectual property) is not enumerated in the categories which, "*in particular*", are regarded as assets and therefore, an "*investment*" for the purposes of the BIT. Further, even if it were assumed that the Hedging Agreement was a "*claim for money*" referred to in category (c), it cannot at the same time also be an investment for the purpose of the phrase "*associated with an investment*" as used in category (c). An instrument cannot be a claim for money, and also an investment with which that claim for money is associated. The Hedging Agreement is, therefore, not associated with a separate investment as required by clause (c), and, therefore, does not qualify as an investment under clause 1.1 (c) of the Treaty.

33. In view of the above, I do not agree with the Majority Award and am of the opinion that the Claimant did not make any “investment” within the meaning of the Treaty. I now turn to the Convention.

B. The ICSID Convention

34. While the Convention does not define the term “investment”, its outer limits have been demarcated in ICSID jurisprudence.²⁰ The result is that not every economic activity is an

²⁰ See *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, 6 August 2003, para. 133:

“...investment...embod[ies] certain core meaning which distinguishes it from ‘an ordinary commercial transaction such as a simple, stand alone, sale of goods or services’;”

Joy Mining v. Arab Republic of Egypt (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, para. 50:

“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”;

Romak S.A. v. Republic of Uzbekistan (PCA Case No. AA280), Award, 26 November 2009, paras. 180 and 207:

“The term —investment has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the [Germany – Ukraine] BIT...The Arbitral Tribunal therefore considers that the term —investments under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of investment the fact that it falls within one of the categories listed in Article 1 does not transform it into an investment.”

Douglas, Z., *The International Law of Investment Claims*, Cambridge University Press, United Kingdom, 2009, para. 342:

“The term ‘investment’, however, is a term of art: its ordinary meaning cannot be extended to bring any rights having an economic value within its scope, for otherwise violence would be done to that ordinary meaning, in contradiction to Article 31 of the Vienna Convention on the Law of Treaties”.

Schreuer, C. H., *The ICSID Convention: A Commentary*, 2d ed., Cambridge University Press, Cambridge, 2009, p. 117:

“Therefore, while it is clear that the parties have much freedom in describing their transaction as an investment, they cannot designate an activity as an investment that is squarely outside the objective meaning of that concept.”

Contra. Abaclat and others v. Argentine Republic (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, para. 364:

“If Claimants’ contributions were to fail the Salini test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants’ contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention’s aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina’s and Italy’s express agreement to protect the value generated by these kinds of contributions. In other words – and from the value perspective – there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.”

“investment” within the meaning of the Convention. Different tribunals have set out the general characteristics, which an investment typically possesses and the presence of which, while not dispositive, suggests that an investment has been made.²¹

35. The Tribunal in *Fedax N.V. v. Venezuela*²² identified five basic features of an investment: “a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.” In recent years, however, these characteristics have coalesced around those noted by the Tribunal in *Salini v. Morocco*²³. “[I]nvestment” noted that Tribunal “suggests payments, a certain period of the execution of the deal and participation in the risks of the transaction ... A reading of the preamble of the Convention permits to add to these the criterion of contribution to the economic development of the State receiving the investment.” The *Salini* Tribunal pointed out that “these various elements can be interdependent” and that “these various criteria must be appreciated together”.²⁴
36. While dismissing attempts to define “investment” as unrealistic, Schreuer identifies “five features that are typical to most of the operations in question”:
- (i) The projects have a certain duration.
 - (ii) There is a certain regularity of profit and return.
 - (iii) There is an assumption of risk usually by both sides (risk is in part a function of duration and expectation of profit).
 - (iv) The commitment is substantial.
 - (v) The operation has a significance for the host State’s development.

²¹ “The weight of authority is ... in favour of viewing the term ‘investment’ as having an objective definition within the framework of the ICSID Convention.” *Global Trading Resource Corporation and Globex International Inc. v. Ukraine* (ICSID Case No. ARB/09/11), Award, 1 December 2010, para. 43.

²² *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction, 11 July 1997, (2002) 5 ICSID Rep. 186, 194.

²³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001, (2004) 6 ICSID Reports 400, 413.

²⁴ The *Joy Mining* Tribunal referred to essentially the same five features as the *Fedax* Tribunal to characterize an investment. It also substituted “significance for the host country’s development” with a “significant contribution to the host State’s development”: *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, (2008) 13 ICSID Rep. 123, 133, para. 53. This was followed in *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Decision on Objections to Jurisdiction, 17 October 2006, para. 77.

These features are not to be “*understood as jurisdictional requirements but merely as typical characteristics of investment under the Convention.*”²⁵

37. The most obvious example of an investment, which fulfills these characteristics, is foreign direct investment such as establishing an industry or enterprise in the host State. This type of investment falls directly under the control of the host State’s legislative, executive and judicial power and requires the protection afforded by the Convention.
38. A more problematic area and one which has led to divergent decisions is indirect foreign investment, in particular ‘portfolio investments’ such as shares, bonds and other financial transactions and products. At times, the issue is directly addressed by the State parties by specifically listing a particular transaction or product in the definition of “*investment*” in the BIT. However, even if a given transaction or product qualifies as an investment under the BIT, the preponderant view is that given the very broad and general language used when defining “*investment*” in BITs it is necessary to examine whether the financial transaction or product qualifies as an investment under the Convention. To quote Professor Schreuer:

*BITs contain definitions of investment, but if you examine the BIT definition of investment you will see that these are extremely wide. They include such terms as claims to money or any right conferred by law or contract. I think most of us will agree, that this is so wide that it goes way beyond what most of us understand by an investment. In particular, it would cover an ordinary commercial transaction or a sales contract. Actually it would cover me going into a restaurant in Washington and ordering a meal for \$30.00. That is obviously not what is meant.*²⁶

39. The majority notes that recent developments in the case law suggest that two of these five characteristics, namely contribution to economic development²⁷ and regularity of profit and return²⁸, introduce an unacceptable degree of subjectivity and, therefore, should be

²⁵ Schreuer, Christoph H, *The ICSID Convention: A Commentary*, 2d ed., Cambridge University Press, Cambridge, 2009, p. 128.

²⁶ “Are the ICSID Rules Governing Nationality & Investment Working?” Panel Discussion, Chapter 6, in Grierson Weiler, TJ, Ed, *Investment Treaty Arbitration and International Law*, Vol. 1, Juris, NY, 2008, p. 119 at 125.

²⁷ Majority Award, para.306.

²⁸ Majority Award, para.305.

abandoned. I agree that the regularity of profit and return is not a valid criterion. Even typical direct foreign investments such as projects for the exploration and extraction of natural resources or construction of highways, depending on their outcome, may not generate regular profits or returns. As such, this characteristic cannot be considered as a typical feature of an investment. Many tribunals have dispensed with it. It is best discarded.

40. With respect to “*contribution to economic development*”, my understanding of the recent jurisprudence is different from that stated in the Majority Award. In my view, recent decisions do not reject “*contribution to economic development*” as a typical characteristic of investment. They either (i) observe that this characteristic is implicit in the other three characteristics and does not necessarily need to be evaluated separately,²⁹ or (ii) modify and supplement the *Salini* characteristics but in a manner which retains the essence of this characteristic.
41. Typical of the first category of decisions are those in *L.E.S.I.-Dipenta v. People’s Democratic Republic of Algeria*³⁰ and *Bayindir v. Islamic Republic of Pakistan*³¹. In *L.E.S.I*, the Tribunal stated that:

It would seem consistent with the objective of the Convention that a contract, in order to be considered an investment within the meaning of the provision, should fulfill the following three conditions:

- (a) *the contracting party has made contributions in the host country;*
- (b) *those contributions had a certain duration; and*
- (c) *they involved some risks for the contributor.*

²⁹ *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award, 8 May 2008, para. 232:

“... the Convention foments the development of the host State. That does not mean that the development of the host State is a constitutive element of the notion of investment. That is why, as has been pointed out by certain arbitral tribunals, this fourth condition is in reality covered by the first three.”

³⁰ *Consortium Groupement L.E.S.I. - DIPENTA v. People’s Democratic Republic of Algeria* (ICSID Case No. ARB/03/8), Award, 10 January 2005.

³¹ *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.

