

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES**

CASE NUMBER ARB/05/10

BETWEEN

MALAYSIAN HISTORICAL SALVORS SDN BHD ...CLAIMANT

AND

THE GOVERNMENT OF MALAYSIA ...RESPONDENT

RESPONDENT'S POST - HEARING BRIEF

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Annexure No.	Document
A	Investment in Malaysia – Policies & Procedures (4 th Edition, 1981) published by the Malaysian Industrial Development Authority
B	Investment in Malaysia – Policies & Procedures (printed in March 1985) published by the Malaysian Industrial Development Authority
C	Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco (ICSID Case No. ARB/00/04)
D	Jan de Nul N.V. Dredging International N.V. v Arab Republic of Egypt (ICSID Case No. ARB/04/13)
E	Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2)
F	Empresas Lucchetti S.A. and Lucchetti Peru S.A. v Republic of Peru (ICSID Case No. ARB/03/04)

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A. INTRODUCTION

1. The Respondent's post hearing brief is filed in accordance with the directions handed down by the Arbitral Tribunal on 25th May 2006.
2. The Respondent shall address the following issues raised by the Arbitral Tribunal during the course of the hearing on 25th May 2006, namely:
 - (a) Whether there is publication of the requirement for an investor to obtain "approved project" status in order to obtain protection under the IGA? **[See Transcript of Minutes at page 14, lines 1 - 6 and page 158, lines 10 - 12];**
 - (b) What is the ratio behind the decision of the Arbitral Tribunal in addressing the issue of "approved projects" in *Philippe Gruslin v The Government of Malaysia* [ICSID Case No. ARB/99/3] **[See Transcript of Minutes at page 95, lines 10 - 16];**
 - (c) Whether *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* [ICSID Case No. ARB/00/4] applies in this instance in relation to the definition of an "investment"? **[See Transcript of Minutes at page 59, lines 5 - 9];**
 - (d) What is the relevance of the decision in *Milhaly International Corporation v The Democratic Socialist Republic of Sri Lanka* [ICSID Case No. ARB/00/2]? **[See Transcript of Minutes at page 119, lines 1 - 22];** and
 - (e) Whether the Claimant's claim is a pure contractual claim?

B. SUBMISSION

ISSUE (1) - Publication of the requirement to obtain “approved project” status in order to obtain protection under the IGA

3. The Respondent submits that the requirement to obtain “approved project” status to ensure protection under the IGA is published in the following documents:
 - (a) “Investment in Malaysia – Policies & Procedures” (4th Edition, 1981) **[See pages 15 - 17 of Annexure A]**; and
 - (b) “Investment in Malaysia – Policies & Procedures” (printed in March 1985) **[See pages 16 - 17 of Annexure B]**. Part of this document has been exhibited in **Annex 50** of the **Respondent’s Bundle of Documents Filed in Support of the Memorial on Objections to Jurisdiction (RBD)**.
4. Due consideration should be given to the passages under the heading “**Procedure**” at **page 16 of Annexure A and page 17 of Annexure B**. It clearly states that the Ministry of Trade and Industry (now known as the Ministry of International Trade and Industry) (MITI) issues letters of coverage under the respective Investment Guarantee Agreements to approved projects in Malaysia and that applications for letters of coverage should be made to MITI.
5. Both publications clearly show that there is no express statement therein that when a party deals or executes a contract with the Government, it is excluded from making an application to MITI for coverage under the respective IGA.

6. There are no records relating to the receipt of any application from the Claimant to obtain coverage under the IGA (**see letter from MITI - Annex 50 of the RBD, Vol. II**).
7. At no time during the negotiations or operation of the Salvage Contract did the Claimant inquire about protection under the IGA. There is also no holding out by the Respondent that the IGA applies simply because the issue never arose at all material time.
8. Coverage has been given by MITI for manufacturing and non-manufacturing activities under the USA and Germany IGA which has a similar provision of “approved project” (**Annexes 41, 42, 43, 44 and 49 of the RBD, Vol. I and II**).

ISSUE (2) – The ratio in *Philippe Gruslin v The Government of Malaysia*

9. In so far as the ***Philippe Gruslin*** case is concerned, the Arbitral Tribunal viewed as valid, the arguments put forward by the Government of Malaysia that the foreign investor needed to obtain “approved project” status so as to ensure protection under the Belgo-Luxembourg and Malaysia BIT. This is clear from a reading of paragraph 17 of the arbitral award read together with paragraphs 21.1 and 21.4 to 21.6 of the arbitral award [**See Annex 87 of the RBD, Vol. IV**].
10. The Respondent submits that it is wrong to attempt to require further reasoning or justification for the rationale of the decision. The simple fact of the matter is that the Arbitral Tribunal in ***Philippe Gruslin*** accepted the argument that a foreign investor needed to obtain “approved project” status by way of express approval before protection under a BIT could be conferred. This reasoning is premised on the evidence disclosed of the

Respondent's past conduct. There is therefore strong precedent for the Respondent's argument on this issue of "approved project".

