ATTORNEY GENERAL'S CHAMBERS MALAYSIA
INTERNATIONAL AFFAIRS DIVISION
LEVEL 6 BLOCK C3
FEDERAL GOVERNMENT ADMINISTRATIVE CENTRE
62512 PUTRAJAYA
MALAYSIA

Tel: (603) 8885 5000
Fax: (603) 8888 3518
Web Site : www.agc.gov.my

BY FAX/E-MAIL/COURIER

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Date: 14 December 2006

The Secretary of the Tribunal,
Malaysian Historical Salvors Sdn. Bhd. v
The Government of Malaysia (ICSID Case No. ARB/05/10)
International Centre for the Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C.
20433 USA

(Fax No. 0012025222615)

Dear Sir,

MALAYSIAN HISTORICAL SALVORS SDN. BHD. v THE GOVERNMENT OF MALAYSIA (ICSID CASE NO. ARB/05/10)

Your letter dated 7 December 2006 in respect of the above refers.

2. Please find enclosed herewith the **Respondent's Comments On The Issue Of "Investment" Within The Meaning Of Article 25(1) Of The ICSID Convention** to be brought to the attention of the Sole Arbitrator, Mr. Michael Hwang.

Thank you.

Yours sincerely,

(AZAILIZA MOHD. AHAD)
For and on behalf of
Attorney General, Malaysia

c.c. The Eren Law Firm
2555 Pennsylvania Avenue NW
Suite 1005
Washington D.C. 20037
1651 USA **(Fax No. 0012022966322)**
(Attention: Mr. H.C. Eren)

RESPONDENT'S COMMENTS ON THE ISSUE OF "INVESTMENT" WITHIN THE MEANING OF ARTICLE 25(1) OF THE ICSID CONVENTION

A. INTRODUCTION

1. The Secretary of the Tribunal, vide letters dated 21 and 28 November 2006 and on behalf of the Sole Arbitrator, had invited both the Claimant and the Respondent to provide any further written comments on the issue of "investment" within the meaning of Article 25(1) of the ICSID Convention.

B. COMMENTS

CESKOSLOVENSKA OBCHODNI, A. S. v. THE SLOVAK REPUBLIC (*Slovak Case*)

2. At the outset, the Respondent takes note that the decision of the Tribunal in the *Slovak Case* had unanimously decided that the dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Respondent submits that in view of the facts in the present case, the Award is obviously in support of the Respondent's arguments that the Claimant's claim as registered on 14 June 2005 is not within the jurisdiction and competence of the Tribunal.

[I] Meaning of "Investment"

3. In **paragraph 63** of the Award, the Tribunal deliberated on the rationale as to why the term "investment" was not defined in the ICSID Convention :

> "*63. It is common ground that the Convention does not define the term "investment" and that various proposals to define it during the drafting negotiations failed. This fact is reflected in the Report of the Executive Directors of the World Bank, which noted that:*

*27. **No attempt was made to define the term "Investment" given the essential requirements of consent by the parties**, and the mechanisms through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*"

4. The above statement shows that whenever a party raises the issue of the meaning of "investment", it is an inescapable fact that the consent of the parties, or rather the elements that constitute the consent must be given the utmost consideration. In other words, for an investment to be considered as "*the investment*" under Article 25(1) of the ICSID Convention, it must fulfill the requirements of consent that has been agreed to by the parties. In the present case, the term "investment" as defined in Article 1(1) of the Investment Guarantee Agreement (**IGA**) is qualified by the requirement of being an "approved project".

5. In the present case, the consent to refer any dispute to ICSID is provided by Article 7(1) of the IGA. The relevant part of that Article provides:

*"(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington at 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an **investment** of the latter in the territory of the former."*[1]

6. The term "investment" in Article 7(1) is defined in Article 1(1)(b)(ii) of the IGA as :

[1] See **Annex No. 38, Volume I** of the Respondent's Bundle of Documents filed in Support of the Memorial on Objections to Jurisdiction (**RBD**).

