

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,

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 Memorials⁶, 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.

Although loans are not expressly mentioned in this list, terms as broad as "assets" and "monetary receivables or claims" clearly encompass loans extended to a Slovak entity by a national of the other Contracting Party. Loans as such are therefore not excluded from the notion of an investment under Article 1(1) of the BIT. It does not follow therefrom, however, that any loan and, in particular, the loan granted by CSOB to the Slovak Collection Company meets the requirements of an investment under Article 25(1) of the Convention or, for that matter, under Article 1(1) of the BIT, which speaks of an "asset Invested or obtained by an investor of one Party in the territory of the other Party".

[V] Common Will of the Parties

22. As stated in paragraph 4 of the Award, the Claimant (CSOB) argued that there were three grounds on which ICSID jurisdiction over the dispute is based, the third of which was that -

"4. ... Article 7 of the Consolidation Agreement incorporates the BIT by reference because it provides that "this Agreement shall be governed by the laws of the Czech Republic and the Treaty on the Promotion and Reciprocal Protection of Investments between the Czech Republic and the Slovak Republic dated November 23, 1992."

23. Eventually, this contention is the ground on which the Tribunal based its conclusion that the parties had consented to ICSID jurisdiction as stated in paragraph 59 of the Award:

"59. For all the above reasons, the Tribunal holds that the parties have consented in the Consolidation Agreement to ICSID jurisdiction and that the date of such Agreement is, for all relevant purposes, the date of their consent. Since each party may separately institute the arbitration proceedings, Claimant was entitled to elect ICSID jurisdiction."

24. Therefore, it is the Respondent's contention that the basis of the Tribunal's decision in holding that the parties had consented to ICSID jurisdiction is the fact

that the Consolidation Agreement between the Claimant and Respondent had in fact incorporated a clause outlining the parties' common intention that, they wanted to be governed by the BIT. Since Article 8(2) of the BIT confers jurisdiction on ICSID to hear any dispute between the parties, the Tribunal held that the Respondent in the *Slovak Case* could not then argue otherwise.

[Article 8 of the BIT is re-produced in note 1 of paragraph 4 of the Award]

25. However, in the dispute between the Claimant and the Respondent in the present case, there was never any reference in the Salvage Contract that it will be governed by the IGA. As a matter of fact, the IGA and its purported protection of investment were never contemplated by the parties during the negotiation of the Salvage Contract. The simple reason for this is because the IGA was not at all applicable to the parties then in light of the fact that the Claimant was not a British company at the time of the negotiations.⁷ In addition, the Claimant has not proven that the requirement of "an approved project" under Article 1(1)(b)(ii) has been met in this case. Moreover, Clause 32 of the Salvage Contract mandates that any dispute between the parties be settled by arbitration in Malaysia in accordance with Malaysian laws.

26. This is cogent proof as to the common will of the parties when they were negotiating the Salvage Contract, a factor which this Tribunal must put great consideration in coming to its decision. In this regard, it is interesting to note that in **paragraph 34** of Award, the Tribunal stated as follows:

"34. In determining how to interpret agreements to arbitrate under the ICSID Convention, the Tribunal is guided by an ICSID decision which held that

a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties.... Moreover, ...any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking

⁷ See paragraphs 35 - 44 of the Respondent's Memorial.

into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged."

27. Therefore, it is the Respondent's contention that since it has never been a common will between the parties in the Salvage Contract that the IGA will be applicable to the Salvage Contract, for the Claimant to now argue that it is perfectly entitled to bring the dispute to ICSID on the strength of the IGA, is clearly an afterthought.

28. In conclusion, it is obvious that the *Slovak Case* was decided on the basis of its peculiar facts, as stated by the Tribunal in **paragraph 91** of the Award which states:

"91. The Tribunal concludes, accordingly, that CSOB's claim and the related loan facility made available to the Slovak Collection Company are closely connected to the development of CSOB's banking activity in the Slovak Republic and that they qualify as investments within the meaning of the Convention and the BIT."