11. This is very different from the decision in ***Yaung Chi Oo Trading Pte Ltd v Government of the Union of Myanmar*** [Asean ID. Case No. ARB/01/1] **[Annex 91 of the RBD, Vol. IV]** for the following reasons:

- (a) The Tribunal in this case noted that under Article 11 of the 1987 Asean Agreement there is an express requirement of approval and registration of foreign investment if it is to be covered by the 1987 Agreement (paragraph 58). Furthermore the procedure for giving approval under Article 11(3) is not spelt out (paragraphs 58 & 60) and there appears to be no indications to be drawn from any ASEAN Practice (paragraph 58). But the Tribunal held that effect must be given to the actual language of Article 11(3) which requires an express subsequent act amounting at least to a written approval and eventually to registration of the investment;
- (b) The arbitral tribunal ruled that approval by the FIC was deemed insufficient for the purposes of Article II(3) of the 1987 ASEAN Agreement which came into force on 23 July 1997 **[See paragraphs 53 to 63 in Annex 91 of the RBD, Vol. IV]**;
- (c) The language and express provision of Article II (3) of the ASEAN Treaty differs from Article 1 of the IGA. In the ASEAN Treaty, no particular form of approval is required and there is no requirement for a project to be an "approved project" as required under the IGA **[See paragraph 22 in Annex 91 of the RBD, Vol. IV]**;
- (d) In our case, the IGA contains an express provision that the term "investment" under Article 1(1)(b)(ii) is a reference in respect of

investment in 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”. Classification is a pre-condition to protection, a factor conspicuously absent in the ASEAN Treaty; and

- (e) The expression “approved project” in the IGA is within quotes. Clearly there must be express signification by the appropriate authority that it has considered the project and has approved that particular project as an “approved project”. The investment is not protected under the IGA if it is not approved as an “approved project”. The language in Article 1(1)(b)(ii) is not directory but mandatory and must be given effect to.
12. The participation of the Respondent through various Ministries and organs in the negotiations of the Salvage Contract and its subsequent renewals were for the general business of salvage of the Claimant. Approval of the Salvage Contract was not, and cannot be, construed or inferred as consent of the subject matter of the “approved project”. There was, and until this day, no express approval of the approved project at all.
 13. In this context the decision in *Philippe Gruslin* is relevant. The Tribunal held that 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 the proviso. What is required is something constituting regulatory approval of a “project” and not merely the approval at some time of the general business activities of a corporation [see paragraph 25.5 in Annex 87 of the RBD, Vol. IV].

14. According to Article 31(1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
15. Thus, Article 1(1)(b)(ii) of the IGA should be interpreted according to its ordinary meaning. It is clearly stated that the term “investment” means, in respect of the territory of Malaysia, all investments made in projects **classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an “approved project”**.
16. It can be clearly understood from Article 1(1)(b)(ii) that the IGA requires a separate layer of approval. If there is no such requirement for a separate layer of approval, Article 1(1)(ii) of the IGA would not have two specific provisos that makes a distinction between an investment in the territory of United Kingdom and an investment in Malaysia.

ISSUE (3) - *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco*

17. The decision in *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* [ICSID Case No. ARB/00/4] **(See Annexure C)** can be distinguished on the following grounds:
 - (a) Article 1 of the IGA is worded differently as compared to Article 1 of the BIT between Italy and Morocco **[See paragraph 45 of Annexure C]**;
 - (b) The Arbitral Tribunal in *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* held that there must be a “contractual benefit

having an economic value". In this case we are dealing with a service arrangement vide the Salvage Contract **[See paragraph 45 of Annexure C]**;

- (c) Approval of the competent authority under the *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* case is not provided for unlike in this case where approval comes from MITI (as stated above) **[See paragraph 47 of Annexure C]**;
 - (d) The Claimant has not met the requirements of an investment as espoused in *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* **[See paragraph 52 of Annexure C]**;
 - (e) The Claimant has not contributed to the economic development of the Respondent **[See paragraphs 57 and 58 of Annexure C]**; and
 - (f) The IGA does not have an equivalent provision to Article 8 of the BIT between Italy and Morocco **[See Respondent's Reply Memorial on Objections to Jurisdiction at paragraphs 122-126 and paragraphs 15 and 27 of the Arbitral Award in Annexure C]**.
18. Due consideration should also be given to the recent decision in *Jan de Nul N.V. Dredging International N.V. v Arab Republic of Egypt* [ICSID Case No. ARB/04/13] **(See Annexure D)**. The test in *Salini's* case as to what constitutes an "investment" was addressed in **paragraphs 90 - 93 of the Arbitral Award in Annexure D**.
19. Based on the case of *Jan de Nul N.V.*, the essential elements amounting to an investment are as follows:

- (a) a contribution;
 - (b) a certain duration over which the project is implemented;
 - (c) a sharing of operational risk; and
 - (d) a contribution to the development of the host State,
20. The Respondent submits that based on the reasons stipulated in the Respondent's Memorial on Objections to Jurisdiction and Reply Memorial, the Claimant has failed to meet the abovementioned elements. Accordingly, there is no "investment" within the meaning of Article 25 of the ICSID Convention read together with Article 1 of the IGA.