> *"in respect of investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an* ***"approved project"***.[2]

7. Therefore, if the principle enunciated by the Tribunal in the Award as explained in paragraphs 3 and 4 above is applied to the facts of the present case, it is undoubtedly clear that the so-called "investment" by the Claimant in the Salvage Contract did not fulfill the essential requirement of consent as agreed to by the parties in the IGA, i.e. the investment must be one which is classified as an "approved project". It is an agreed fact between the parties that the Claimant had never applied for, and the Salvage Contract was never granted, an "approved project" status.[3]

8. This argument can be further solidified by the Tribunal's remark in **paragraph 66** of the Awards which states:

> "*66.* ***It follows that an important element in determining whether a dispute qualifies as an investment under the Convention in any given case is the specific consent given by the Parties.*** *The Parties' acceptance of the Centre's jurisdiction with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention.*"

[II] Nature of the Salvage Contract

9. In **paragraph 2** of the Award, it was stated that "*[t]he Consolidation Agreement, which was designed to facilitate the privatization of CSOB and its operation in the Czech and Slovak Republics after their separation, provided,*

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[2] Ibid.

[3] **See paragraphs 64 - 90 and 102 - 120** of the Respondent's Memorial on Objections to Jurisdiction dated 11 March 2006 (**Respondent's Memorial**) and **paragraphs 19 - 47** of the Respondent's Reply Memorial on Objections to Jurisdiction dated 19 April 2006 (**Respondent's Reply Memorial**).

inter alia, for the assignment by CSOB of certain non-performing loan portfolio receivables to two so-called "Collection Companies,".... The Consolidation Agreement also stipulated that each Collection Company was to pay CSOB for the assigned receivables. To enable them to do so, each Collection Company was to receive the necessary funds from CSOB under the terms of separate loan agreements, such loans to be paid down in accordance with a stipulated repayment schedule."

10. It was then stated in **paragraph 88** of the Award that "*[i]n the Tribunal's view, the basic and ultimate goal of the Consolidation Agreement was to ensure a continuing and expanding activity of CSOB in both Republics. This undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic; it qualified CSOB as an investor and the entire process as an investment in the Slovak Republic within the meaning of the Convention ....*"

11. In **paragraph 89** of the Award, the Tribunal concluded its finding by saying "*that the requirements spelled out in Article 1(1) of the BIT for a qualifying investment are also met in the instant case. This must have been the view of the parties when they accepted a reference to the BIT in Article 7 of the Consolidation Agreement. The contrary conclusion would deprive this reference to the BIT of any meaning (cf. para. 67).*"

12. Therefore, it is the Respondent's submission that in the *Slovak Case*, the basic and ultimate goal of the Consolidation Agreement was to ensure the continuing activity of the CSOB in both republics and as such involved a contribution to the Slovak Republic especially given the CSOB's express undertaking which includes spending or outlay of resources in the Slovak Republic in response to the need to develop the banking infrastructure in that Republic. In contrast, the Claimant in the present case has not given any similar undertaking under the Salvage Contract, which its scope is for the Claimant to survey, identify, classify, research, restore, preserve, appraise, market,

sell/auction and carry out a scientific survey and salvage of the Wreck of Diana. In the absence of an undertaking by the Claimant involving a contribution by the Claimant to the economic development of the Respondent, the Salvage Contract cannot qualify as an investment within the meaning of the ICSID Convention.

