

PHILIPPE GRUSLIN v. MALAYSIA

Award. 27 November 2000

(Sole Arbitrator: Gavan Griffith QC)

1. The Parties

1.1 The Claimant is a Belgian national—

Philippe Gruslin
Rue Roberts Jones, 71
1180 Brussels, Belgium

The Claimant represented himself throughout the proceedings.

1.2 The Respondent is the State of Malaysia, whose address for the proceedings is—

Attorney-General's Chambers, Malaysia
Advisory and International Division
14th Floor, Bank Rakyat Building
Jalan Tangsi
50512 Kuala Lumpur, Malaysia

The Respondent was represented in the course of the proceedings by the Solicitor-General of Malaysia, The Hon. Datuk Helilah Mohd Yusof, of the above address, and by

Professor Sir Elihu Lauterpacht, CBE QC
[...]

Jan Paulsson
Avocat à la Cour
Freshfields Bruckhaus Deringer
[...]

Robert Volterra
Freshfields Bruckhaus Deringer
[...]

as counsel.

2. Initiation of the Proceedings

2.1 The proceedings were instituted by the Claimant's Request dated 16 March 1999 (the Claimant's Request), made under Rule 2 the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules).

2.2 The Claimant claims from the Respondent the amount of losses in the value of his investments arising from the alleged breach by the Respondent of the terms of an Intergovernmental Agreement (the IGA) made 22 November 1979 with the Belgo-Luxemburg Economic Union. The claim is that the imposition by the Respondent of exchange controls in September 1998 constitutes a breach of obligations owed by the Respondent to the Claimant under the terms of the IGA.

2.3 The Claimant asserts that the Respondent has consented to the jurisdiction of ICSID by operation of Article 10 of the IGA, which provides for reference of a dispute arising out of an investment between a contracting party and a national of the other contracting party—

Reference to the International Centre for Settlement of Investment Disputes

(1) Any dispute arising directly out of an investment, between either Contracting Party and a national of the other Contracting Party shall, as far as possible, be settled amicably between the Parties to the dispute.

(2) If any such dispute cannot be so settled within three months of a written notification of a sufficiently detailed claim, the dispute shall upon the request of the nationals of either of the Contracting Parties be submitted for conciliation or arbitration to the International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18th March, 1965. For this purpose, each Contracting Party, by this Agreement irrevocably consents in advance to submit any such dispute to this Centre. This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.

3. Registration of the Claimant's Request

3.1 The Claimant's Request was supplemented by the Claimant's letter of 4 May 1999.

3.2 After some correspondence between the ICSID Secretariat and the Claimant, on 12 May 1999 the Secretariat registered the Claimant's Request pursuant to Rule 6 of the Institution Rules.

3.3 The ICSID Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) are applicable to the proceedings.

4. Appointment of Arbitrator

4.1 Pursuant to Rule 2 of the Arbitration Rules, the parties agreed on 2 June 1999 that the Tribunal should comprise a sole arbitrator.

4.2 The parties also agreed that the arbitrator should be Gavan Griffith QC (the Arbitrator) of 205 William Street, Melbourne, Australia. Pursuant to Rule 5 of the Arbitration Rules, the Arbitrator accepted the appointment on 3 June 1999.

4.3 On 9 June 1999 the Secretariat notified the parties that the Arbitrator had accepted the appointment as sole arbitrator. Pursuant to Rule 6(1), the Tribunal was deemed to be constituted and the proceedings to have begun on that date. It was agreed by the parties at the first session of the Tribunal on 9 August 1999 that the Tribunal was properly constituted in accordance with the Convention and the Arbitration Rules.

4.4 The Arbitrator signed the declaration required by Rule 6(2) and copies were delivered to the parties on 1 July 1999.

4.5 Pursuant to the Arbitration Rules, the Claimant's Memorial on the merits dated 16 June 1999 (the Claimant's Memorial) was filed on 17 June 1999.

5. ICSID Secretariat

5.1 Ms Eloïse M. Obadia was designated by the Secretary-General of the Centre to act as Secretary of the Tribunal.

6. First Session of the Tribunal

6.1 The first session of the Tribunal was held in Washington on 9 August 1999.

6.2 The Claimant acted on his own behalf.

6.3 The Respondent was represented by Mrs Lau Bee Lan and Mr Mohamad Bazain bin Idris, each Senior Federal Counsel of the Respondent.

6.4 Pursuant to Article 44 of the ICSID Convention, the parties agreed that the proceedings were to be conducted in accordance with the Arbitration Rules in effect from 26 September 1984. They also agreed that within the ambit of the Arbitration Rules the Tribunal could make directions appropriate to ensure efficiency, economy and fairness to the parties, including directions to ensure that the case proceeded as quickly as possible to a final result.

6.5 Upon the Tribunal ruling that the Respondent's letters to ICSID dated 12 and 19 July 1999 did not constitute a formal objection to jurisdiction within the terms of Rule 41(3) of the Arbitration Rules, the Respondent filed with the Secretary a handwritten notice of objection dated 9 August 1999 (Notice of Objection). The Notice of Objection was accepted by the Tribunal as an objection to jurisdiction sufficient to enliven a stay of the proceedings under Rule 41(3).

6.6 With the consent of the parties, the Tribunal made appropriate procedural directions as are set out in the Minutes of the First Session certified by the Secretary.

6.7 On issues of confidentiality, the parties particularly agreed—

- that the statements, documents, evidence and transcripts of the proceedings should be used for the purposes of the proceeding only;
- that if a party were uncertain whether any materials were confidential that party could raise the issue with the other party; and

- if there was any difficulty the issue could be raised with the Tribunal for directions.

7. Further Directions

7.1 Pursuant to the directions made by the Tribunal at the first session on 9 August 1999 and further directions later made by the Tribunal, the principal pleadings made on the Notice of Objection were—

- Respondent's Memorial on its objections to jurisdiction dated 16 November 1999 and filed 17 November 1999 (Respondent's Memorial)
- Claimant's Counter-Memorial on the jurisdictional objection dated 27 December 1999 and filed 28 December 1999 (Claimant's Counter-Memorial)
- Respondent's Reply on its objections to jurisdiction dated 9 March 2000 and filed 9 March 2000 (Respondent's Reply)
- Claimant's Rejoinder on the jurisdictional objection dated 27 March 2000 and filed 29 March 2000 (Claimant's Rejoinder).

7.2 The parties also relied upon the documents annexed to their pleadings, including the Claimant's Memorial, and the various other documents filed before, during and after the hearing including copies and extracts of texts, translations and other exhibits and documents.

7.3 Pursuant to directions made by the Tribunal, on 14 August 2000 the Respondent filed a short summary outline of its submissions on its objection to jurisdiction (Respondent's Summary) to which the Claimant responded by a summary outline dated 18 August 2000 (Claimant's Summary).

7.4 At the hearing in Paris on 22 August 2000 the Respondent handed up a folder, described as a Hearing Book, containing some 19 documents and extracts from legislation, texts and articles, to which it referred and upon which it relied during the course of its submissions. This filing was made without objection by the Claimant.

8. The Claim

8.1 The Claimant claims that in January 1996 he made an investment of some US \$2.3m. in securities listed on the Kuala Lumpur Stock Exchange (KLSE) through the entity known as the Emerging Asian Markets Equity Citiportfolio (the EAMEC portfolio) managed by Citiportfolios SA (established as a société anonyme under the laws of Luxembourg.) The EAMEC portfolio constitutes an "Organisme de Placement Collectif" registered in Luxembourg as a mutual fund governed by the Luxembourg law of 30 March 1988.

8.2 The EAMEC portfolio was managed by Citiportfolios SA (the Management Company). At the direction of the Management Company, the moneys comprising the EAMEC portfolio were invested by and in the name of Citibank (Luxembourg) SA.