ISSUE (4) - *Milhaly International Corporation v The Democratic Socialist Republic of Sri Lanka*

21. The decision in *Milhaly International Corporation v The Democratic Socialist Republic of Sri Lanka* [ICSID Case No. ARB/00/2] (**See Annexure E**) is cited for the proposition that -
- (a) expenditure in the process of preparing the stage for completing a contract does not constitute an investment [**See paragraph 51 of the Arbitral Award at Annexure E**];
 - (b) express consent on the part of the Respondent is required for the "investment" to garner protection of the IGA [**See paragraph 52 of the Arbitral Award at Annexure E**]; and

- (c) the Arbitral Tribunal in our case is entitled to examine the past practices of the Respondent in the absence of an accepted definition of “investments” and therefore “approved project” status **[See paragraph 58 of the Arbitral Award at Annexure E]**.

ISSUE (5) – Contract Claim vs Treaty Claim

22. In so far as this issue is concerned, the Respondent submits that the Claimant’s only sustainable cause of action is possibly for breach of contract. This reasoning is premised on the following grounds:

- (a) The Claimant’s counsel and the Claimant in person have expressly stated that they did not want recourse to the Malaysian Courts in seeking to arbitrate under the KLRCA Rules.
- (b) Accordingly, there can be no denial of justice if the court has no jurisdiction to interfere in the Arbitral Award in light of Section 34 of the Arbitration Act 1956 **[See Transcript of Minutes at pages 100 - 103 at lines 1- 5, page 171 at lines 12-25 and page 172 at lines 1- 3]**.
- (c) There is no issue of expropriation as the “Finds” under the Salvage Contract are the Respondent’s property pursuant to Clause 17 and Clause 18 of the Salvage Contract.

23. The distinguishing features of the ***SGS v Philippines*** case are as follows:

- (a) The form of the “investment”
In ***SGS v Philippines*** the “specific investments” were identifiable. Accordingly, the Arbitral Tribunal was able to refer certain claims of

contract to local jurisdiction while retaining jurisdiction over the treaty based claims.

In this case, the Claimant's real claim is for monies owed under the Salvage Contract. This is a pure contractual claim.

(b) The link between the contract claim and treaty claim

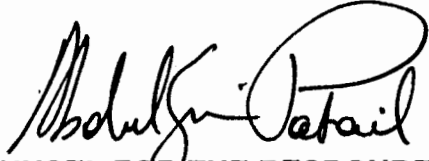
In *SGS v Philippines*, the Arbitral Tribunal was shown the link between the breach under the contract and that of the BIT. This has not been established by the Claimant here.

24. The Respondent invites this Arbitral Tribunal to take cognizance of the decision in *Lucchetti SA and Luchetti Peru SA v Republic of Peru* [ICSID Case No. ARB/03/4] (**See Annexure F**) in particular **paragraph 50** of the Arbitral Award. There the Tribunal stressed that it falls to be determined in each case whether or not the facts or consideration that give rise to an earlier dispute continues to be central to a later dispute. The Respondent submits that applying this test to the case before this Arbitral Tribunal, it is clear that the present dispute has the same origin or source, and that it concerns the same subject matter.
25. In light of the above, the Claimant's cause of action, shorn of all its trappings, is simply one for monies owed under the Salvage Contract. Thus, to seek relief by way of an ICSID Arbitration clearly tantamount to an attempt to re-arbitrate the earlier dispute that had, at the Claimant's own choice, already been arbitrated at the domestic arbitration [**See Transcript of Minutes at page 129, lines 12 - 18**].

C. Conclusion

26. From the evidence and the legal arguments put forward by the Respondent, it is submitted that the Respondent has established valid and sustainable grounds that this Arbitral Tribunal has no jurisdiction to determine this dispute.

Dated the 26 day of June 2006.


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The **Respondent's Supplementary Note** is filed by the Attorney-General's Chambers of Malaysia, Solicitors for the Respondent, whose address for service is at the Civil Division, Level 3, Block C3, Federal Government Administrative Centre, 62512 Putrajaya, Malaysia.

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