*On the other hand, it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.*³²

42. The *Bayindir* Tribunal confirmed this approach:

*Lastly, relying on the preamble of the ICSID Convention, ICSID tribunals generally consider that, to qualify as an investment, the project must represent a significant contribution to the host State's development. In other words, investment should be significant to the State's development. As stated by the tribunal in L.E.S.I, often this condition is already included in the three classical conditions set out in the 'Salini test'.*³³

43. In my view, the Majority Award does not take this characteristic into account at all. It finds that *"this criteria is unworkable owing to its subjective nature."*³⁴ In fact the majority's reasoning, in my respectful view, is not even in consonance with the second type of decisions such as those in *Phoenix Action v. Czech Republic*³⁵ and *Biwater Gauff v. Tanzania*³⁶. These suggest that the *Salini* characteristics should, in fact, be modified and supplemented rather than abandoned and that the contribution to economic development should be taken into account. In *Phoenix Action*, the Tribunal listed six elements that have to be taken into account for an investment to benefit from the international protection of ICSID:

1 – a contribution in money or other assets;

2 – a certain duration;

3 – an element of risk;

4 – an operation made in order to develop an economic activity in the host State;

³² *L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), Award, 10 January 2005, para. 13(iv).

³³ *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, para. 137.

³⁴ Majority Award, para. 306.

³⁵ *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, para 85.

³⁶ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008.

5 – assets invested in accordance with the laws of the host State;

6 – assets invested *bona fide*.³⁷ (Emphasis supplied).

44. The *Phoenix* Tribunal, like the *L.E.S.I.-Dipenta* and *Bayindir* Tribunals, also recognized that:

“an extensive scrutiny of all these requirements is not always necessary, as they are most often fulfilled on their face, ‘overlapping’ or implicitly contained in others, and that they have to be analyzed with due consideration to all circumstances”.³⁸

45. The Tribunal in *Biwater* was of the view that:

“a more flexible and pragmatic approach to the meaning of ‘investment’ is appropriate, which takes into account the features identified in Salini, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID”.³⁹

46. Such an approach is to be preferred to the complete abandonment of the characteristic of “*contribution to economic development*” as “*unworkable*”. While this characteristic is arguably subjective, it is not devoid of all utility and in fact preserves a vital link between an investment and the intended purpose of the Convention. This link, between investments and economic development, is emphasized not only in the preamble to the Convention but also in the Report of the Executive Directors of the World Bank accompanying the Convention:

In 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. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an

³⁷ *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, para. 114.

³⁸ *Ibid.* para. 115.

³⁹ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, para. 316.

*atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.*⁴⁰

47. To entirely abandon this characteristic would be to sever this link.
48. As I am of the view that a contribution to economic development is implicitly recognized and contained in the other *Salini* characteristics, I do not consider it necessary to discuss this separately.
49. I, therefore, turn to the discussion of the first characteristic in the Majority Award.

(i) Substantial Commitment or Contribution

50. The majority finds that the Hedging Agreement involved a substantial contribution to Sri Lanka since such a contribution can take any form.⁴¹ In reaching this conclusion, the majority relies on three ICSID decisions, *Consortium R.F.C.C. v. Kingdom of Morocco*⁴², *Bayindir v. Islamic Republic of Pakistan*⁴³ and *L.E.S.I. S.p.A. & Astaldi S.p.A. v. People's Democratic Republic of Algeria*⁴⁴. *Consortium R.F.C.C.* and *Bayindir* relate to disputes arising out of contracts for the construction of highways in Morocco and Pakistan respectively. *L.E.S.I. & Astaldi* relates to a dispute arising out of a contract for the construction of a dam in Algeria. In the first two decisions, disputes arose after the respective claimants had already commenced construction of the highways. In the third decision, no actual work on the construction of the dam had begun but the claimant had committed considerable resources to the project. In my opinion all three cases are distinguishable. What was under consideration in these cases was investment in infrastructure projects. None recorded a finding that entering into a purely commercial or financial transaction, without more, constituted a substantial contribution or commitment.

⁴⁰ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 1 ICSID Rep 25, para. 9.

⁴¹ Majority Award, para. 297.

⁴² *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No. ARB/00/6), Decision on Jurisdiction, 16 July 2001.

⁴³ *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.

⁴⁴ *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3), Decision on Jurisdiction, 12 July 2006.

51. The Majority Award then cites three instances to show the substantial contribution made by the Claimant:

- (i) By concluding the Hedging Agreement the Claimant committed to pay USD 2.5 Million to CPC if the cost of importing oil remained above USD 112.50 per barrel;⁴⁵
- (ii) The Claimant made a payment of USD 35,523.81 to CPC on 19 September 2008;⁴⁶ and
- (iii) The Claimant's employees engaged in over two years of regular meetings, negotiations and correspondence with CPC and the Central Bank of Sri Lanka.⁴⁷

52. The phrase '*substantial commitment or contribution*' cannot be considered in isolation, particularly where contribution to economic development is not being considered as a separate characteristic. The substantial commitment or contribution by the Claimant must be made for economic development in the host State. Whether a financial transaction is an investment must be judged at the time of its inception.⁴⁸ That it subsequently produces an economic benefit for the host State is irrelevant. What is important is the purpose of the commitment or contribution. The Majority Award states that "*some transactions may undoubtedly be qualified as investments, even though they do not result in a significant contribution to economic development in a post hoc evaluation of the claimant's activities. This is for example the case of mergers and acquisitions or failed construction projects.*"⁴⁹ In my opinion the example does not support the conclusions of the Majority Award. A merger or acquisition which does not produce beneficial results, or a construction project which is subsequently aborted, would still be an investment since the purpose is to contribute to the economic development of the host State.

53. The Claimant and CPC entered into the Hedging Agreement under which the Claimant had to pay CPC a maximum of USD 2.5 million if the price of oil remained above USD 112.50 for the duration of the Agreement. The majority reasons that this provided an immediate benefit to CPC and the Respondent by reducing their exposure to oil price volatility and

⁴⁵ Majority Award, para. 298.

⁴⁶ Majority Award, para. 299.

⁴⁷ Majority Award, para. 300.

⁴⁸ Majority Award, para. 295: "*the existence of an investment must be assessed at its inception and not with hindsight.*"

⁴⁹ Majority Award, para. 306.

improved the predictability of their cash flow.⁵⁰ The fact is that the Hedging Agreement produced no immediate benefit to CPC or the Respondent.

54. The Hedging Agreement could not possibly have benefitted both parties. Which one of the two parties to the Hedging Agreement benefitted was contingent not on the execution of the Hedging Agreement but on the rise or fall of the price of oil. At the time the Hedging Agreement was made, it could not be predicted with certainty as to which party would benefit. The very nature of the Hedging Agreement made that impossible. If the price of oil had remained above the strike price of USD 112.50 during the currency of the Hedging Agreement, CPC would have benefitted. If it fell the benefit was to go to the Claimant. The price fell and, therefore, on 17 October 2008 and 14 November 2008, CPC made payments of USD 1,659,636.36 and USD 4,597,857.14 respectively to the Claimant.
55. I am of the view that the findings in the Majority Award are not supported even by the decisions in *Fedax N.V. v. Venezuela*⁵¹ and *Abaclat and others v. Argentine Republic*⁵². In *Fedax*, the Government of Venezuela issued promissory notes to a Venezuelan corporation in return for services provided to it. The claimant was an endorsee of these promissory notes and the *Fedax* Tribunal reasoned that had the claimant itself provided the services to the respondent, then the transaction would have constituted an investment. The subsequent endorsement did not change the character of the underlying transaction, which involved the provision of valuable services to the Government of Venezuela. In *Abaclat*, the Government of Argentina, in a bid to restructure its economy, raise funds, and stimulate growth, issued bonds on the international market. These bonds were underwritten by various banks that paid Argentina lump-sum amounts and then sold these to subsequent purchasers, including the claimants, on the secondary bond market. The *Abaclat* Tribunal found that since funds were made available to Argentina and financed its economic development the security entitlements in the bonds constituted an investment.
56. While both these decisions have been the subject of some criticism⁵³, even in these cases the host States received a tangible and immediate benefit from the underlying transaction.

⁵⁰ Majority Award, para. 298.

⁵¹ *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction, 11 July 1997, (2002) 5 ICSID Rep 183; Award, 9 March 1998, (2002) 5 ICSID Rep 200.

⁵² *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011.

⁵³ See Douglas, Zachary, *supra* footnote 20, discussion of *Fedax N.V. v. Republic of Venezuela*, para. 378C:

In *Fedax*, the benefit was in the form of services received by Venezuela, and in *Abaclat*, Argentina received funds. In the present case, the Government of Sri Lanka received no such benefit from the execution of the Hedging Agreement.