8.3 The Claimant claims that he suffered losses of the proportion of his investment in the entire EAMEC portfolio (about 52%) that was invested in KLSE listed

securities (the KLSE investment). This loss of the entire KLSE investment was claimed to have arisen from exchange controls in respect to the trading of its currency imposed by the Respondent in early September 1998. The Claimant claims that the KLSE investment constituted an investment within the definitions of the IGA to the extent that he was entitled directly to invoke the dispute resolution proceedings of the IGA to recover from the Respondent the amount of his losses.

8.4 These principal claims made in the Claimant's Request and in the Claimant's Memorial are maintained in the Claimant's Counter-Memorial and the Claimant's Rejoinder.

9. Terms of the IGA

9.1 The IGA was made between the Government of the Kingdom of Belgium (acting in its own name and on behalf of the Grand-Duchy of Luxemburg under the Convention establishing the Belgo-Luxemburg Economic Union) and the Respondent. The preamble reads—

DESIRING to create favourable conditions for greater economic co-operation between them and in particular for investments by nationals of one Contracting Party in the territory of the other Contracting Party;

RECOGNISING that the encouragement and reciprocal protection of such investments will be conducive to stimulating individual business initiative and increasing prosperity in the territories of the Contracting Parties;

9.2 Other relevant provisions of the IGA (in addition to Article 10 set out in para 2.3 above) are—

Article 1—Definitions

(3) The term "investment" shall comprise every kind of assets and more particularly, though not exclusively:—

- (a) movable and immovable property as well as any other rights *in rem*, such as mortgages, liens, pledges, usufructs and similar rights;
- (b) shares and other types of holding;
- (c) titles to money or to any performance having an economic value;
- (d) copyrights, industrial property rights (such as patents for inventions, trademarks, industrial designs), know-how, trade names and goodwill; and
- (e) concessions under public law, including concessions to search for, extract or exploit natural resources.

provided that such assets when invested:—

- (i) in Malaysia, are invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon;
- (ii) in the Belgo-Luxemburg Economic Union, are invested under the relevant laws and regulations.

Any alteration of the form in which assets are invested shall not affect their classification as investment, provided that such alteration is not contrary to the approval, if any, granted in respect of the assets originally invested.

Article 3—Protection of Investments

(1) Each Contracting Party shall, within its territory, ensure full protection to the investments made in accordance with its legislation by nationals or companies of the other Contracting Party and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, selling or liquidation of such investments.

Article 12—Application of Agreement

This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its legislation or rules or regulations by nationals or companies of the other Contracting Party prior to as well as after the entry into force of this Agreement.

10. Objection to Jurisdiction

10.1 The Notice of Objection objected to jurisdiction over the dispute under the ICSID Convention on grounds that were said to “include, but not necessarily be limited to”—

- (a) that the claim which is the subject matter of the dispute is not a dispute falling within the scope of Article 10(1) of the IGA; and
- (b) following (a), there is no consent by the Government of Malaysia to ICSID jurisdiction by virtue of Article 10(2) of the IGA;

and asserted that each of these grounds was sufficient to operate as a bar to ICSID jurisdiction in the matter.

10.2 As is noted in para 6.5 above, under Rule 41(3) of the Arbitration Rules the filing of the Objection to Jurisdiction suspended the proceedings on the merits.

10.3 The argument in support of the Notice of Objection made in the Respondent’s Memorial was directed to the issues—

- (1) that to qualify for protection an investment must be located “within the territory” of the party whose obligation of protection is being invoked, (the “investment in the territory issue”); and
- (2) that the Claimant had not made an investment in Malaysia qualifying for protection under the IGA in that he was not the “owner” of the KLSE investment and that his rights arising out of his purchase of units in the mutual fund were no more than rights of a contractual nature against the management company (the “no investment in the territory issue”).

10.4 The Claimant made answer to the arguments in his Counter-Memorial.

10.5 The Respondent took up the election reserved to it under para 19 of the Minutes of the First Session, and after further directions made by the Tribunal delivered a further pleading constituted by the Respondent’s Reply 9 March 2000.

10.6 Paras 17 to 31 of the Respondent’s Reply raised a further argument to that noted in para 10.3 above by invoking proviso (i) to Article 1(3) of the IGA, to contend that the investment did not satisfy the requirement of being an approved project

(the “approved project issue”). This argument was supported by the documents and statements comprising annexures 14 to 26 to the Respondent’s Reply.

10.7 At the hearing the Respondent’s counsel conceded that the approved project issue was a new and alternative argument made in support of the Notice of Objection. It became common ground that a decision adverse to the Claimant on either of the arguments would dispose of the claim.

11. Summary of Respondent’s Submissions at the Hearing

11.1 The Respondent’s Summary expresses the jurisdiction objection made in the Notice of Objection as—

(1) The requirements laid down in Article 25(1) of the ICSID Convention for the jurisdiction of ICSID are not met. The facts set out in the Claimant’s Memorial do not establish that there exists a dispute arising directly out of an investment which the parties to the present arbitration have consented to settle under the ICSID Convention [paras. 7–8 M/J].

(2) Malaysia’s consent, as required in Article 25, cannot be found in the IGA for the following reasons:

- (a) the IGA applies only to investments in the territory of the Contracting Parties;
- (b) the Claimant’s investment was not an investment in the territory of Malaysia because he acquired no ownership of the Malaysian assets of the FCP; and
- (c) with regard to investments in the territory of Malaysia, the IGA applies only to investments in “approved projects”, and portfolio investment does not fall within this definition.

11.2 The Claimant’s pleadings made substantive arguments in answer to these objections. The Claimant also contended that for various reasons the Respondent was not able or permitted to advance its substantive objection, and in particular that—

- (a) the Respondent’s reliance upon the terms of proviso (i) to Article 1(3) of the IGA is inadmissible under the second sentence of Article 25(1) of the ICSID Convention;
- (b) the Respondent’s objection is inadmissible under Arbitration Rule 27;
- (c) the Respondent is estopped from denying the fact that the dispute falls within Article 10(1) of the IGA.

12. The Course of the Hearings

12.1 The hearing on the Objection to Jurisdiction was fixed for the three days 22 to 24 August 2000.

12.2 The appearances for the Respondent at the hearings were the Hon. Datuk Heliliah Mohd Yusof, Solicitor-General of Malaysia, Professor Sir Elihu Lauterpacht QC, Mr Jan Paulsson and Mr Robert Volterra as counsel, assisted by Mrs Lau Bee Lan and Dr Lee Foong Mee.

12.3 The parties were allocated time for their primary submissions on the basis of equality.

12.4 The Respondent's submissions took the entire day 22 August. As noted in para 7.4 above, the Respondent produced and filed a "Hearing Book" which contained some 19 documents, at least 9 of which were new to the proceeding. A draft for a speech made by the Malaysian Deputy Prime Minister at the time of the IGA in 1979 also was filed at the hearings as material relied upon by the Respondent (Transcript, 22 August 121–8).

12.5 The Claimant completed his submissions in the morning of 23 August. It was then agreed that the Respondent should make its reply the same afternoon, with the Claimant making his final submissions after a short adjournment. Hence, with their consent, each party was given such time as it sought completely to make its primary submissions and submissions in reply over the two days of hearing. At the conclusion of the hearing each party agreed that it had had a full and complete opportunity to present its case on the issues of objection (Transcript, 23 August 171–2).

12.6 All matters for submission by the parties other than for costs were disposed of at the hearing, save for leave being reserved to the Respondent to make submissions in answer to an extract from Planiol, *Droit Civil*, 5th edn, 102–7 filed by the Claimant. By letter 24 August 2000 the Respondent elected not to make submissions on this issue.

12.7 In response to a request made by the Tribunal at the hearing (Transcript, 22 August 15–16), and under cover of its letter 24 August 2000, the Respondent filed 3 bilateral investment treaties made by the Respondent that did not contain a reference to an "approved project" requirement together with a complete copy of UNCTAD 1999 publication on international investment agreements entitled "Scope and Definition" extracted in the Hearing Book, Tab 16.