BAYINDIR INSAAT TURIZM TICARET VE SANAYI A. S. V. ISLAMIC REPUBLIC OF PAKISTAN (Pakistan Case)

29. With reference to the present case, the Respondent reiterates that the issue of Article 25(1) of the ICSID Convention has already been addressed in the Memorials.⁸

30. In the *Pakistan Case*, **paragraph 105** provides the wordings in Article I(2) of the BIT which defined "investment". It is clear that the definition is different from the definition in the IGA in the present case in which "investment" is defined in Articles 1(1)(a) and 1(1)(b)(ii) of the IGA, specifically with the "approved project" requirement.

⁸ See paragraphs 102 - 109 of the Respondent's Memorial and paragraphs 19 - 32 of the Respondent's Reply Memorial.

31. During the negotiations of the IGA between the Respondent and the UK Government, the Respondent had proposed for the insertion of the terms "approved project" to which the UK Government had not objected to.⁹ This shows the clear intention of the parties that the term "investment" shall be qualified by the definition in Article 1(1)(b)(ii).¹⁰ For instance, between 1959 and 1993, the concept of "approved project" practically appeared in 24 out of 29 IGAs signed. Beginning with the IGA with Indonesia in 1994 and other countries thereafter, the explicit requirement for project to be approved has thereafter been removed.¹¹

32. In the *Pakistan Case*, it is observed that the arguments raised on Article 25(1) of the Convention are based on two grounds, namely -

- (i) the object of the contract; and
- (ii) the "*Salini test*".

33. With regard to the first ground, the Respondent refers to the arguments that have been made in the Memorial which supports the Respondent's submission that a salvage contract in the nature of this Salvage Contract does not amount to an "investment" within the meaning of Article 25(1) of the ICSID Convention read together with Articles 1 and 7(1) of the IGA.¹²

34. With regard to the second ground, the Respondent submits that the case of Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco [*Salini Case*] has also been highlighted in previous arguments as shown in the Memorial, in which the Respondent submitted that the IGA does not have a provision similar to Article 8 of the Italy-Morocco BIT referred to in the *Salini Case*.¹³ The provision of Article 8 in the *Salini Case* gives the Claimant a choice as to whether the Claimant wishes to submit the dispute to the competent court of the contracting party or to an ICSID arbitration. Therefore, the *Salini Case* is easily distinguishable from the present case.

⁹ See paragraphs 56 – 63 of the Respondent's Memorial.

¹⁰ Ibid.

¹¹ See paragraph 70 of the Respondent's Memorial and Annex 40 RBD Vol. I.

¹² See paragraphs 102 - 109 of the Respondent's Memorial.

¹³ See paragraphs 122 – 128 of the Respondent's Reply Memorial.

35. Furthermore, the Respondent argues that another factor that could distinguish the *Salini Case* (as well as the *Pakistan Case* and *Jan De Nul N. V. Dredging International v. Aran Republic of Egypt* [ICSID Case No. ARB/04/13] (*Jan De Nul Case*) where the *Salini test* was applied) from the present case is the fact the projects in issue in those cases were of “*such magnitude and complexity*” and involves risk to the extent that the operation of such projects constitute paramount significance of the economy and development of the countries. For example, the projects involved in the *Salini Case* and the *Pakistan Case* were in relation to major construction exercises whilst *Jan de Nul Case* involved the mega dredging project of the Suez Canal.¹⁴

36. It is nevertheless the Respondent's submission that in case this Tribunal comes to hold that the *Salini test* is still applicable in the present case, the four elements of an “investment” as propounded in *Salini Case* were not met by the Claimants in the Salvage Contract. The said elements are:

- (i) A contribution;
- (ii) A certain duration over which the project is implemented;
- (iii) Sharing of the operational risks; and
- (iv) A contribution to the host State's economic development.

37. As pointed out in the Award, the Tribunal stated that in determining whether there is an investment, these four elements may be closely inter-related, should be examined in their totality and will normally depend on the circumstances of each case.¹⁵ It is also noted that the Tribunal held that all the elements must be fulfilled before the project can be considered as an investment under Article 25(1).