57. To quote from the Majority Award “*the transaction in the present case involved CPC buying a call option at a strike price of \$112.50 and selling a put option at the same strike price*”⁵⁴ A call or a put option is an economic activity but it cannot be regarded as making a substantial contribution or commitment of resources to the economic development of the Host State. It cannot be equated with an “*investment*”. On the contrary it may be regarded as having an adverse impact on economic stability and development. As noted elsewhere by one of my distinguished colleagues:

Until the mid twentieth century ... no distinction was made between investments and other forms of property and economic activity... Various analytical reasons have been proposed for the distinction. However, the general perception tends to be that certain ‘investment’ is a ‘catalyst for development and prosperity’, which it helps by ‘expanding welfare around the world’. It is in this context that investment protection treaties are concluded and provide for a conscious derogation of State sovereignty. However, certain capital flows, usually of a transient nature, do not promote welfare or economic development; indeed those involving speculation in debt or currency may cause economic instability. In those circumstances, the derogation from State sovereignty provided for in the relevant treaty is not worth undertaking. It is the concept of ‘investment’ that seeks to delineate between the constructive capital flow that a State

“The difficulty with this reasoning is that the tribunal has aggregated certain aspects of the underlying transaction with certain aspects of the endorsement in order to justify the existence of an investment. The original contract for the provision of services by a Venezuelan company to the Venezuelan Government may have evidenced the necessary attributes of an investment but Fedax was not privy to that arrangement and hence cannot rely upon those attributes to establish its investment in Venezuela. It is difficult to accept that those attributes can be invoked by one of the subsequent endorsees to the promissory notes issued by the Government to the Venezuelan company in the event that the endorsee has the requisite foreign nationality to benefit from the protection of an investment treaty”;

and *Abaclat and others v. Argentine Republic*(ICSID Case No. ARB/07/15), Decision of Jurisdiction and Admissibility, 4 August 2011, Dissent of Professor Georges Abi-Saab.

⁵⁴ Majority Award, para. 324.

*wishes to attract (and therefore protect) and the transient transaction that it does not.*⁵⁵

58. I am also of the view that in order for a financial transaction to be considered an investment, it must constitute an investment at the moment of its execution. Future events are irrelevant. At the time the Hedging Agreement was signed, there was no immediate or guaranteed future contribution or commitment of resources or funds to Sri Lanka or to its economic development.

59. In *PSEG Global Incorporated and another v. Republic of Turkey*⁵⁶ the claimant's argument that an option was 'a claim for money or a claim to performance having economic value, and associated with an investment' was rejected by the Tribunal. The Tribunal found that:

*"the Respondent's argument that the definition of investment does not include an option is persuasive as a general approach. Broad as many definitions of investment are in treaties of this kind, there is a limit to what they can reasonably encompass as an investment. Options such as this particular one cannot, in the view of the Tribunal be interpreted as an 'investment' ...Professor Dolzer's Rejoinder Opinion to the effect that the Treaty definition of investment refers to any right, even one that can be exercised at any time in the future, is not persuasive."*⁵⁷

While the *PSEG* Tribunal did not give elaborate reasons for its decision, it stands to reason that an option which is not protected by the BIT and is contingent in nature, and does not involve contribution or commitment of resources to the host State, lacks the typical characteristics of an investment.

⁵⁵ Williams, David A. R QC and Foote, Simon, "Recent developments in the approach to identifying an 'investment' pursuant to Article 25(1) of the ICSID Convention" in Brown, Chester and Miles, Kate, *Evolution in Investment Treaty Law and Arbitration*, Cambridge, Cambridge University Press, 2011, p.44.

⁵⁶ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5).

⁵⁷ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Decision on Jurisdiction, 4 June 2004, (2004) 11 ICSID Rep. 434, 469, paras. 189-190. Case cited by the Respondent in its Objections to Jurisdiction, para. 86.

60. The payment of USD 35,523.81 by the Claimant to CPC on 19 September 2008 must be viewed in this context. This payment was made because the strike price of oil at the relevant time was above USD 112.50. If the price of oil fell below the strike price of USD 112.50 the moment the Hedging Agreement was signed and remained there throughout its duration, CPC would have received nothing from the Claimant. It would have been obliged to make continuous payments to the Claimant. Whether the Hedging Agreement is an investment cannot depend on the eventual outcome of the transaction. Otherwise, the status of the Hedging Agreement as an investment, at any moment, would depend on the price of oil. Any payment made by either party to the other under the Hedging Agreement due to fluctuations in the price of oil, therefore, is irrelevant for determining whether the Hedging Agreement constituted an investment at its inception.
61. The majority also seeks support from the fact that the employees of the Claimant engaged in two years of negotiations, correspondence and meetings with the CPC prior to the execution of the Hedging Agreement.⁵⁸ I am of the view that to determine whether a particular financial instrument – in this case the Hedging Agreement – entails a substantial contribution or commitment, it is the financial instrument itself, which must be evaluated. Any activity – in this case negotiations, correspondence and meetings between the Claimant and CPC – preceding the execution of the financial instrument is irrelevant for this purpose.
62. In view of the above, it is difficult to see how the Hedging Agreement involved any contribution or commitment let alone any *substantial* contribution or commitment for the purpose of economic development in Sri Lanka. The Majority Award states that there is “*no doubt that the hedging program was designed and implemented in the national interest, as was repeatedly attested by the Sri Lankan authorities*”⁵⁹. The view of the Sri Lankan authorities that a hedging programme may be beneficial to the State is in my opinion not determinative. The Hedging Agreement cannot be transformed into an investment simply because the authorities in Sri Lanka regarded it to be in the national interest. For instance, if instead of the Hedging Agreement, the parties had entered into an agreement to purchase oil and the Claimant had offered CPC a USD 10 discount on each barrel of oil purchased up to a maximum of 100,000 barrels, there is no doubt that such an

⁵⁸ Majority Award, para. 300.

⁵⁹ Majority Award, para. 307.

agreement would have benefited Sri Lanka and furthered its national interest. Such an agreement would nevertheless have been an ordinary sale of goods with an offer of a discount and not an investment.⁶⁰ It is, therefore, difficult to see why a Hedging Agreement, which potentially and at best would have the same effect (and at worst would lead to CPC paying millions of dollars to the Claimant), should be considered a substantial contribution or commitment for the purposes of economic development in Sri Lanka.

63. The manner in which the majority treats the Hedging Agreement as a substantial contribution and commitment would mean that almost all transactions would be considered as having this characteristic. Any ordinary commercial contract including the sale of goods would involve:

- (i) The delivery of goods or services in the host State;
- (ii) Potentially lengthy pre-contract negotiations;
- (iii) Some risk; and
- (iv) Some direct or indirect benefit to the host State (otherwise the host State would not execute such an agreement).

That would not, however, result in these pure trading contracts being transformed into investments for the purposes of a BIT or the Convention.

64. In *Global Trading Resource Corporation* it was argued by the claimants that:

the conclusion of the contracts was solicited by Ukraine at the highest level, for important reasons of social and economic development policy, and with performance guaranteed by the State ... the claims arise from “(a) the Ukrainian Prime Minister’s entreaties that U.S exporters assist the Prime Minister’s efforts to break a domestic-producer monopoly, reduce prices, and curb inflation, and (b) the Prime Minister’s explicit assurances that Ukraine would fulfill its obligations to those exporters

⁶⁰ See *Global Trading Resource Corp. and Globex International Inc. v. Ukraine* (ICSID Case No. ARB/9/11), Award, 1 December 2010, para 56. The specific contracts at issue in that case involved the import of poultry into Ukraine for the purpose of easing prices in the domestic market. The Tribunal held that

“[t]he fact that the trade in these particular goods was seen to further the policy priorities of the purchasing State does not bring about a qualitative change in the economic benefit that all legitimate trade brings in its train. Nor can an undertaking by officials of the State to honour the contractual commitments to be concluded transform a sale and purchase agreement into an investment.”

willing to support the Prime Minister’s economic-development efforts.” The substantial resources devoted by the Claimants to procuring, shipping and delivering the goods and the purposes for which they were being purchased thus constituted on a proper interpretation, in the Claimants’ submission, ‘investments’ under the BIT and the ICSID Convention.⁶¹

The *Global Trading* Tribunal rejected this submission in the following words:

The fact that the trade in these particular goods was seen to further the policy priorities of the purchasing State does not bring about a qualitative change in the economic benefits that all legitimate trade brings in its train. Nor can an undertaking by officials of the State to honour the contractual commitments to be concluded transform a sale and purchase agreement into an investment.