12.8 The only other matter reserved for post-hearing consideration was the parties' submissions on costs in the event the Respondent's objection was upheld. The Respondent made its written submissions by letter 7 September 2000. The Claimant made answering submissions 10 September 2000.

12.9 For the reasons stated at the hearing and by letter to the parties 12 September 2000, the Tribunal indicated it would have no regard to the parties' submissions on costs unless the Respondent's objection was upheld as determinative of the dispute.

13. Investment in the Territory Issue

13.1 Para (1) of the Respondent's Summary (extracted in para 11.1 above) expresses the Respondent's objection to jurisdiction as a single contention that the requirements laid down by Article 25(1) of the ICSID Convention for the jurisdiction of ICSID are not met. The chapeau of para (2) is an elucidation of the objection made in para (1) rather than an alternative ground. Sub-para (2)(a), (b) and (c) go on to particularize the reasons why it is contended that the Respondent's consent required by Article 25 cannot be found in the IGA.

13.2 As a preliminary issue of construction of the IGA, sub-para (2)(a) of the Respondent's Summary contends that the IGA applies only to investments made by a national of Belgium or Luxemburg made "in the territory of Malaysia" (the "investment in the territory issue").

13.3 Paras 3 to 7 of the Respondent's Summary picked up the arguments advanced on the investment in the territory issue in paras 9 to 12 of the Respondent's Memorial and in paras 6 to 16 of the Respondent's Reply—

3. Under the IGA the Contracting Parties have undertaken commitments only in relation to investments of nationals of the other Contracting Party made in their respective territories. This is evidenced by the following provisions of the IGA: Preamble, Articles 2(1), 3(1), 4(1), 5(1), 7(1) and 8 [paras. 9–11 M/J].

4. In particular, Article 3(1)—the substantive provision allegedly infringed by the GOM according to the Claimant [para. 2, part II of the Claimant's Memorial]—contains the territorial requirement. The Claimant's interpretation of this provision as having two separate parts is grammatically unsound and legally wrong. The territorial requirement in Article 3(1) applies to both sentences of this provision [paras. 9–14 R/J].

5. In addition, Article 1(3)(i) of the IGA establishes that the investments in Malaysia that are to enjoy the benefit of protection under the agreement are those made in an "approved project". This is evidence that the investments must be made in the territory of Malaysia [paras. 17–18 R/J].

6. It is irrelevant that Article 10 of the IGA (referral of disputes to ICSID) does not explicitly refer to the territorial requirement. Article 10 is merely a procedural provision which must be interpreted in the context of other provisions of the IGA. The territorial requirement is implicit in Article 10 [paras. 15–16 R/J].

7. The disputes that may be referred to ICSID under Article 10 of the IGA are only those arising directly out of an investment made by a national of one Contracting Party within the territory of the other.

13.4 The outline answer made in the Claimant's Summary on the investment in the territory issue is—

8. There is no territorial requirement under Article 25(1) of the ICSID Convention and under Articles 1(3), 10(1) and 10(2) of the IGA.

9. There is no territorial requirement either under the second guarantee provided in Article 3(1) of the IGA.

This reflects the arguments put under part G, paras 61 to 68 of the Claimant's Counter-Memorial and part B, paras 16 to 21 of the Claimant's Rejoinder.

13.5 Each party invoked reliance on the use of the noun "investment" in Article 25(1) of the ICSID Convention. The Claimant contends that it is impermissible to confine "investment" to an investment in the territory of Malaysia.

13.6 It is clear to the Tribunal that Article 25(1) does not touch upon the definition of "investment" for the purposes of either the Convention or the IGA. Article 25(1) *inter alia* is directed to defining the Convention requirement for written consent with respect to the "investment . . . which the parties to the dispute consent in writing to submit to the Centre". It does not operate to define the particular investment. That is a matter to be determined by the terms of the IGA as the document relied upon as constituting the consent.

13.7 The Claimant's primary argument on this issue was that because qualifying words "in the territory" are joined to the noun "investment" in some provisions and not in others, the word "investment" is to be read with no territorial requirement unless expressly stated. The Claimant relied particularly on Article 10(1), where the term "investment" is not limited by qualifying words, to contend that for the purposes of Article 25(1) of the Convention "investment" there applies in its general sense without territorial limit.

13.8 The meaning of investment in Article 10 is informed by the stated objects of the IGA as expressed in its preamble (see para 9.1 above) by reference to the creation of favourable conditions for greater economic co-operation for investments by nationals of one party in the territory of the other.

13.9 Plainly this objective is carried through by the substantive articles. Article 2 reflects the preamble's promotion of investment in the territory of one party by nationals of the other contracting party. Article 3 deals with investments made within the territory by nationals of the other contracting party. Each of Articles 4, 5, 7, 8 and 12 also is predicated on the same subject matter of investments by nationals of one state party in the territory of the other party. In this context of the definitions of Article 1, it is clear to the Tribunal that the concept of investment is to be read as confined to the same defined subject matter of investments by nationals of one contracting party in the territory of the other.

13.10 To this extent, Article 10(1) does no more than constitute the requisite consent in writing by the Respondent for disputes with respect to investments embraced by the terms of the IGA to become subject to the ICSID Convention. The absence of qualifying words of limitation to the word "investment" in Article 10 itself does not broaden the class of investments included by the IGA. It follows that in providing for the resolution of disputes within the ICSID Convention, Article 10 is limited to the same subject matter as the rest of the IGA, namely to investments by nationals of one contracting party in the territory of the other.

13.11 For these reasons, in the circumstances of this dispute the Tribunal finds that the IGA is limited in its application to investments by the Claimant, as a national of Belgium, made by him in the territory of Malaysia. Any relevant consent by the Respondent for the purposes of Article 25(1) of the Convention is confined to investments made in its territory.

13.12 It follows that the Respondent's alternative arguments in support of its Notice of Objection, namely the no investment in the territory issue and the approved project issue, fall to be considered on the basis that the IGA does require the Claimant's investment to be made in the territory of Malaysia.

14. No Investment in the Territory of Malaysia Issue

14.1 As noted in para 10.3 above, the no investment in the territory issue was the principal argument advanced in the Respondent's Memorial in support of grounds of objection made in the Notice of Objection. It is based on the assertion that the KLSE investment is not an investment made by the Claimant in the territory of Malaysia.

14.2 The Respondent's Summary expresses its propositions on this issue—

10. It follows that the Claimant has no severable individual property rights that he can pursue by individual action [paras. 28–29 M/J; paras. 39 and 54 R/J].

11. This emerges from the Law of 30 March 1988 and from the contractual documents regarding Citiportfolios, i.e. Management Regulations, Citiportfolios sales prospectus, contract between the Management Company and the Depository Bank, contract notes and bearer's certificate [paras. 17–26 M/J; paras 32–4, 40 R/J].

12. All this is supported by the evidence submitted by the Respondent, which includes:

- (a) Maître Elvinger's expert legal opinions [para. 30 M/J; para 41 R/J; Annexes 1 and 7];
- (b) the chapter on "OPCVM", *Juris Classeur Commercial*, fascicule 2238 (1996) [paras. 49–54 and 59 R/J; Annex 9]
- (c) the chapter on "Fonds Communs de Placement"; *Encyclopédie Juridique Dalloz*, "Répertoire des Sociétés", volume 3 (1992) [paras. 42–8 R/J; Annex 10];
- (d) the UCITS Directive [para. 57 R/J; Annex 1 attached to Annex 7];
- (e) the article by Philippe Jestaz in *Revue de droit civil* 1980, pp. 180–3.

13. The Claimant has failed to submit any evidence that rebuts the Respondent's arguments. In addition, he has seriously misquoted the Respondent's pleadings as well as misquoted and mistranslated the evidence submitted by the Respondent.

14. Malaysian law supports the conclusion that the Claimant had no legal interest in the underlying Malaysian assets of the FCP [paras. 34–40 M/J; paras. 60–2 R/J].