[III] No reference to IGA in the Salvage Contract

13. In **paragraph 67** of the Award, the Tribunal made the following remark :

> *"67. **The Tribunal must accordingly attach considerable significance to the reference made in Article 7 of the Consolidation Agreement to the BIT and thus to the ICSID arbitration clause contained therein** (Article 8). The Parties' acceptance of the relevance and applicability of the BIT to the Consolidation Agreement expresses their view that the latter transaction **relates to an investment within the meaning of the BIT**."*

14. This statement must be read together with the findings of the Tribunal as stated in **line 6** of **paragraph 54** of the Award which states:

> "... ***In the absence of a separate dispute resolution provision**, the reference to the BIT satisfies the requirement that international arbitration, as specified in its Article 8, is the agreed dispute resolution mechanism...."*

15. Reverting to the facts in the present case, there is no provision in the Salvage Contract which provides for reference to the IGA (*which inevitably means that there is also no reference to Article 7 of the IGA*). In addition, **Clause 32** of the Salvage Contract provides as follows :

> *"Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia. The venue of Arbitration shall be in Kuala Lumpur."*[4]

[4] **See Annex No. 6 RBD Vol. I.**

From the above formulation, it is clear that it is mandatory for the parties to the Salvage Contract to settle any dispute arising from that Contract by way of arbitration in Malaysia, without leaving open any avenue for the parties to have recourse to any other form of dispute settlement.[5]

16. Therefore, applying the principles as enunciated by the Tribunal in the Award as explained in paragraphs 13 and 14 above to the facts of the present case, it is very clear that there is absolutely nothing that can be relied on by the Claimant to show that its so-called "investment" in the Salvage Contract is an investment as envisaged by the IGA. As a consequence, the Claimant fails to show that the dispute is one that can be referred to ICSID as provided by Article 7 of the IGA.

[IV] Two-fold Test

17. The Respondent submits that the most important part of the Award is the reasoning as well as the two-fold test as laid down in **paragraph 68**.

18. Firstly, the Tribunal stated that "*an agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention*". Secondly, the Tribunal stated that "***the concept of an investment as spelt out in that provision is objective in nature in that the parties may agree on a more precise or restrictive definition of their acceptance of the Centre's jurisdiction***". **This is precisely in conformity with the action taken by the Respondent in defining "investment" in the IGA as an investment classified as an "approved project"**. Thirdly, the Tribunal laid down the test in determining whether it has the competence to consider the merits of the claim, which can be summarized as follows:

(i) Whether the dispute arises out of an investment within the meaning of the Convention and if so; and

[5] See **paragraphs 178 – 181** of the Respondent's Memorial.

(ii) Whether the dispute relates to an investment as defined in the parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.

19. Hence, irrespective of the status of the agreement that has been agreed to by the parties themselves, the Claimant must still satisfy the test as to what constitutes an investment as described in paragraph 18 above. As such, even if the first requirement as in paragraph 18(i) above is fulfilled, the Tribunal will still have to look at the parties' consent to the ICSID arbitration (*which in the present case is Article 7 of IGA*), in their reference to the BIT (*which in the present case is non-existent*) and the pertinent definitions contained in Article 1 of the BIT (*which in the present case is Article 1(1)(b)(ii) of IGA*).

20. It is the Respondent's submission that in the present case, in order for the Tribunal to hold that it is competent to hear the dispute, even if it is satisfied that the dispute arises out of an investment within the meaning of the Convention, it must still be satisfied that the dispute relates to an investment as defined in the parties' consent to the ICSID arbitration and the pertinent definitions contained in Article 1 of the IGA. Based on the facts of this case, which has been repeatedly submitted by the Respondent in its Memorials[6], the Respondent submits that this dispute does not relate to an investment as defined in the parties' consent to the ICSID arbitration. The Claimant has failed to prove that the Salvage Contract is an "approved project", being an essential requirement of the definition of investment under the IGA. Hence, the Claimant's claim is not within the jurisdiction and competence of the Tribunal.

21. The importance of referring to the pertinent definitions in the IGA is further reinforced by the Tribunal in **paragraph 77** of the Award which states:

> "*77. In support of its conclusion that the CSOB loan qualifies as an investment under the BIT, Claimant points to Article 1(1), which reads in part as follows:*
>
> ...

[6] See **paragraphs 64 – 90** of the Respondent's Memorial and **paragraphs 33 – 47** of the Respondent's Reply Memorial.