It concluded⁶² that neither such contracts “*nor the moneys expended by the supplier in financing its part in their performance, can by any reasonable process of interpretation be construed to be ‘investments’ for the purposes of the ICSID Convention.*”⁶³

65. The Majority Award relies on *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*⁶⁴ in support of its conclusion that “*where a sales agreement includes special features such as a bespoke product, it will usually be considered an investment*”⁶⁵. My reading of the *Pantechniki* award is different from that of the majority.
66. *Pantechniki* arose out of a claim made by a contractor engaged in road works in Albania. The claimant’s site had been destroyed and his equipment looted during civil disturbances. The respondent sought to minimize the nature of the claimant’s work by referring to it as “*mere repairs*”. It contended that it lacked the characteristics of an “*investment*”. The Tribunal found the objection unsustainable.

⁶¹ *Global Trading Resource Corp. and Globex International Inc. v. Ukraine* (ICSID Case No. ARB/9/11), Award, 1 December 2010, para. 42.

⁶² *Ibid.* para. 56.

⁶³ *Ibid.*

⁶⁴ *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award, 30 July 2009.

⁶⁵ Majority Award, para. 310.

67. The State parties to the BIT, at issue in *Pantechniki*, had defined “investment” broadly. The Tribunal was of the view that the claim was clearly within the definition of investment in the BIT. The question before that Tribunal was whether the concept of “investment”, under Article 25 of the Convention, had an objective meaning which could not be enlarged by the parties to a BIT. It was in this context that the *Pantechniki* Tribunal noted that even a “pure” sales contract which was protected under the BIT may in certain cases fall within the scope of Article 25:

It may be objected that some types of economic transactions simply cannot be called “investments” no matter what a BIT may say ... The typical example given is that of a “pure” sales contract. There is force in the argument. It is admittedly hard to accept that the free on board sale of a single tractor in country A could be considered an “investment” in country “B”. But what if there are many tractors and payments are substantially deferred to allow cash poor buyers time to generate income? Or what if the first tractor is a prototype developed at great expense for the specificities of country B on the evident premise of amortization?”⁶⁶

68. The context of these remarks is made evident by the very next sentence:

*Why should States not be allowed to consider such transactions as investments to be encouraged by the promise of access to ICSID.*⁶⁷

The Tribunal, thus, questioned the wisdom of denying ICSID access to transactions which enjoyed BIT protection on the basis of a one size fits all description of the “objective features” of an ICSID investment. It did not make a one size fits all ruling that a sales agreement which “includes special features such as a bespoke product...will usually be considered an investment.”⁶⁸

⁶⁶ *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21), Award, 30 July 2009, para. 44.

⁶⁷ *Ibid.*

⁶⁸ Majority Award, para. 310.

69. There are several reason why the ratio of the *Pantechiki* award is not applicable to this case. First, the agreement there was found to be clearly a protected investment under the BIT. The Hedging Agreement is not so protected. Second, the Hedging Agreement is not a bespoke product or a “*prototype developed at great expense for the specificities of [Sri Lanka] on the evident premise of amortization*”. There is in fact very little difference between this Hedging Agreement and those executed between CPC and Citibank and Standard Chartered Bank respectively. Third, CPC and the Claimant did not execute many Hedging Agreements. They executed only one Hedging Agreement. It had no special features which offered any benefits to either the Respondent or its “*cash poor*” citizens.
70. The *Pantechiki* Tribunal did suggest that depending on the facts and circumstances of a case, the same product may be considered an ordinary sale of goods or an investment. This does not mean that every commercial transaction or sale agreement, having any special feature, will be considered an investment. As stated by the *ad hoc* Committee in *Malaysian Historical Salvors v. Malaysia*⁶⁹:

It appears to have been assumed by the Convention’s drafters that the use of the term “investment” excluded a simple sale and like transient commercial transaction from the jurisdiction of the Centre.

71. Almost all ordinary commercial transactions contain some special features designed to fulfill the specific requirements of the parties. For instance, an agreement for the purchase of oil may contain special terms relating to the method and time of payment and delivery of the oil. This does not, however, mean that such an agreement will usually be an investment. Such a proposition would, in effect, turn the ICSID jurisprudence on its head. Almost every agreement would then be presumed to be an investment and the onus would be on the respondent to show that a particular agreement did not in fact contain any special features.
72. It is worth remembering that the Convention is supposed to strike a delicate balance between the rights of foreign investors and those of host States. According to the Report of the Executive Directors on the Convention:

⁶⁹ *Malaysian Historical Salvors Sdn, BHD v. Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009, para 80.

*While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.*⁷⁰

73. In measuring any asset against these characteristics, the purpose of the Convention has to be kept in sight, which is to encourage the flow of private foreign investment into host States by providing certain procedural and substantive protections and guarantees to foreign investors whose investments would otherwise be at the mercy of the host States. The rational underpinning the entire system of investment treaty arbitration is a *quid pro quo* between private foreign investors and host countries. The former seek profitable avenues for investing their resources and the latter seek investment for their economic development.
74. The expansion of ICSID jurisdiction to include every commercial agreement, which contains any special features, will alter this carefully crafted balance. It is one thing to say that arbitral tribunals should respect the agreement of the parties to a BIT and where a financial transaction is clearly protected by the BIT arbitrators should hesitate before dismissing a claim on an arbitrator-crafted notion of an ICSID investment. It is quite another to hold that transactions which may not ordinarily be regarded as an “*investment*” should be protected on the basis of a “*special features*” doctrine.
75. I, therefore, find that the Hedging Agreement did not constitute an investment for the purposes of the Treaty or the Convention.

III. Expropriation

76. In other parts of this opinion, I have relied on the facts as stated in the Majority Award. To consider whether the Supreme Court’s Interim Order of 28 November 2008 and the Central Bank’s letter of 16 December 2008 amounted to an expropriation of the

⁷⁰ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 1 ICSID Rep 25, para. 13.

Claimant's debt under the Hedging Agreement, it is necessary, in my opinion, to restate the relevant facts:

- (i) In November 2008, two fundamental rights applications were filed in the Supreme Court of Sri Lanka relating to the hedging agreements entered into by the CPC with various banks. In one of these applications, the petitioner sought to challenge the authority of the CPC to enter into these agreements.
- (ii) On 28 November 2008, the Supreme Court issued an Interim Order in which it ordered that all payments by the CPC to the Claimant and other banks be suspended and directed the Monetary Board of the Central Bank to carry out an investigation into the hedging agreements.
- (iii) On 3 December 2008, the Claimant terminated the Hedging Agreement on the ground that CPC had failed to execute the ISDA Master Agreement within 90 days of the Trade Date as defined in the Confirmation.
- (iv) On 5 December 2008, following a meeting between the officers of the Claimant and members of the Central Bank, the Claimant received a report containing an Assessment of Compliance with the Provisions of the Directions Issued by the Central Bank of Sri Lanka on Financial Derivative Products, which identified five non-compliances in connection with the execution of the Hedging Agreement.
- (v) On 10 December 2008, the Claimant calculated a close-out amount payable by CPC to the Claimant of USD 60,368,993.
- (vi) On 16 December 2008, the Monetary Board of the Central Bank requested banks not to proceed with or give effect to the hedging agreements.
- (vii) On 6 January 2009, the Central Bank sent a report titled "Initial Investigation Report on Oil Derivative Transactions entered into by Deutsche Bank AG with the Ceylon Petroleum Corporation" to the Claimant. The report concluded that the Hedging Agreement was materially affected, which seriously undermined the propriety of the transaction.

- (viii) On 27 January 2009, the Supreme Court issued a final order terminating the fundamental rights proceedings and vacating all previous interim orders.
- (ix) The Central Bank issued a press release stating that its directions to the banks, of 16 December 2008, would remain in force.

77. CPC made a payment of USD 4,597,857.14 to the Claimant on 14 November 2008. Two weeks later, on 28 November 2008, while the Hedging Agreement was in force the Supreme Court issued its first Interim Order. At that time no claim for payment by the Claimant was pending with CPC. In the absence of such a claim there was no debt and, therefore, none which could have been expropriated.

78. A few days later, on 3 December 2008, the Claimant terminated the Hedging Agreement. The letter of termination neither mentioned the Interim Order of the Supreme Court nor referred to any action by the Central Bank. The stated reason was CPC's failure to execute the ISDA Master Agreement. It was only on the termination of the Hedging Agreement that a close-out amount was calculated and a debt identified. The question, therefore, is whether this debt was expropriated by the failure of the Supreme Court to immediately vacate its Interim Order or by a continuation by the Central Bank of its direction of 16 December 2008.