(FCP is an abbreviation for *fonds communs de placement* as the legal form of EAMEC portfolio constituted under the Luxemburg law.)

14.3 The Claimant's Memorial and Counter-Memorial, supplemented by his Rejoinder, made exhaustive argument on this issue in support of the propositions made in the Claimant's Summary to the effect that—

1. Agreement of the parties that the issues of the ownership of the assets that make up the EAMEC portfolio and of my right to exercise this cause of action be decided in accordance with Luxembourg law, which excludes "opinions" of lawyers that are not expressly upheld by judicial decisions.

2. The ownership of assets that make up a collective investment fund such as the EAMEC portfolio is expressly vested in the investors (unitholders) under Luxembourg law and under the investors' contract with the Management Company of the portfolio, and not in the said Management Company.

3. The said Management Company is the agent of the investors under Luxembourg law, and under Malaysian law as well.

4. The investors (unitholders) of the EAMEC portfolio are also deemed to be the owners of the assets that make up the portfolio under Malaysian law.

5. Shares of Malaysian companies listed on the Kuala Lumpur Stock Exchange (the KLSE) were bound to permanently constitute half of the EAMEC portfolio.

14.4 A further and alternative answer on this no investment in the territory issue was advanced at the hearing by the Claimant (Transcript, 23 August 5–30). The Claimant contended that in the event that the Management Company was properly to be regarded as the owner of the KLSE investment, Articles 1165 and 1166 of the

Luxemburg Civil Code enabled him to be subrogated and to exercise, in his own name, its rights, at least to the extent of claiming the amount of loss attributed to his share of the EAMEC portfolio invested in such securities.

14.5 Articles 1165 and 1166 of the Luxemburg Civil Code provide—

1165. Agreements are effective only between the contracting parties; they do not prejudice third parties, and do not benefit them except in the situation specified in article 1121.
1166. Nevertheless, obligees may exercise all the rights and causes of action (*actions*) of their obligor, with the exception of those which are exclusively personal.

14.6 Although the Claimant had referred to Article 1165 in para 107 of his Rejoinder, undoubtedly this alternative procedural argument was new. After some discussion at the hearing, the Claimant relied upon these Articles as furnishing an alternative, rather than substitute, argument entitling him to maintain his claim under the terms of the IGA.

14.7 The Respondent did not object to the Claimant raising this argument late in the proceedings. In answer, it filed some legal commentaries and made oral submissions in reply on 23 August 2000 (see para 15.9 below).

15. Respondent's Arguments at Hearing

15.1 The essence of its no investment in the territory argument was stated by the Respondent's counsel (Transcript, 22 August 21) to be that—

... the Claimant has made no investment in Malaysia, and has no legal relationship with Malaysia that falls within the scope of the investment treaty.

15.2 The Respondent's counsel also submitted that it was unlikely that the IGA would have influenced any Belgian investor making direct or indirect investments in securities listed by the KLSE (Transcript, 22 August 23–4). However, to the extent that it may be relevant, at the time of his investment in the EAMEC portfolio in 1996 the Claimant was in the peculiar position of being completely aware of the terms of the IGA, upon which he had relied in his earlier claim against the Respondent made in ICSID Case No. ARB/94/1 (the First Dispute).

15.3 In any event, as a national of Belgium the Claimant is entitled to maintain rights vested in him by the IGA irrespective of his awareness of its terms at the time of the investment.

15.4 The constituting documents for the EAMEC portfolio were filed by the Claimant as Annexes C13 and C12 and referred to at the hearing and copied in the Hearing Book, Tabs 1 and 2. They were invoked to support the Respondent's proposition that under the laws of Luxemburg the Claimant had no interest as owner in the KLSE investment.

15.5 The commentaries, articles and the two opinions of Maître Elvinger annexed to the pleadings or produced and tendered by the Respondent at the hearing in

support of its contentions on the no investment in the territory issue expose some of the uncertainties in the evolution of the laws of Luxemburg to deal with mutual fund investments. There is an obvious tension at the point where its laws seek to assimilate civil law principles with some of the concepts of a trust. The difficulty was expressed by counsel for the Respondent (Transcript, 22 August 183) as representing “a struggle to work towards functional equivalents of the trust”. This is reflective of the observations by Professor Philippe Jestaz made 20 years ago in (1980) *Revue de droit Civil* 180–3, under Hearing Book, Tab 19, in his reference to the grafting of trust laws into Luxemburg’s civil law.

15.6 The Respondent contended that under the applicable Luxemburg law the rights of the Claimant as an investor in the EAMEC portfolio were no more than his entitlement to have the fund administered in accordance with its constituting documents and the Luxemburg laws applicable to it as an FCP. It was argued that there was no requirement for any funds to be invested in Malaysian securities, and their investment, retention and sale was wholly a matter for the Management Company. The Respondent asserted that unitholders’ contractual rights entitled them to no more than the proper administration of the EAMEC portfolio, and that no unitholder had any severable individual property right with respect to any investments made by the EAMEC portfolio, particularly the KLSE investments. It followed that no unitholder had any severable individual property rights with respect to the investment in securities listed by KLSE.

15.7 The parties were agreed that the characterisation of whether or not the Claimant had made an investment in the territory of Malaysia under the terms of the IGA was a matter to be determined by reference to the laws of Luxemburg (Transcript, 23 August 10).

15.8 The Respondent’s supporting argument (see para 14.2 above) that Malaysian law separately supports the conclusion that the Claimant had no legal interest in the underlying Malaysian assets of the EAMEC portfolio would not seem to advance the Respondent’s argument based on the Luxemburg laws.

15.9 In submissions in reply (Transcript, 23 August 116–35), the Respondent’s counsel answered the alternative procedural arguments advanced by the Claimant at the hearing in reliance upon Article 1166 of the Civil Code (see paras 14.4 to 14.7 above), in terms that—

- (1) Article 1166 is a procedural provision that does not impact upon the substantive issue for determination, namely whether the Claimant is to be regarded within the terms of the IGA to be a national of Belgium who has invested in the territory of Malaysia; and
- (2) the provision applies only to certain, due and liquidated rights.

16. Order of Determination of Objections

16.1 At the hearing (Transcript, 22 August 178–80) the Respondent’s counsel asked the Tribunal to determine the “approved project” issue first and requested that if it were upheld the Tribunal should make a final award dismissing the claim without

going on to consider the no investment in the territory ground. After expressing his confidence that neither ground would be sustained, the Claimant concurred in this approach. (Transcript, 23 August 59–61). On this agreed basis, the Tribunal will adopt the proposed order of consideration of the alternative arguments.

16.2 It follows that if the approved project argument is upheld the Respondent will have sufficiently made out the objection expressed in its Notice of Objection that there has been no consent by it to the reference of the dispute within Article 25 of the ICSID Convention. The proper course then would be for the Tribunal to make an award upholding the objection and to dismiss the claim, with final costs orders.

17. The Approved Project Issue

17.1 The approved project issue is embraced by paras 15 to 19 in the Respondent's Summary—

15. With regard to investments in the territory of Malaysia, Article 1(3) of the IGA restricts the application of the IGA to those investments made in an “approved project”.

16. With this restriction Malaysia intended to limit the encouragement and protection of foreign investment made in its territory to investment made in projects that contributed to the manufacturing and industrial capacity of the country. Portfolio and stock market investment, the kind of investment involved in the case at hand, does not fall within the definition of approved project. Therefore the IGA does not apply [para. 21 R/J].