38. In respect of the first element, to qualify as an investment, the project in question must constitute a substantial commitment on the side of an investor.¹⁶

¹⁴ See *Jan De Nul Case* at page 29. See also *Autopista Concesionada de Venezuela v Venezuela* [ICSID Case No. ARB/00/5 concerning the construction of a highway and *Impreglio v Pakistan* [ICSID Case No. ARB/00/4] in relation to the construction of a dam.

¹⁵ See paragraphs 130 – 138 of the Award in the *Pakistan case* articulating on how the elements apply to the M1 Project.

¹⁶ See paragraph 131 of the Award.

The Respondent hereby submits that in the present case, the Claimant did not make substantial contribution as it was purely doing the salvage works which was merely a contract for services. Hence, the contract did not extend to the extensive training of personnel and development of expertise to conduct the salvage works. Further, as submitted earlier in paragraph 35 above, the contribution made by the Claimant in the salvage project, in contrast with the projects in the *Salini Case*, *Pakistan Case* and *Jan De Nul Case*, is less substantial compared to the latter which were concerned mainly with mega projects to which the contribution is substantial.

39. In respect of the second element¹⁷, the Salvage Contract in the present case was on a one-off basis as there is neither maintenance nor defect-liability period involved. The duration of completion of the salvage project was determined in the contract itself and it had to be completed within a certain period of time on a "No Finds No Pay" basis. The initial period of completing the project was 18 months and the subsequent time extensions were allowed following requests made by the Claimant. In denying the qualification of investment to an ordinary sale of contract, the Tribunal in the *Pakistan Case* referred to Joy Mining Machinery Limited v. Egypt [ICSID Case No. ARB/03/11] which expressly distinguished the *Salini Case* on the ground that "[i]n that case, however, a major project for the construction of a highway was involved and this indeed required not only heavy capital investment but also services and other long-term commitments".¹⁸ However, in the present case, the Salvage Contract was intended to carry out the Works relating to the Wreck as described in the Preamble.¹⁹

40. In respect of the third element,²⁰ as explained in paragraph 39 above, the Salvage Contract specifically provides that it is on the basis of "No Finds No Pay". The risk that was involved in the salvage operation was always borne by the Claimant. Furthermore, the Claimant itself submitted that all risks were

¹⁷ See paragraphs 132 – 133 of the Award.

¹⁸ See paragraph 132 of the Award.

¹⁹ "Works" as in the Preamble means to survey, identify, classify, research, restore, preserve, appraise, market, sell/auction and carry out a scientific survey and salvage of the wreck and contents. "Wreck" in the Preamble means the Wreck of Diana.

²⁰ See paragraphs 134 – 136 of the Award.

undertaken by the Claimant based on the very terms of the Salvage Contract.²¹ The Respondent submits that the Contract is a typical salvage contract; no different from the numerous ordinary salvage contracts that are entered into on a regular basis in the shipping industry, with all the attendant risks that a salvage operation normally entails.

41. In respect of the fourth element,²² the Respondent submits that the salvage operation did not involve any or a significant contribution to the economic development of the Respondent. The Salvage Contract is merely concerned with the recovery of the Diana wreck and its contents with the **sole purpose of archeological interest and the study of historical heritage of the Respondent**, as expressed in the Preamble to the Salvage Contract.²³ Comparing the *Salini Case* and *Pakistan Case* with the present case, the financial spending and outlays of resources by the claimants in those two cases were in response to the need for development of the infrastructure in the host states whereas in the present case, the Salvage Contract merely envisages a recovery of artifacts from the sea and such a venture is merely a contract for services and does not contribute significantly to the economic development of the Respondent.

42. In addition, as a further proof that there was no significant contribution to the economic development of the Respondent, **Article 15.1 of the Salvage Contract provides that the Respondent shall not commercially exploit the publication and intellectual property rights in relation to the finds except in so far as to propagate education, tourism, museums, culture and history.**²⁴

43. There was also no transfer of know-how or technology to the Respondent and neither is there any economic value in it as it is the contractual obligation and responsibility of the Claimant to undertake those obligations. The Salvage Contract is no different from any ordinary salvage contract that is entered on a

²¹ See page 36 of the Claimant's Memorial on Jurisdiction dated 15 March 2006.