79. Expropriation, in international law, takes place when a claimant suffers a substantial deprivation of property rights for a meaningful period of time. Several tribunals have expressed the view that unless these twin requirements are met there can be no expropriation. In *S.D. Myers Inc. v. Canada*⁷¹, the Tribunal found that a ban on exports for a period of eighteen months did not amount to a lasting removal of the ability of the owner to make use of its economic rights.⁷² Similarly, in the case of *Técnicas Medioambientales Tecmed S.A. v. Mexico*⁷³, the Tribunal noted that:

⁷¹ *S.D. Myers Inc. v. Canada* (UNCITRAL), Partial Award, 13 November 2000.

⁷² *Ibid.* paras. 283-288.

⁷³ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003.

it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the Landfill or to its exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state’s police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance. (emphasis supplied)

...Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that “...any form of exploitation thereof...” has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.⁷⁴

80. The majority accepts this standard as correct⁷⁵. It does not, however, apply it to the facts of this case. The majority finds that “*the entire value of Deutsche Bank’s investment was expropriated for the benefit of Sri Lanka itself*”⁷⁶. This finding is not supported with any independent reasoning. Instead, the Majority Award refers to its earlier analysis with regard to the denial of fair and equitable treatment (“FET”).

⁷⁴ *Ibid.* paras. 115 and 116. See also *Mohammad Ammar Al-Bahloul v Republic of Tajikistan* (SCC Case No. 064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, para. 281:

As the standard set out in the Tecmed case ... suggests, for an indirect expropriation to have occurred in respect of Claimant’s contract rights ... the conduct of the State must result in an irreversible and permanent taking or destruction of Claimant’s rights. In case of contractual rights, a temporary non-fulfilment of the State’s contractual obligations is not sufficient to constitute an expropriation.

⁷⁵ Majority Award, para. 503: “*In general terms a substantial deprivation of rights, for at least a meaningful period of time is required*”.

⁷⁶ *Ibid.* para. 523.

81. The denial of FET, if any, to the investment of the Claimant by the orders of the Supreme Court and the actions of the Central Bank would not *ipso facto* result in an expropriation. A denial of one – FET – does not automatically lead to a finding of the other – expropriation. In several cases tribunals held that there was a breach of FET but no expropriation.⁷⁷
82. For an action to constitute expropriation under international law, it must have completely or at least substantially destroyed the investor’s right to the enjoyment or use of his investment. The rights related thereto must have effectively ceased to exist. In this case, therefore, the relevant question is whether the Claimant’s debt was so completely or substantially destroyed that it will no longer be able to recover the same.
83. The parties agree that the Hedging Agreement is governed by English law and is subject to the jurisdiction of English courts. In similar facts and circumstances involving CPC, an English court, in the case of *Standard Chartered Bank v. Ceylon Petroleum Company*⁷⁸, held that the bank could recover a debt owed by CPC under a hedging agreement despite those very actions of the Supreme Court and the Central Bank which are under scrutiny here. This decision has been upheld by the English Court of Appeals⁷⁹.
84. One of the defences taken by CPC in this action before the High Court was that as a result of the directions of the Central Bank, any payment made by it to Standard Chartered Bank would be illegal under the law of Sri Lanka and therefore, it could not be required to make such a payment. The defence failed. While rejecting this argument the judge held as follows:

⁷⁷ *Pope and Talbot Inc. v. Canada*, Award on the Merits, 10 April 2001, 7 ICSID Rep 102; and Award on Damages, 31 May 2002, 7 ICSID Rep 148, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005, 44 ILM 1205, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Award, 22 May 2007, *Sempra Energy International v. Argentina* (ICSID Case No. ARB/02/16), Award, 28 September 2007, *El Paso Energy International Co. v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2007, *EDF International S.A., Saur International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) Award, 11 June 2012, *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/01/2), Award, 21 June 2012; and *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012.

⁷⁸ *Standard Chartered Bank v. Ceylon Petroleum Company*, Neutral Citation No. 1785, Case No. 2009 FOLIO 375, Queen’s Bench Division Commercial Court, 11 July 2011.

⁷⁹ *Standard Chartered Bank v. Ceylon Petroleum Corporation*, 2012 EWCA Civ 1049, 27 July 2012.

467. *However, I do not accept that these provisions required payment to be made from Sri Lanka. Payment was required to be made in New York. How that payment was to be made was a matter for CPC but it was not contractually obliged to do so from Sri Lanka.*

468. *In any event, the statutory power [of the Central Bank] is directed at SCB not CPC. It could not be directed at CPC, which was not a bank, and therefore could not render CPC's payment obligation illegal in Sri Lanka.*

469. *Further, the import of CPC's case is that CBSL had power, after a contract had been entered into, effectively to deprive a bank, by letter, of its accrued right to payment, for no compensation. Even assuming that such an extraordinary power could be granted consistently with the Sri Lankan constitution I agree with SCB that for it to exist, it would need to be clearly spelt out in the relevant statute, and clearly exercised. Neither condition is satisfied here. The statutory provision relied upon (s 46 of the Banking Act, a regulatory statute) does not disclose such a power. Nor does the letter of 16 December 2008 letter [sic] purport to exercise any such power. Rather, it appears to be ancillary to the Supreme Court's interim order dated 26 November 2006 [sic], which fell away on 27 January 2009.*

470. *For the reasons set out above CPC's illegality defence fails.*

85. CPC did not appeal this aspect of the judgment. For the purposes of English law, therefore, it stands concluded that the debt owed by CPC, under the Hedging Agreement, can be recovered by the Claimant. The debt as well as the remedy for its recovery has survived both the order of the Supreme Court and the action of the Central Bank. As observed by the Tribunal in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*:

...on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe SGS still exists;

*whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such refusal.*⁸⁰

86. The Majority Award holds that “*the coordinated actions of the Supreme Court and the Central Bank prevented Deutsche Bank from receiving payment under the Hedging Agreement*”.⁸¹ This is an extra-ordinary finding without any credible evidence to support it. It is correct that the Central Bank passed its first stop payment order immediately after the first Interim Order of the Supreme Court. It is also correct that the Central Bank decided to continue with this order after the Supreme Court had discharged its interim order. These facts on their own or taken together do not lead to the conclusion that the two institutions were working in tandem to prevent payment to the Claimant.
87. Even if it is assumed that the Interim Order of the Supreme Court and the actions of the Central Bank caused a breach of the contract between the Claimant and CPC that cannot be equated with an expropriation of the debt. A mere breach of contract or denial of liability is not expropriation. As observed by the Tribunal in *Waste Management Inc. v. United Mexican States*⁸²:

The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation... [T]he normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is practically or legally

⁸⁰ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 161.

⁸¹ Majority Award, para. 521.

⁸² *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, para. 174.

foreclosed that the breach could amount to an outright denial of the right, and the protection of Article 1110 [of NAFTA] would be called into play.

88. The *Waste Management* Tribunal did not lay down a rule that an investor alleging expropriation of contractual rights must exhaust the contractual remedies before initiating a BIT claim. The investor must, however, establish to the satisfaction of the tribunal that its efforts to obtain correction of the action have been frustrated by conduct which is tantamount to expropriation or that such avenues are not available to it. As noted by the Tribunal in *Generation Ukraine Inc. v. Ukraine*⁸³:

*The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. Nor is it sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of reasonable – not necessarily exhaustive – effort by the investor to obtain correction.*⁸⁴

89. The Tribunal in *Parkerings-Compagniet AS v. Republic of Lithuania*⁸⁵ identified “three cumulative conditions”⁸⁶ which must be met to qualify a State’s conduct as an indirect expropriation for which compensation is due:

⁸³ *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003.

⁸⁴ *Ibid.* para. 20.30.

⁸⁵ *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September 2007.

⁸⁶ *Ibid.* para. 440.

- (i) *the State must have acted not only in its capacity of party to the agreement but also pursuant to its sovereign authority and power;*
- (ii) *as a general rule, the foreign investor must have sought to remedy the breach of contract by suing in the appropriate forum; and*
- (iii) *the breach must give rise to a substantial decrease of the value of the investment.*⁸⁷

90. The Tribunal cited several NAFTA and ICSID decisions to support the conclusion that it was a prerequisite that the foreign investor should seek relief from the contractual forum before initiating a BIT claim for expropriation. It observed as follows:

*An investor faced with a breach of an agreement by the State counterparty should, as a general rule sue that party in the appropriate forum to remedy the breach. Therefore, ... a preliminary determination of the existence of a contractual breach under domestic law is, in most cases a prerequisite.*⁸⁸

*If the investor is deprived, legally or practically, of the possibility to seek a remedy before the appropriate domestic court, the Arbitral Tribunal might decide on the basis of the BIT if international rights have been violated... That would be the case, for instance, if a party is denied the possibility to complain about the wrongful termination of the agreement before the forum contractually chosen.*⁸⁹

*In the absence of any objective reason not to bring the case before national tribunals, it cannot be concluded, on the basis of facts at hand, that the Claimant's investment has been indirectly expropriated.*⁹⁰

⁸⁷ *Ibid.* paras.443 448 and 455 and Polasek, Martina and Puig, Sergio, Case Summary: *Parkerings-Companiet AS v. Republic of Lithuania* (ICSID Case No.ARB/05/8), ICSID Review–FILJ, Vol. 22, No. 2 (2007), p. 415, at p. 420.