17. This is supported by the evidence submitted by the Respondent on the historical background of the IGA, which includes:

- (a) the Malaya/US IGA and its application practice [para. 22 R/J; Annexes 16–17];
- (b) the Malaya/Germany IGA, its *travaux préparatoires*, press reports and official statements and application practice [paras. 23–5 R/J; Annexes 18–20];
- (c) the Malaysia/Switzerland IGA and its *travaux préparatoires* [paras 26–7 R/J; Annexes 24 and 25];
- (d) the records of interview with Malaysian officials involved in the negotiations of the IGA [para. 28 R/J; Annex 14];
- (e) the Memorandum from the Ministry of Trade and Industry of Malaysia to the Attorney-General's Chambers of 11 November 1999 on the “Policy underlying the Investment Guarantee Agreement (IGA)” [para. 28 R/J; Annex 15]; and
- (f) Malaysia's consistent practice regarding the limitation of protection to investments in approved projects in IGAs [para. 29 R/J; Annex 26].

18. The Claimant's reference to the proceedings in ICSID Case No. ARB/94/1 and the related correspondence does not alter the conclusion that the IGA does not apply to portfolio investment, the kind of investment involved in the case at hand [paras. 30–1 R/J].

19. The Claimant's interpretation of the evidence submitted by the Respondent in support of this conclusion is manifestly flawed.

17.2 The Claimant's Summary made answer to the approved project argument in terms—

6. Shares of Malaysian companies listed on the KLSE comply with proviso (i) to Article 1(3)—aka Article 1(3)(i)—of the Investment Guarantee Agreement of November 22, 1979 between Malaysia and Belgium/Luxembourg (the IGA) as completed by Malaysia’s note ref. F28/92 of September 28, 1992 to the Belgian embassy in Malaysia (C6).

7. The reference to the notion of “approved project” by the Respondent in its Reply on its Objections to Jurisdiction is inadmissible under the second sentence of Article 25(1) of the ICSID Convention.

[...]

13. The Respondent’s jurisdictional objection is inadmissible under Arbitration Rule 27.

14. The Respondent is estopped from referring to the notion of “*approved project*”.

15. The reference by the Respondent to the notion of “*approved project*” is inadmissible under Arbitration Rule 27.

18. ICSID Convention, Article 25(1)

18.1 The Claimant’s Summary, para 7, asserts that the approved project issue is inadmissible “under the second sentence of Article 25(1) of the ICSID Convention”.

18.2 Article 25(1) provides—

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

18.3 The Claimant’s argument at the hearing (Transcript, 23 August 33–6) arises from the Claimant’s Rejoinder. It was asserted that for the purposes of the second sentence of Article 25(1) the raising of the approved project issue in the Respondent’s Reply constitutes an impermissible derogation from a prior consent to jurisdiction implicitly constituted by the last sentence of para 10 of the Respondent’s Memorial.

18.4 This contention is rejected by the Tribunal for the reason that the requisite consent under Article 25(1) of the ICSID Convention is the consent constituted by the terms of the IGA itself. The formal requirement for consent by a State is not to be derived as an inference drawn from the terms of a State’s Memorial advancing an objection based on the absence of such consent.

19. Waiver Under Rule 27

19.1 Rule 27 of the Arbitration Rules provides—

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which

fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

19.2 The Claimant's Summary, para 15, contends that the approved project issue is inadmissible under Arbitration Rule 27. This appears to be a particular of the general contention earlier made under para 13 that the Respondent's entire objection is inadmissible under Arbitration Rule 27 (Claimant's Rejoinder, Part VI C. at p. 45).

19.3 To the same extent that the pleading in para 10 of the Respondent's Memorial does not constitute consent for the purposes of Article 25(1) of the ICSID Convention, the Tribunal determines that it also does not constitute a deemed waiver of its denial of the Respondent's consent for jurisdiction under the ICSID Convention.

19.4 Further, as the Respondent's Notice of Objection raised the issue of consent at the first session on 9 August 1999, there can be no possibility of waiver on the issue of consent arising from the failure by the Respondent to plead the approved project argument in a timely manner in the first round of pleadings. This is a matter of procedural criticism rather than jurisdictional objection or waiver within the term of Article 27 of the Arbitration Rules.

19.5 The procedural position is much the same as arose upon the Claimant raising at the hearing his new and alternative argument which was based on Articles 1165 and 1166 of the Luxemburg Civil Code (see paras 14.4 to 14.7 above). In each case a party is not shut out for raising the new argument by reasons of waiver.

19.6 Further, the approved project argument was an issue obviously thrown up by the terms of entire Article 1(3). It was raised in correspondence between the Claimant and the ICSID Secretariat prior to the acceptance of the Request (Hearing Book, Tab 18), and was particularly dealt with by the Claimant's Request and Claimant's Memorial.

19.7 After hearing submissions from the parties at the hearing on 22 August, the Tribunal indicated that if the issue of the Respondent's consent under Article 25(1) of the ICSID Convention were not foreclosed by reasons of waiver or estoppel the Tribunal itself would raise the issue under Article 41(2) of the Arbitration Rules were it not effectively raised by the Respondent (Transcript, 22 August 71–102 and 109–12). As the Tribunal finds that there was no waiver under Rule 27 and that the Respondent is not otherwise shut out from raising the issue, the Tribunal does not raise this issue for separate consideration under Article 41(2).

20. Estoppel on Approved Project Issue

20.1 Part IV of the Claimant's Counter-Memorial asserts that the Respondent is estopped from denying its consent under Article 10 of the IGA by reason of its failure to express an objection to the notification of the claim constituted by the Claimant's letter 23 November 1998 (Annexure C.24 to the Claimant's Memorial).

20.2 Whilst conceding that an estoppel may arise in international law so as to bind a state, the Respondent's counsel's submission was that, as for any estoppel, the Claimant must establish both a statement made by one party and reliance upon

it by the other party to his detriment or to the advantage of the party making it (Transcript, 22 August 48–9). The Tribunal accepts that this is a correct statement of the applicable principle, expressed in an international law context in 1990 by a Chamber of the International Court of Justice in *El Salvador v. Honduras* (ICJ Rep. 1990, p. 118, para 63, extracted Hearing Book, Tab 9).

20.3 The matters identified in para 72 of the Claimant's Counter-Memorial cannot constitute sufficient acts of reliance to the Claimant's detriment for this purpose. In any event, these contentions were raised in connection with the no investment in the territory issue. They have no obvious relevance to the approved project issue, which was not raised until the second round of pleadings.

20.4 The Claimant's submissions at the hearing did not advance any basis to find an estoppel with respect to the approved project issue such as to give particular content to para 14 (see para 17.2 above) of the Claimant's summary. In particular, the Claimant has not established that he acted to his detriment in reliance upon any representation which might be constructed out of the failure of the Respondent to plead the approved project issue at an appropriate time. Nor has he established anything arising from the circumstances of the first dispute which may found an estoppel against the Respondent contending that the approved project requirement of proviso (i) of Article 1(3) is not satisfied.

20.5 For these reasons the Tribunal rejects the Claimant's argument that the Respondent is estopped from raising the approved project issue.

21. Materials Extrinsic to the IGA

21.1 The Respondent's Summary, para 17 (see para 17.1 above), lists extrinsic circumstances and materials adduced to support the general proposition made in para 16 that the approved project requirement was a restriction intended to limit protection to foreign investments that contributed to the Respondent's manufacturing and industrial capacity.

21.2 The arguments made in paras 22 to 29 of the Respondent's Reply are supported by the materials comprised in its Annexes 14 to 26. These constitute a variety of factual material ranging from statements of civil servants involved in the negotiations of the IGA (Annex 14) to documents with respect to the terms and operation of this and other investment agreements made by the Respondent. Annex 25 is a copy of the investment agreement made 1 March 1978 between the Respondent and the Government of the Swiss Confederation which contains a definition of investment in similar terms to Article 1(3) of the IGA but in terms that plainly attach the proviso for an approved project to the entire definition of "investment". Annex 26 to the Respondent's Reply lists some 24 investment agreements made by Malaysia since 1959 which contain as part of the definition of protected assets a requirement that the investment be an approved project. It also identifies 3 investment agreements made by Malaysia which contain no such express reference. Of temporal relevance is the investment agreement with France made on 24 April 1975, some four years prior to the IGA made 22 November 1979 (a copy of which the Respondent filed with the Tribunal after the hearing).