²² See paragraph 137 of the Award.

²³ Supra no. 4.

²⁴ Supra no. 4.

regular basis in the shipping industry, with all the attendant risks a salvage operation entails.

44. The Respondent further submits that notwithstanding the elements that must be fulfilled in respect of the definition of "investment" under Article 25(1) of the ICSID Convention as laid down in the *Salini Case*, the overriding consideration in respect of the present case is that the project must be "an approved project" in accordance with Article 1(1)(b)(ii) of the IGA, the issue of which has been dealt with extensively in the Memorial.²⁵ The objective of having the requirement of "approved project" in the definition of "investment" under the IGA was that the Respondent was in need of foreign direct investment and long term capital investments in fixed assets in labour intensive manufacturing and other manufacturing industries and related infrastructure. The Respondent was desirous of creating favourable conditions for greater investments in these sectors. In contrast, the Salvage Contract is merely a standard salvage contract for services that would be entered into in the normal course of business of the Respondent and is not an "investment" in any sense of the word. The Claimant's claim is nothing more than an alleged breach of contractual obligations, which the Claimant attempts to elevate to the status of breach of the IGA. The distinction between the Respondent entering into a contract as a "merchant" as in this instance and that as a "sovereign" is to be borne in mind. In this instance, the Respondent clearly executed the Salvage Contract as a "merchant".

45. Hence, the Salvage Contract in the present case is just a contract for services, for which the Claimant will be remunerated on an agreed scale and in order to be remunerated, the Wreck has to be located. The Claimant may have expended their resources in terms of financial, personnel and equipment but that exercise does not necessarily convert it into an investment. It remains a contract for personal services with no significant contribution to the economic development of the Respondent, unlike investments in labour intensive manufacturing and non-manufacturing industries, long term capital investments

²⁶ See paragraphs 64 – 90 of the Respondent's Memorial.

in fixed assets and pioneer status investments which were considered as industries that will stimulate the Respondent's economy.

MR. PATRICK MITCHELL V. THE DEMOCRATIC REPUBLIC OF CONGO
(Congo Case)

46. In **paragraph 41** of the Award, the *ad hoc Committee* stated that the Tribunal's award was "*tainted by a failure to state reasons, in the sense that the inadequacy of reasons is such that it seriously affects the coherence of the reasoning as to the existence of an investment in accordance with Article 25(1) of the Convention.*" The Respondent submits that this actually means that the *ad hoc Committee's* decision was primarily based on the said failure by the Tribunal, rather than on the Tribunal's determination that there was in fact an investment as envisaged under Article 25(1) of the Convention.

47. Another point of contention in relation to the Award is the difference in the wordings of the respective Articles on the definition of "investment". While Item I(c) of the BIT in the *Congo case* refers to "*every kind of investment ... including ... service*", there is no express reference to the word "services" in Article 1 of our IGA. In addition, Article 1(1)(b)(ii) of our IGA intentionally qualifies the term "investment" with the requirement of "an approved project". Therefore, based on the above reasons, the Respondent submits that the *Congo Case* is distinguishable from the present case.

48. The *ad hoc Committee* in the *Congo Case* also referred to the characteristics of "investment" under the Washington Convention in **paragraph 27** of the Award as follows :

"27. There are four characteristics of investment identified by ICSID case law and commented on by legal doctrine, but in reality they are interdependent and are consequently examined comprehensively. The first characteristic of investment is the commitment of the investor, which may be financial or through work; indeed, in several ICSID cases the investor's commitment mainly consisted in its know-how. Other characteristics of investment are the duration of the project and the

*economic risk entailed, in the sense of an uncertainty regarding its successful outcome. **The fourth characteristic of investment is the contribution to the economic development of the host country, a matter which the ad hoc Committee will review at some length in that it is a key point of the debates in the Annulment Proceedings. Indeed, while the Respondent regards the contribution to economic development as an "essential element" of investment which, if found wanting, must prompt the Arbitral Tribunal to declare that it lacks jurisdiction, - as a supplementary condition used heretofore in order to justify the broadening of the concept of investment and as somewhat duplicating with the investor's commitment.***

...