⁸⁸ *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8, Award 11 September, 2007, para. 448. See also, Polasek, Martina and Puig, Sergio, Case Summary: *Parkerings-Companiet AS v. Republic of Lithuania* (ICSID Case No.ARB/05/8), ICSID Review–FILJ, Vol. 22, No. 2 (2007), p. 415, at p. 419:

In any event the Tribunal stressed that the contractually identified forum would need to issue a preliminary ruling on a breach of contract claim under the applicable municipal law before an ICSID tribunal could consider whether international law had been violated.

⁸⁹ *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8), Award, 11 September, 2007, para.449.

⁹⁰ *Ibid.* para. 454.

91. As the first two conditions were not met the Tribunal did not see the need to examine whether the third condition was satisfied.⁹¹
92. In this case the contract was not terminated by CPC in the exercise of its authority under the Hedging Agreement. The grievance of the Claimant is that the sovereign power of Sri Lanka was used through the Supreme Court and the Central Bank to direct that no payments be made to it. The Claimant can, therefore, claim that ostensibly the first of the three conditions, mentioned above, is satisfied.
93. English law governs the Hedging Agreement. Claims arising out of it can be adjudicated by the English courts. The contractual remedy for the recovery of the debt is legal action in England. The parties may have selected English Law and English jurisdiction because, as stated in the Majority Award, “[i]t is a reality of modern banking that London is the world’s premier financial location. Its courts have great experience in financial transactions and its law in that area offers great security to bankers and investors.”⁹² The choice may, however, equally plausibly have been dictated by the desire of the Claimant to curb any temptation that Sri Lanka may have to obstruct a legal action for the recovery of the debt. Whatever may have been the intention of the parties the result is that an action for the recovery of the debt can be commenced in England. The Supreme Court and the Central Bank have not interfered with nor could they have interfered with this remedy.
94. The object of expropriation, *i.e.*, the debt, has not been destroyed. It is enforceable under English law. It cannot, therefore, be said to have been expropriated. To deal with this the majority draws an analogy with *Abaclat and others v. Argentine Republic*⁹³. The majority reasons that the situation in the present case is the same as in *Abaclat* where the claimants also had a contractual remedy against Argentina’s failure to make payments under the bonds, but invoked ICSID jurisdiction because Argentina “*had intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditor in general*”⁹⁴.

⁹¹ *Ibid.* para. 456.

⁹² Majority Award, para. 291.

⁹³ *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011.

⁹⁴ Majority Award, para. 557 to 559.

95. This analogy conflates two issues. The Tribunal's discussion and decision in the *Abaclat* case related to the admissibility of the claim and not to the merits of the dispute. The *Abaclat* Tribunal admitted the claim on the ground that Argentina had not merely breached a contract but had used its sovereign power, through the enactment of various laws, to interfere with and change the terms of the contract. Whether such interference with or modification of the terms of the contract amounted to an expropriation was neither the issue before nor the issue decided by the *Abaclat* Tribunal, at the time.
96. In this case, the Respondent has not taken the position that the Claimant could not have invoked ICSID jurisdiction because it had a contractual remedy available to it.⁹⁵ The case of the Respondent is that the orders of the Supreme Court and the conduct of the Central Bank have not resulted in the expropriation of the money claim of the Claimant. The governing law of the contract is English law. The courts in England have the jurisdiction to adjudicate the money claim. Nothing that has happened in Sri Lanka has either destroyed the debt or barred the contractual remedy available to the Claimant for its recovery. *Abaclat*, therefore, does not support the majority's finding of expropriation in this case.
97. By drawing this analogy with *Abaclat*, the majority treats the issue of jurisdiction and the issue of expropriation as one. In relation to a claim for the recovery of a debt, which has allegedly been expropriated, the analysis of the availability of an alternate forum in the context of determining ICSID jurisdiction is different from the analysis of the availability of an alternative forum to seek damages for expropriation. In the former, a tribunal analyses whether a claimant can successfully establish ICSID jurisdiction based on an alleged violation of an international agreement. In the latter, a tribunal analyses whether a claimant can successfully establish expropriation where the money claim is alive and enforceable.
98. The Majority Award also states that

In any case, it is evident that even if Deutsche Bank were to obtain a judgment from the English courts, CPC would likely be prevented from

⁹⁵ The Respondent takes the position that because the Claimant's contractual remedy to recover the debt under the Hedging Agreement remains available to it, there was no expropriation of the debt. See Respondent's Counter-Memorial, Vol. 1, paras 511 to 515.

*complying with that judgment as a result of the prohibition on paying its debt to Deutsche Bank.*⁹⁶.

The majority's reasoning runs contrary to the judgment of the English court in the *Standard Chartered Bank* case, where the judge found that the Central Bank's direction did not prevent CPC from making a payment to the bank. As observed by the judge, as CPC is not a bank, the Central Bank had no authority to issue any directions to it.⁹⁷ As a matter of English law, which governs the debt, there is no prohibition on CPC paying its debt to the Claimant.

99. The Majority Award presumes that the judgment of the English court will be in favour of the Claimant, that CPC will be "*prevented from complying*" with any such judgment and that the Claimant will not be able to enforce it as CPC may have no assets outside Sri Lanka. Whether CPC has any assets outside Sri Lanka is a matter of speculation. The majority postulates that it would be impossible for CPC to make such a payment since its operations are based in Sri Lanka and it receives all its income there. A finding of expropriation and an award of damages cannot, however, be based on such assumptions. If a direction of the Central Bank prevents the Claimant from enforcing a judgment against CPC and recovering the debt this may lead to a breach of the Treaty and a valid ICSID claim. Even the Respondent admits this.⁹⁸ The situation as it stands, is different. The debt has not been destroyed. It continues to exist. It can be enforced and recovered under its governing law. It, therefore, has not been expropriated.

100. In view of the foregoing, I find that there has been no expropriation of the Claimant's claim to money. No damages can, therefore, be awarded to the Claimant on the basis of a violation of Article 3 of the Treaty.

⁹⁶ Majority Award, para. 563.

⁹⁷ The Interim Order of the Supreme Court was vacated on 27 January 2009 and therefore is irrelevant.

⁹⁸ Respondent's Post-Hearing Brief, para. 119.

IV. Fair and Equitable Treatment

A. Interim Order of the Supreme Court

101. The majority finds that:

- (i) The Supreme Court issued its Interim Order on 28 November 2008. *“In a five page judgment rendered less than 48 hours after the filing of the petition, it granted all the claims formulated by petitioners based on what appears to have been extremely limited evidence and without hearing from the various banks whose contractual rights were directly affected by the Order.”*⁹⁹.
- (ii) *“Founding itself on the allegations of the petitioners with respect to the structure of the different hedging agreements...the Supreme Court decided that the petitioners had established a strong prima facie case”*.¹⁰⁰
- (iii) *“[R]eaching such a conclusion and issuing the Order as detailed above with its far reaching consequences without a proper examination and without giving the banks involved, constitutes a breach of the fair and equitable treatment”*.¹⁰¹
- (iv) *“[P]ublic statements made subsequently by Chief Justice Silva who presided over the hearing. In those public statements the Chief Justice confirmed that the decision was issued for political reasons.”*¹⁰²
- (v) *“[T]he fact that the Order of the Supreme Court was interim and was discharged two months later, is irrelevant, particularly given that the Tribunal considers that it involved a serious due process violation.”*¹⁰³
- (vi) *“Indeed looking at the situation as a whole, at the time that the Order of the Supreme Court was discharged, the Monetary Board of the Central Bank had put*

⁹⁹ Majority Award, para. 476.

¹⁰⁰ *Ibid.* para. 477.

¹⁰¹ *Ibid.* para. 478.

¹⁰² *Ibid.* para. 479.