21.3 At the hearing the Respondent also supported the proposition made in para 16 of the Respondent's Summary with an extract from UNCTAD's 1999 publication *Scope and Definition* (Hearing Book, Tab 16, a complete copy of which the Respondent filed with the Tribunal after the hearing), together with an UNCTAD press release 29 June 2000 (Tab 17). These most recent UN publications were relied upon to support the contention that the IGA made in 1979 should be read by the Tribunal with a background assumption that it was confined to the subject matter of productive investment.

21.4 Even if it may be accepted that in 1979 bilateral investment agreements made by states with a developing economy might be expected to encourage productive foreign investment, resort to extrinsic materials of the sort invoked by the Respondent for the purpose of colouring the meaning of the particular terms of the IGA is of limited utility in determining whether Article 1(3) of the IGA by its terms restricts the application of the entire IGA to investments made in an "approved project". This especially is so given that the investment agreement made with France some 4 years earlier contained no such restriction (see para 21.2 above).

21.5 Further, it is for the Tribunal to determine the probative value of the evidence of the underlying factual matrix at the time the IGA was made (Arbitration Rules, Rule 34).

21.6 The Tribunal has considered the materials from sources ranging from 1960 (Respondent's Reply, Annex 21) to 2000 (Hearing Book, Tab 17). Its approach is first to consider the terms of proviso (i). If its meaning is found to be clear, the Tribunal will not reduce its reach by reference to general considerations or assumptions derived from extrinsic sources of the sort relied upon by the Respondent in its materials and arguments.

22. Proviso (i) of Article 1(3)

22.1 Article 1(3) of the IGA is set out in para 9.2 above in the same layout as in the executed IGA. It is obvious that proviso (i) should have been justified back to the margin, immediately under para (e), rather than aligned to its text. It is untenable to suggest that because the proviso is indented in from the margin it is to be read as attaching only to para (e). Proviso (i) sensibly is to be read as attaching to any asset coming within the term of "investment", including any of the paras (a) to (e).

22.2 As the KLSE investment is an "asset" within the terms of para (b) of Article 1(3), the relevant enquiry is to determine whether proviso (i) is satisfied to the extent it is—

invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia, in accordance with the legislation and the administrative practice, based thereon . . .

22.3 The contentions advanced in the Claimant's Request, Memorial and pleadings on the objections and in his oral argument are to the effect either that the requirement of proviso (i) is dispensed with or that in the particular circumstances

of this investment is to be regarded as satisfied under the terms of Malaysian law and administrative practice.

22.4 A particular factual foundation for this claim arises from the terms of the communications made between the Ministry of Foreign Affairs of Malaysia and the Royal Embassy of Belgium constituted by an exchange of *notes verbales* of 28 August and 28 September 1992.

23. The Respondent's *Note Verbale* 28 September 1992

23.1 By *note verbale* 28 August 1992 addressed to the Respondent's Ministry of Foreign Affairs from the Royal Embassy of Belgium in Malaysia, Belgium sought clarification on the term "approved project" under the terms of the IGA in terms—

The Royal Embassy of Belgium presents its compliments to the Ministry of Foreign Affairs and has the honour to refer to the Agreement between the Belgo-Luxemburg Economic Union and the Government of Malaysia on encouragement and reciprocal protection of investments, signed in Kuala Lumpur on November 22, 1979.

The Embassy would like to address Article 1, point 3, para (i), and seek some clarification on the term "approved project" in the light of the Malaysian legislation and administrative practices.

Since the conclusion of the Agreement Malaysia has known an important economic development, in particular under the impulse of special incentive programmes for the attraction of foreign investment, of which many of them have been introduced through the Ministry of International Trade and Industry in the beginning of the 1980s.

The policy for attracting foreign investment usely [*sic*] targets particular economic goals, and the related incentives mostly become operational only after "approval of the project".

In the above mentioned Agreement the scope of application is meant to be the very larger one, as determined in Article 1, point 3: "The term investment shall comprise every kind of assets and more particular, though not exclusively, . . .". It therefore can include foreign investments outside the promotional policies for particular sectors, and even foreign investments which because of their substance or object have not been marked for explicit approval procedures by the Authorities.

For the purpose of correct information towards the Belgian Business Community, the Government of Belgium would like to obtain from the Government of Malaysia the assertion that the term "approved project", as referred to in Article 1, point 3, para (i), is to be understood in the larger sense and does include foreign investment for which the substance and or the object are not subject to explicit approval procedures.

The Royal Embassy of Belgium wishes to thank the Ministry of Foreign Affairs for its assistance in obtaining this assertion, and avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

23.2 The response was by a *note verbale* addressed to the Royal Embassy of Belgium at Kuala Lumpur 28 September 1992 (*Note Verbale*) in terms—

The Ministry of Foreign Affairs, Malaysia presents its compliments to the Royal Embassy of Belgium and with reference to the latter's Note B12-90/Nr. 1095 N.V. 85 dated 28 August 1992, has the honour to inform that the term "Approved Projects"

under Article 1,(3)(i) of the Agreement on Encouragement and Reciprocal Protection of Investments between Malaysia and the Belgo-Luxemburg Economic Union should be read together with Article 1(3)(a) to Article 1(3)(e). If any project undertaken does not require [sic] approval from the relevant designated Ministries, hence Article 1(3)(i) is not applicable.

The Ministry of Foreign Affairs, Malaysia avails itself of this opportunity to renew to the Royal Embassy of Belgium the assurances of its highest consideration.

23.3 The Respondent's Reply sought to explain the position of the *Note Verbale*—

30. The Claimant has referred to a letter of 19 December 1991 from the GOM to Mr Parra, of ICSID, and to a note of 28 September 1992 from the GOM to Belgium which he interprets as excluding the application of the "approved projects" limitation to the shares acquired in Malaysia by the Mutual Fund. This approach could only be relevant if the Claimant were correct in his contention that he is an owner of the shares owned by the Mutual Fund. This, of course, the Respondent denies. However, even if he were, his interpretation of these documents is mistaken. Neither of these documents serves to change the meaning of the proviso that appears at the end of Article 1(3) of the IGA which excludes the protection of portfolio investment.

31. For example, the note of 28 September 1992 indicates the understanding of the GOM of the term "approved projects" in the IGA Article 1(3)(i). The GOM then said that the term should be read together with Article 1(3)(a) to (e) (i.e., the non-exclusive list there given of "assets" constituting "investment") and stated: "If any project undertaken does not require approval from the relevant designated Ministries, [hence] Article 1(3)(i) is not applicable". Thus, investment in an "approved project" is a necessary condition of being a protected investment. Only where the investment is in an approved project is it protected. Mere investment in shares in the stock market, which can be traded by anyone and are not connected to the development of an approved project, are not protected. The assertion in the C-M/J that portfolio investments "are deemed to be encompassed in the definition of the term 'investment' as laid down in Article 1(3) of the IGA" is incorrect. The Claimant's reference to correspondence associated with the proceedings which he started against the GOM in 1991 is not relevant here. In that case, the Claimant had made a direct investment in the shares of a single, specific development project and the correspondence must be read in that light.

23.4 At the hearing (Transcript, 22 August 38) counsel for the Respondent submitted that these exchanges between Belgium and Malaysia should be regarded as the equivalent of an exchange of letters. Indeed, counsel denigrated the *Note Verbale* from the Respondent to the level of "some functionary at the Ministry of Foreign Affairs" (Transcript, 23 August 102). This is imperfectly to characterize the status of a *note verbale* as a formal communication between states. The particular and formal enquiry made by Belgium's *note verbale* of 28 August 1992 was formally answered by the Respondent on 28 September 1992. Of course, this exchange does not effect a direct amendment to the terms of the IGA. However, at this peak level of intercourse between states it must be regarded as an enduring and authoritative engagement expressing to the Belgo-Luxemburg Union the manner in which the Respondent regards and applies the terms of the IGA with regard to investments made in its territory by nationals of the Belgo-Luxemburg Union.