... the parameter of contributing to the economic development of the host State has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty."

49. The *ad hoc* Committee also referred to **paragraph 30** in the *Salini Case* and said that the contribution to the economic development of the host State was explicitly set as a "criterion" for an investment.

50. They also refer to the writing of Professor Schreuer in **paragraph 31** as follows :

*"31. In addition to the foregoing, it bears noting that Professor Schreuer regards the contribution to the economic development of the host State as 'the only possible indication of an objective meaning' of the term "investment". **In other words, the parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.**"*

51. The abovementioned principles taken together with the Award in the *Slovak Case* support the Respondent's contention that in order to invoke the jurisdiction of the Centre, the Claimant must satisfy not only the requirements of "an investment" under Article 25(1) of the ICSID Convention, but also under Article 1(1) of the IGA.

C. CONCLUSION

52. Based on the above discussion, the Respondent's comments on the *Slovak Case*, the *Pakistan Case* and the *Congo Case* can be summarized as follows :

The Slovak Case

- (i) There was a reference to the BIT in the Consolidation Agreement;
- (ii) The parties themselves expressly intended that the Consolidation Agreement will be governed by the BIT; and
- (iii) There was a contribution made to the economic development of the Respondent.

The Pakistan Case

- (i) The definition of "investment" in the BIT is different as there is no requirement of an "approved project";
- (ii) The case was decided in reliance of the *Salini test* but different wordings are used in the BIT in the *Pakistan Case* and the IGA in the present case; and
- (iii) Even if the *Salini test* is applicable to the present case, the Claimant has failed to fulfill all the said four elements of an "investment".

The Congo Case

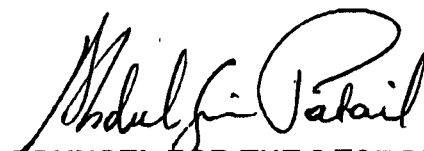
- (i) The annulment of the Award was decided due to failure of the Arbitral Tribunal to clearly state its reasons for determining that the services offered by a legal firm constitute an "investment" within the meaning of the

ICSID Convention rather than on the merits of that determination itself;
and

- (ii) The word "service" is expressly provided in the definition of "investment" in the BIT, which is not the case in the IGA.

53. In conclusion, the Respondent reiterates that in order for this Tribunal to determine whether it has the jurisdiction and competence to hear the dispute referred to it by the Claimant in the present case, the Tribunal must satisfy itself that there is "an investment" as envisaged by Article 25(1) of the ICSID Convention. Based on the facts of the present case, the Respondent submits that the Claimant has failed to prove to the Tribunal that the Salvage Contract is "an investment" for purposes of Article 25(1) of the ICSID Convention and as intended by the parties in the IGA, due to the fact that it was never classified as an "approved project" as required by Article 1(1)(b)(ii), an essential requirement that was expressly agreed to by the Respondent and the UK Government in the IGA.

Dated the 13th day of December 2006.



COUNSEL FOR THE RESPONDENT

**TAN SRI ABDUL GANI BIN PATAIL
ATTORNEY GENERAL, MALAYSIA**

(With him : Mrs. Azailiza Mohd. Ahad
Dato K.C. Vohrah
Dato' Cecil Abraham
Mrs. Aliza Sulaiman
Mrs. Chandra Devi Letchumanan
Mr. Osman Affendi Mohd. Shalleh
Ms. Sarah Khalilah Abdul Rahman
Mr. Wan Mohd. Asnur Wan Jantan
Mr. Sunil Abraham)

The Respondent's Comments On The Issue Of "Investment" Within The Meaning Of Article 25(1) Of The ICSID Convention is filed by the Attorney General's Chambers of Malaysia, Solicitors for the Respondent, whose address for service is at the International Affairs Division, Level 6, Block C3, Federal Government Administrative Centre, 62512, Putrajaya, Malaysia.

[Ref: JPN(S)152/185/113 (INT) JLD. 4; Tel : 03-88855000; Fax : 03-88883518]