¹⁰³ *Ibid.* para. 479.

its own stop-payment Order in place, preventing performance of the Hedging Agreement.”¹⁰⁴

102. In practice, the grant of interim injunctions or orders is neither unusual nor extraordinary for a common law court. The court may grant an interim remedy on an application made without notice if satisfied that there are good reasons for not giving notice. “*Such applications may be made whether or not the claim form has been issued and in cases of extreme urgency may be dealt with by telephone.*”¹⁰⁵ As is well known from publicly available media reports, such orders are even more readily and frequently granted by the courts in South Asia. In recent years, the Supreme Courts of South Asian States have increasingly intervened to protect the public interest. Interim *ex parte* injunctions in public interest petitions without notice to the other side are granted often. Such orders are passed after a *prima facie* examination of facts and in the absence of the respondents. Neither lengthy submissions are made nor a detailed investigation conducted. The orders are, therefore, usually quite brief. If, after hearing the parties, a court comes to the conclusion that the order was improperly obtained or incorrectly granted it discharges the order and at times even burdens the applicant with costs. Viewed in this context, the Interim Order passed by the Supreme Court of Sri Lanka should raise few eyebrows.
103. In this case, on 28 November 2008, when the matter came up for hearing before the Supreme Court, CPC had to make a payment of USD 46 million to Standard Chartered Bank, under another hedging agreement, in a few days time.¹⁰⁶ Given the substantial amount involved, in order to protect the public interest, the Supreme Court may have deemed it necessary to stop such payments pending a more detailed enquiry into the transaction.
104. There is no evidence to suggest that the conduct of proceedings before the Supreme Court violated any established rules and principles. While the Claimant was not present on the day the Interim Order was passed, an *ex parte* Interim Order does not *ipso facto* deny due process. Nothing prevented the Claimant from approaching the Court and seeking a modification or discharge of the order. It could also have sought costs and damages if it

¹⁰⁴ *Ibid.* para. 480.

¹⁰⁵ Halsbury’s Laws of England, vol. 37, 4th ed., Reissue, para. 467. *See also* Halsbury’s Laws of England, Vol. 11, 5th ed, para. 334; Kerr on Injunctions, 6th ed, p.634.

¹⁰⁶ Interim Order of the Supreme Court of Sri Lanka in S.C.(FR)535/2008 and S.C.(FR) 536/2008 dated 28 November 2008, p. 5.

believed that the order had been wrongly obtained. The case was then taken up on 15 December 2008, 17 December 2008 and 13 January 2009 by the Supreme Court. No such application was made on any of these dates. The Supreme Court on its own on 27 January 2009 vacated the interim orders and terminated the proceedings. The Interim Order in question barely lasted two months. This is a very relevant fact both with regard to the finding on expropriation and FET particularly as the order did not deny due process.

105. The Majority Award determines the propriety of the Interim Order in a legal and contextual vacuum. By holding that the Interim Order constitutes a breach of the FET standard on the basis that, in the majority's view, the evidence before the Supreme Court was not sufficient to draw the conclusions it did, the majority has adopted the role of an appellate court sitting in judgment on the Supreme Court's order. With utmost respect this is not the role that an international tribunal should arrogate to itself.

106. There is no doubt that certain actions by domestic courts can constitute a breach of the FET standard, but an international tribunal should not be quick to reach such a conclusion without clear evidence to that effect. The judiciary of a host State is entitled to a "*high measure of deference*"¹⁰⁷ and there should be a presumption that it has acted in a proper manner. To hold that an interim order passed by the Supreme Court of a host State on the first day of hearing breaches the international FET standard is a finding which needs to be supported by more than the subjective view of the majority that the evidence before the Supreme Court did not warrant the making of such an order.

107. The Majority Award seeks to draw support from certain statements allegedly made by the former Chief Justice of the Supreme Court in a newspaper interview. The majority fails to mention that the Respondent had not only vehemently denied these allegations but had also pointed out that these statements only appeared in an internet newspaper run by a person wanted in Sri Lanka for fraud and for whom a red warrant had been issued by Interpol.¹⁰⁸

108. The Respondent had also submitted that the former Chief Justice himself had, after his retirement, taken on a political role and had become a vehement critic of the current government. In the interview on which the Majority Award relies the Chief Justice made

¹⁰⁷ *S. D. Myers v. Canada*, First Partial Award on Liability, 13 November 2000, para. 236.

¹⁰⁸ Core Bundle 7, Exhibit 320.

no bones about his disagreement with the executive. The majority nevertheless reproduces and relies on these alleged statements as if they had been proved through cogent and credible evidence and on that basis imputes bad faith to the Supreme Court. This is in spite of the fact that in the very first line of the interview the Chief Justice is described as “*a controversial figure who locked horns with the executive in the last stages of his term.*”¹⁰⁹.

109. The Chief Justice had stated that neither the government nor the banks were willing to listen to and abide by the orders of the Supreme Court, which is why, the petitioners, once they realized the position the Supreme Court was in, withdrew the applications.¹¹⁰ Also omitted from the Majority Award is the fact that the Chief Justice believed that the case raised issues of public interest which the Court had to take up:

*It was a public interest suit. People were affected by the high taxes that were imposed, about 150 per cent at that time. The petitioners came to court on the basis that these high taxes were imposed to make payments on the illegal hedging agreements whereas market prices were tumbling. We had every right to see whether the hedging agreements were lawfully entered into. That was executive action. It was well within jurisdiction.*¹¹¹

110. The Majority Award holds that the public statements by the Chief Justice “*confirmed that the decision was issued for political reasons. He indeed declared that*”¹¹²:

*the Government was forced to comply with the hedging agreements. We will stop that on a judicial order, just pass on to the benefit to the people. The Government said you stop the hedging agreements we won't pass on the benefits.*¹¹³

¹⁰⁹ Core Bundle 7, Exhibit 313, p.1.

¹¹⁰ Core Bundle 7, Exhibit 313, p. 2 where the Chief Justice is quoted as stating that “*...because when the Supreme Court's orders are not complied by the government, the bank will say they, too, won't comply. There are two parties to this, the government and the banks. That was the dilemma and fortunately we didn't have to go into that crisis because the petitioners knew we were in a bad position and withdrew*”.

¹¹¹ Core Bundle 7, Exhibit 313, p.2.

¹¹² Majority Award, para. 479.

¹¹³ Core Bundle 7, Exhibit 320.

111. This statement is to be examined in its context. In the preceding sentences of this paragraph, the Chief Justice refers to the high tax structure worked out by the Treasury officials to meet the claims arising out of the Hedging Agreement. This had caused public concern. In the previous paragraph, the Chief Justice stated the legal basis for his order and his belief that had the executive obeyed his orders the problem was capable of being judicially resolved:

*All we said was that the hedging agreements entered into by the chairman of the petroleum corporation – who is under the jurisdiction of the court – are prima facie not valid and the benefit of this should pass on to the people ... The Supreme Court would have dealt with this matter. We would probably have brought about the solution with the banks. It was stymied by this very hard headed decision not to comply with the court decision.*¹¹⁴

This interview, when read in its entirety, suggests that the Court intervened because high taxes were a matter of public concern and it believed that the matter was capable of judicial resolution. This cannot form the basis of a conclusion that the intervention was motivated by any behind the scenes dialogue or by political considerations.

112. The Majority Award does not mention that the interview clearly brings out that the Chief Justice wanted to decide the issues relating to the hedging agreements. He was unhappy with the executive for not obeying his orders. The Majority Award relies on the opinion of the Chief Justice that in an international arbitration Sri Lanka has no defence to present and that it would be a difficult fight.¹¹⁵ But it is clear from the interview that the Chief Justice wanted the case to be decided locally because he was of the view that it had elements of fraud and corruption and that the Court could have brought about a solution with the banks. He believed that by refusing to obey his orders the executive triggered international arbitration which would produce unfavourable results. In this the Chief Justice is not alone. Many judges of domestic courts believe that they are much better placed than arbitrators to decide complex contentious issues. They also regard international arbitration as alien and unfriendly. One may not agree with such views but

¹¹⁴Core Bundle 7, Exhibit 313, p.2.

¹¹⁵Majority Award, para. 479.

one cannot on that basis conclude that the proceedings before the Supreme Court violated due process.

113. In any event, relying solely on such contested evidence to impute bad faith to the highest court of a country does not meet the standard for rigorous analysis and reasoning that should be the *sine qua non* for any international tribunal recording such a damaging finding about the Supreme Court of a Sovereign State.

114. A finding of denial of FET to a foreign investor should not be readily made against the highest court of a country. *Mondev v. USA* lays down, in my opinion, the correct test in this regard:

*[W]hether, at an international level and having regard to the generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.*¹¹⁶ [Emphasis supplied].