23.5 Although the first sentence of the statement might have been more correctly expressed in terms that the proviso (i) to Article 1(3) attaches to the entire definition of investment, the *Note Verbale* to this extent is merely confirmatory that the proviso (i) attaches to each of the paragraphs (a) to (e) of Article 1(3).

23.6 It is the second sentence of the *Note Verbale* that gives rise to uncertainty—

If any project undertaken does not require [sic] approval from the relevant designated Ministries, hence Article 1(3)(i) is not applicable.

Para 31 of the Respondent's Reply set out in para 23.3 above, makes what the Tribunal accepts as the appropriate grammatical correction to this statement to read—

If any project undertaken does not require approval from the relevant designated Ministries, Article 1(3)(i) is not applicable.

23.7 In the search for content, the statement is to be read as the considered position adopted by Malaysia in response to the operative part of Belgium's *note verbale* seeking confirmation ("assertation") that—

The term "approved project" as referred to in Article 1, point 3, para (i), is to be understood in the larger sense and does include foreign investment for which the substance and or the object are not subject to explicit approval procedures.

23.8 The difficulty is to give any meaning to the second sentence which assists, rather than confounds, the sensible application of proviso (i) to a particular investment made by a national of the Belgo-Luxemburg Union. The intended reach and application of the statement remains elusive. At the hearing the Respondent's counsel described the *Note Verbale* as an "otherwise obscure reply". Little emerged in the ensuing discussion (Transcript, 22 August 131–56) to reduce the obscurity.

23.9 The Solicitor-General explained that the *Note Verbale* arose out of issues in contention between the Claimant and the Respondent prior to the initiation of the proceedings in the First Dispute in 1994. However, the *Note Verbale* is not expressed as limited to the circumstances of that dispute. It may endure with a continuing relevance with respect to investments by nationals of the Belgo-Luxemburg Union in Malaysia.

23.10 Some sensible content to the second part of the *Note Verbale* may be given by the suggestion by the Respondent's counsel that it would embrace a general "blanket" statement made by or on behalf of the Respondent with respect to particular classes of investments (Transcript, 22 August 146–9). For example, the Respondent might encourage investments in the IT industry by stating that all such investments would be accepted as investments in an "approved project" for the purposes of the IGA. This proposition may be accepted. However, it is noted that such a statement would in any event seem to fall within the terms of the second sentence of the *Note Verbale* as much as under the terms of the proviso itself. Further, the Respondent did not proffer any example of any such general stipulation having been issued by the Respondent before or after 1992.

23.11 In the search for real content there is an admitted circularity in this second sentence of the *Note Verbale*. In its literal reading it purports to say that proviso (i) will not attach to a project which does not require approval from a relevant designated Ministry. If this were its effect, the approved project requirement effectively would be abrogated for investments in a project where there was no particular approval process, as proviso (i) would apply only to a project that required approval. However, such an operation would be a radical departure and derogation of the entire IGA that by its terms clearly applies a requirement for an approved project for each asset constituting an investment in Malaysia by a national of the Belgo-Luxemburg Union.

23.12 The *Note Verbale* remains a statement that engenders rather than resolves uncertainty as to the application of proviso (i) to Article 1(3).

23.13 Somewhat reluctantly the Tribunal is moved to accept the position pressed by the Respondent's counsel (Transcript, 22 August 149) that the Respondent has not produced an interpretation of the exchange constituted by the *Note Verbale* which is secure "in absolute or abstract terms". Little more may be made of the terms of the *Note Verbale* other than to admit the force of the Respondent's counsel's further submission (Transcript, 22 August 151) that in this uncertain field of operation it is for the Claimant to establish a meaning of the *Note Verbale* that supports his contentions on the approved project issue.

23.14 The Tribunal accepts that the Claimant may reasonably complain that the *Note Verbale* is of uncertain effect to the circumstances of his investment. However, it remains that, whatever was intended, it is for the Claimant to establish that the particular assets of the EAMEC portfolio constituted by the KLSE investment fall within the definition of Article 1(3).

23.15 On this question the Tribunal rejects the contention of the Claimant that the *Note Verbale* has the effect of abrogating the requirement that proviso (i) be satisfied with respect to the KLSE investment.

23.16 Apart from its consideration of costs issues, it may not be for the Tribunal to comment that the Respondent usefully might either withdraw or clarify the *Note Verbale*. As is manifest in the circumstances of this dispute, it is a source of confusion rather than clarity with respect to the application of the terms of the IGA to an investment made in Malaysia by a national of the Belgo-Luxemburg Union.

24. Application of Proviso (i) to KLSE Investments

24.1 An investment in KLSE listed securities by a national of Belgium or Luxemburg will fall within the broad definition of an asset constituted within para (b) of Article 1(3) of the IGA. This in itself does not make the investment a protected asset, for the investment will be entitled to protection under the IGA only if proviso (i) is satisfied.

24.2 As the Tribunal has rejected the contention that the *Note Verbale* has the effect of abrogating the application of proviso (i) where there is no particular law or regulation requiring a consent for an investment in the territory of the Respondent,

the Tribunal finds that the approved project requirement does attach to the KLSE investment.

25. KLSE Listing Requirements

25.1 In his pleadings the Claimant anticipated the relevance of the application of the definition of investment under Article 1(3) to the KLSE investment. In particular, he argued, in the Claimant's Memorial, para 17 (page 3), that the term "project" is used in the sense of activity, and that a share of corporate stock is, by definition, an investment in the activity of the corporation. In para 20 (page 4), he relied upon Article 7 of the KLSE Listing Manual which requires approval from the Respondent's Capital Issues Committee (CIC) before listing of any shares on the KLSE with an investment in an approved project. It is argued that this constitutes satisfaction of the requirements of proviso (i) (Transcript, 23 August 41-4).

25.2 The Claimant's Memorial, Annexure C.20, is a relevant extract from the official listing requirements, of which para 1.A.(I).(7) requires—

Approval must first be obtained from the Capital Issues Committee before listing and quotation of any shares can be granted.

The Guidelines for the new issues of securities is Annexure C.21. It sets out the functions of the CIC as set up in June 1968 by the Minister of Finance "to ensure the orderly development of the capital market" as becoming formally established with the coming into force of the *Securities Industry Act*, 1983 on 7 July 1983.

25.3 Part II of these Guidelines confirms the role of the CIC as to ensure the orderly development of the capital market by regulating the issue of securities by public limited companies and/or the listing of such securities on a stock exchange. Paras 3, 4 and 5 of the Guidelines provide—

3. In examining proposals for the issue of securities and/or listing on a stock exchange, the CIC considers each company on its own merits, with reference to the industry as a whole. The CIC makes a financial evaluation of the securities to be offered after taking into account the various criteria relating to the soundness and growth prospects of the company, including the integrity and the performance of the management in running the public listed company. Generally, the CIC examines proposals, and after paying due regard to:—

- "(i) the viability of the company;
- (ii) the quality and capability of the management of the company;
- (iii) the suitability for listing of the company in a stock exchange where applicable; and
- (iv) the interests of the public,"

may approve the proposals upon such terms and conditions as it deems fit.

4. The CIC in examining proposals also ensures that Government policies and objectives are observed by working closely with the Ministry of Trade and Industry, the Registrar of Companies (ROC) and the Foreign Investment Committee (FIC). In considering any application which requires the issue of a prospectus, the CIC in consultation with the ROC seeks to ensure a full disclosure of information in the prospectus as required

under the Companies Act, 1965. The prospectus shall also include a reasonable forecast of profits and dividends which the directors and the sponsoring merchant bank shall be accountable. The CIC also requires that the guidelines of the FIC be complied with by companies undertaking acquisitions of assets or mergers and take-overs to ensure that proposals are consistent with national interests.