115. In *Waste Management v. Mexico* where the failure of the Mexican courts and tribunals to provide relief was in issue, the Tribunal observed that

*“fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust, idiosyncratic or discriminatory and exposes claimant to sectional or racial prejudice.”*¹¹⁷ [Emphasis supplied].

116. The term “arbitrary” was defined by the ICJ in the *ELSI* case as “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”¹¹⁸

¹¹⁶ *Mondev International Limited v United States of America* (ICSID Case No. ARB(AF)99/2), Award, 25 May 2004, para. 127.

¹¹⁷ *Waste Management Inc v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, para. 98.

¹¹⁸ *Case Concerning Elettronica SpA (ELSI) (United States v Italy)*, ICJ reports, 1989, para. 128.

117. In the light of the facts of this case, it is not possible for me to conclude that the Supreme Court acted in an improper or discreditable manner. I do not find the conduct of the judges or the content of their orders to be arbitrary, grossly unfair, unjust, idiosyncratic or discriminatory. They did not act in a manner or pass such orders which shock or surprise a sense of judicial propriety. I, therefore, find that the Interim Order of the Supreme Court did not result in a denial of fair and equitable treatment to the Claimant and that the Claimant is not entitled to any damages on this basis.
118. The Majority Award states that at the time when the order of the Supreme Court was discharged, the Central Bank had issued a Stop-Payment Order.¹¹⁹ The conduct of the Central Bank has been separately examined in the Majority Award. It holds that the actions of the Central Bank denied FET to the Claimant. The Stop-Payment Order of the Central Bank cannot, therefore, be made a basis for a finding that the orders of the Supreme Court resulted in a denial of FET. I now proceed to examine whether the actions of the Central Bank caused any damage to the Claimants.

B. Actions of the Central Bank

119. Insofar as the investigations conducted by the Central Bank are concerned, even if these can be said to have been arbitrary or unfair, these cannot without more lead to an award of the damages accorded by the majority. There being no causality between the investigation and the damages claimed by and awarded to the Claimant, it is not clear how these investigations could lead to an award of damages of USD 60,368,993 plus interest.
120. With regard to the stop-payment direction issued by the Central Bank, it is essential for the Claimant to establish that this direction affected the existence or the recovery of the debt. The debt, however, remains unaffected. The stop-payment direction of the Central Bank, as held by the English court, could not have been aimed at CPC and did not prevent it from making payment to the Claimant. Despite the actions of the Central Bank, the Claimant's debt and its recovery remains unaffected. A direct causal link between the act of the Respondent and the damage suffered by the Claimant is missing. In the absence of this link no damages can be awarded to the Claimant on this basis.

¹¹⁹ Majority Award, para. 480.

121. Alexandra Diehl states that there are four elements that have to be present if a claim for FET is to succeed. These are:

- (i) an act or omission attributable to the host State;
- (ii) that constitutes a violation of the applicable FET clause;
- (iii) which has caused damage to the investor; and
- (iv) the existence of a direct and causal link between the act of the State and the damage to the investor.¹²⁰

122. Iona Tudor is also of the view that there are “[f]our elements” required of a FET based claim. These are “*the action of the host State, the damage to the Investor, the causality between these two, and solid factual proof of those to be brought by the investor.*”¹²¹ Elaborating upon the third element *i.e.*, causality she states as follows:

*The third requirement for a FET claim is to establish a direct causal link between the act or omission attributable to the State and the damage suffered by the Investor. There are not many cases discussing or specifically requiring this third condition independently from the other two. However, it appears that the arbitrators do verify, on a regular basis, the existence of this direct causal link. In GAMI, the impossibility for the Investor of bringing sufficient proof of establishing such a link was one of the reasons why the tribunal decided to dismiss his claim on the basis of FET. Establishing this direct connection between the action and the damage is a natural feature in a legal procedure verified spontaneously by tribunals and this may be the reason behind the absence of lengthy analysis of this point, in the arbitral awards. However, if the damage suffered is not a direct consequence of the State’s act or omission, the FET claim is dismissed.*¹²²

¹²⁰ Diehl, Alexandra, *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, Kluwer, The Netherlands, 2012, p.324-327.

¹²¹ Tudor, Iona, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, OUP, New York, 2008, pp. 134.

¹²² *Ibid.* pp.137-138.

123. The Tribunal in *Joseph Charles Lemire v. Ukraine* also summarized the FET standard as requiring “*an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm.*”¹²³ (Emphasis supplied).
124. As the existence of the debt has not been affected and the remedy to recover it has not been impaired by either the investigations conducted or the Stop-Payment Order issued by the Central Bank, the causal link between the actions of the Respondent and the damages claimed by Claimant is missing. The Claimant has, therefore, failed to establish one of the elements without which a FET claim cannot succeed.
125. In view of the above, I am of the opinion that no damages can be awarded to the Claimant on the ground that it was denied FET by the actions of the Central Bank.

V. Capacity of CPC to enter into the Hedging Agreement

126. The majority analyses this issue by considering whether the Hedging Agreement was a hedge or a speculation. This analysis is based on the assumption that CPC does not have the capacity to enter into speculative transactions. The majority fashions a bright-line test for differentiating between hedging and speculation and finds that the Hedging Agreement did not constitute speculation.
127. Transactions such as the Hedging Agreement contain elements of both hedging (due to CPC’s underlying exposure to oil) and speculation (due to the unpredictable outcome of the transaction) and it is difficult to place them firmly in either camp. Rather than fashion a test, which may not be workable in all circumstances and which creates artificial distinctions, the majority could have arrived at the same conclusion on the narrower and alternative grounds it describes in paragraph 345 of the Majority Award. I agree with the majority’s conclusion but only for the reasons set out in paragraph 345 of the Majority Award.

¹²³ *Joseph C. Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, para. 284.

VI. Attribution

128. In paragraph 404 of the Award, the majority finds that since it

“is satisfied that the actions of the Supreme Court and the Central Bank of Sri Lanka establish violations of the Treaty under Articles 2 (fair and equitable treatment) and 4(2) (expropriation) of the Treaty, it is unnecessary for this Tribunal to further decide whether Article 8 was also breached. As such, the primary rationale for deciding whether CPC’s actions are attributable to Sri Lanka under Articles 4, 5 or 8 of the ILC Articles also slips away.”

129. It reaffirms this conclusion in paragraph 406 by observing that *“it is unnecessary for the Tribunal to come to any firm conclusions on this matter, as it does not affect the Tribunal’s findings on the violations of Articles 2 and 4 of the Treaty, nor does it have any effect on the quantum of the damages claimed by Deutsche Bank.”* In paragraph 407 it notes that, *“[f]inally, the Arbitral Tribunal has decided above that Sri Lanka’s actions were within its powers and were not ultra vires. There is therefore no issue in this respect.”*

130. Despite stating that it is unnecessary to decide whether the CPC’s actions are attributable to the Respondent, in paragraph 407 the majority makes a number of observations as to why the actions of CPC are, in fact, attributable to the Respondent.

131. This international Tribunal has a limited mandate and should as matter of both principle and propriety decide the dispute before it on the narrowest possible grounds. Having stated that it is not required to decide the question of attribution since it does not affect its final conclusions, the majority should have shied away from making the observations in paragraph 407. These are quite unnecessary. While agreeing with the majority’s discussion of the issue of attribution, I, therefore, disassociate myself from the observations made in paragraph 407.

VII. Conclusion

132. For the foregoing reasons, I conclude as follows:

- I. The Hedging Agreement did not constitute an investment for the purposes of the Germany-Sri Lanka BIT or the ICSID Convention and the Tribunal, therefore, has no jurisdiction over this dispute.
- II. The Claimant's asset, in this case a claim under the Hedging Agreement, was not expropriated by the Interim Order of the Supreme Court of Sri Lanka or the actions of the Central Bank of Sri Lanka; there was no breach of Article 3 of the Germany-Sri Lanka BIT and therefore, the Claimant is not entitled to any damages.
- III. The Interim Order of the Supreme Court of Sri Lanka did not constitute a violation of Article 2 of the Germany-Sri Lanka BIT, which requires Sri Lanka to accord protected investments or companies fair and equitable treatment and therefore, the Claimant is not entitled to any damages.
- IV. There being no causal link between the damages claimed by the Claimant and the actions of the Central Bank of Sri Lanka which allegedly violated Article 2 of the Germany-Sri Lanka BIT, the Claimant is not entitled to any damages.



Makhdoom Ali Khan

23 October 2012