5. With regard to public listed companies, they are required to seek the approval of the CIC before seeking listing and quotation of their securities on other stock exchanges. There should also be continual disclosure to the CIC in respect of any management or business agreements entered into between the company and its foreign associated and related companies which may result in a conflict of interest situation.

25.4 It follows that as part of the process of listing securities on the KLSE the applicable regulatory scheme invokes the requirement that the CIC give its approval by reference to the matters listed in para 3 of the Guidelines and with regard to the governmental policies and objectives referred to in para 4.

25.5 Proviso (i) requires that to be a protected asset within the definition of investment under Article 1(3) of the IGA there be an investment in an “approved project”. The Claimant contends that the proviso is satisfied with respect to the KLSE investment because the approval of the CIC is an “approval” of the existing or intended business activity of a corporation. The answer to this proposition is that proviso (i) and the CIC requirements concern different subject matters. Approval by the CIC may satisfy a governmental requirement that the business of a corporation be approved by a governmental agency. But this is not the content or subject matter of the “approved project” requirements of proviso (i). What is required is something constituting regulatory approval of a “project”, as such, and not merely the approval at some time of the general business activities of a corporation. The Tribunal rejects the Claimant’s contentions that a CIC approval for a corporation in the listing processes for the KLSE suffices to satisfy the request for an “approved project” under the proviso. To this extent, the contention in para 31 of the Respondent’s Reply (set out in para 23.3 above) that “mere investments in shares in the stock market, which can be traded by anyone, and are not connected to the development of an approved project, are not protected”, is upheld by the Tribunal.

25.6 For these reasons, it is the finding of the Tribunal that, neither on the application of the terms of proviso (i) itself, nor as it may be informed by the second sentence of the *Note Verbale*, does an investment by a national of the Belgo-Luxemburg Union in shares of companies that are listed on the KLSE, following approval by the CIC as is required under the regulatory laws of the Respondent, satisfy the requirements of proviso (i) as an approved project.

25.7 The finding of the Tribunal on the approved project issue is that the KLSE investment does not satisfy the definition of investment under Article 1(3) of the IGA merely because of the fact that it is invested in KLSE listed securities. For that reason, it is not a protected investment within the terms of the IGA, including Article 10. As there is no contention by the Claimant that the KLSE investment otherwise has been approved as an “approved project” under the terms of proviso (i), it follows that whether or not the Claimant himself has made the KLSE investment in the territory

of the Respondent, there is no requisite consent by the Respondent for the purposes of the IGA as is required by Article 25(1) of the ICSID Convention.

26. Statement of Facts Found by the Tribunal

26.1 As is required by Arbitration Rule 47(1)(g), the Tribunal makes findings of facts in this Award that the parts of the EAMEC portfolio invested in securities listed on the KLSE, and in particular the KLSE investment, do not constitute an approved project as is required by the terms of proviso (i) for the investment to constitute an investment within the meaning of Article 1(3) of the IGA. The Claimant's claim fails by reason of a want of consent by the Respondent under Article 10 of the IGA and Article 25(1) of the ICSID Convention.

26.2 In the circumstances of the parties' agreement and invitation to the Tribunal to determine the approved project issue first, the Tribunal does not determine the issues raised and sustained in the pleadings and arguments with respect to the no investment in the territory issue.

26.3 In reaching its decision to uphold the objection made by the Respondent in the Notice of Objection the Tribunal has exhaustively considered the entire pleadings, contentions, arguments, submissions and documentary materials in the proceedings, including in the Claimant's Request and the Claimant's Memorial and each of the pleadings listed in para 7.1 above. The Tribunal also has considered the entire arguments made by the parties, and has reviewed the Transcript of the hearing.

26.4 The award of the Tribunal is to uphold the jurisdictional objection made by the Respondent in the Notice of Objection on 9 August 1999 and to make an award to determine the entire claim by declaring that this dispute does not fall within the jurisdiction of the ICSID Convention.

27. Costs

27.1 As an award is to be made, Article 61 of the ICSID Convention requires the Tribunal to decide how and by whom the expenses incurred by the parties and the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Rule 47 of the Arbitration Rules also requires the award to contain any decision of the Tribunal regarding the costs of the proceedings.

27.2 In its submissions made by letter 7 September 2000 the Respondent claimed for its entire costs to be paid by the Claimant.

27.3 In his answering submissions on costs and his letter 10 September 2000 the Claimant requested orders for payment of his costs of the objection to jurisdiction. The Tribunal refers to its letter to the parties 12 September 2000, that explains the extent to which the Tribunal would have regard to the terms of the Claimant's submissions on costs. It also was explained at the hearing, that in the event that the Respondent's objection was not upheld no award would be made, and the Claimant's costs would have fallen for consideration with the entire costs of the arbitration.

27.4 The Tribunal rejects the Claimant's submission that the Respondent should be ordered to pay any of the Claimant's costs of his unsuccessful claim now dismissed for want of jurisdiction.

27.5 Although the Respondent's objection to jurisdiction has been upheld, there are several considerations that militate against the Claimant being ordered to pay the Respondent's costs.

27.6 The first relevant matter is the inequality of the position of the parties. The Claimant conducted the proceedings in person and with particular tenacity both to advance his claim on the merits (as expressed in his Request and Memorial) and to make answer to the successive arguments which emerged to support the Respondent's jurisdictional objection.

27.7 Secondly, although the Claimant's Request and Memorial affirmatively argued that proviso (i) of Article 1(3) was satisfied as a jurisdictional matter, the Respondent did not raise the approved project argument until the second round of pleadings. This was an argument which could, and should, have been advanced in the Respondent's Memorial in support of its Notice of Objection. There is no obvious reason why two rounds of pleadings were required to expose the Respondent's two arguments on its objection.

27.8 Thirdly, the position of the Tribunal is that for costs purposes the Tribunal should make no assumption that the Respondent would have been successful on the no investment in the territory issue. Indeed, on the election by the Respondent not to pursue the no investment in the territory issue to resolution unless that was necessary to uphold the objection, the proper approach is for the Tribunal to consider costs issues on the contrary assumption that the argument would not have been sustained. The Claimant may reasonably argue for what a common lawyer terms the costs thrown away.

27.9 In its opening and closing submissions at the hearing and in its written submissions for costs the Respondent asserted that the dispute was a "nuisance" claim. The Tribunal is uncertain as to the assistance to be derived from such characterization, particularly on costs issues. The Respondent's counsel invoked a scenario of disaster which would arise were investors in mutual funds individually entitled to claim the protection of the IGA. However, it was on the invitation of the Respondent that this issue has not been decided by the Tribunal.

27.10 From time to time the Tribunal and the Secretary have been required to intervene to secure compliance by the Claimant to the requirements of proper form. At the outset of his submissions (Transcript, 23 August 4) the Claimant apologized for any offence arising from his style and prose. Nonetheless, under the persiflage the Claimant has presented a thoroughly prepared argument through several layers of pleadings. As a layman he has exposed the real difficulties arising from the issuance of the *Note Verbale* and the application of proviso (i) of Article 1(3) of the IGA to the circumstances of the KLSE investment.

27.11 Although the Claimant is unsuccessful on the approved project issue, and in the result, on one view this is for the somewhat negative reason submitted by the Respondent's counsel (Transcript, 23 August 149 and 151) as noted in para 23.13 above.

27.12 It is the conclusion of the Tribunal that the collation of these circumstances is recognized by the determination that each party should pay one-half of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre and otherwise that each party pay its own expenses incurred in connection with the proceedings.

Award

The Tribunal upholds the objection made by the Respondent in its Notice of Objection of 9 August 1999 and declares that the claim is not a dispute falling within the scope of Article 10(1) and that there is no consent by the Respondent to ICSID jurisdiction under Article 10(2) of the Intergovernmental Agreement made 22 November 1979 between the Belgo-Luxemburg Economic Union and Malaysia, or as is required under Article 25(1) of the ICSID Convention.

The claim is dismissed.

Each party shall pay its own expenses in the arbitration and one-half of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre.

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