

**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**

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**RESPONDENT'S MEMORIAL ON  
OBJECTIONS TO JURISDICTION**

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**The Arbitrator: Mr. Michael Hwang, SC**

**Secretary of the Tribunal: Mr Ucheora Onwuamaegbu**

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**RESPONDENT'S MEMORIAL ON OBJECTIONS TO JURISDICTION**

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## A. INTRODUCTION

1. The Respondent's Memorial is filed in furtherance to the Respondent's Notice of Objection dated 23.12.2005 that the Claimant's claim as registered on 14.6.2005 is not within the jurisdiction and competence of the International Centre for the Settlement of Investment Disputes (ICSID).
2. At the outset, the Respondent submits that the grounds in support of the Respondent's objection against the jurisdiction and competence of the Arbitral Tribunal are as follows:
  - (a) The Claimant and the claim do not fall within the scope of Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and Article 7 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (IGA).
  - (b) The Claimant's claim is not an "investment" under Article 1 of the IGA.
3. In this regard the following issues are relevant for consideration:
  - (i) Whether the Claimant has the *locus standi* to institute proceedings before the ICSID Tribunal?

- (ii) Whether the Claimant's claim is an "investment" within the meaning under Article 25(1) of the ICSID Convention?
  - (iii) Whether the Claimant's claim is an "approved project" pursuant to Article 1(1)(b) of the IGA?
  - (iv) Whether the Arbitral Tribunal has jurisdiction to determine a pure contractual claim?
  - (v) Whether the Claimant has been denied access to justice in the Malaysian Courts?
  - (vi) Whether the Claimant has exhausted all domestic remedies prior to instituting the request for arbitration before ICSID?
4. The Respondent views the present case with the utmost of seriousness. The issue involved is one, which goes to the heart of the conduct of the Respondent's economy. If, contrary to the Respondent's contention, this case should ever reach the merits stage, the Respondent will explain in all necessary detail as to why no responsibility can be attached to it in relation to measures which were fully justified by the Respondent's economic needs and were in no way discriminatory against foreigners.

5. The Respondent submits that:
- (i) the Claimant has **NO** *locus standi* to institute proceedings before this Arbitral Tribunal under the ICSID Convention;
  - (ii) the Claimant's claim is **NOT** an "investment" within the meaning of Article 25(1) of the ICSID Convention;
  - (iii) the Claimant's claim is **NOT** an "approved project" pursuant to Article 1(1) (b) of the IGA;
  - (iv) the Claimant's claim is a **PURELY CONTRACTUAL CLAIM;**
  - (v) the Claimant has **NOT** been denied access to justice within the jurisdiction of the Malaysian Courts; and
  - (vi) the Claimant has **NOT** exhausted all domestic remedies prior to instituting the request for arbitration before ICSID.
6. Since the Claimant's claim is fatally flawed there is **NO** requisite consent by the Respondent to submit to this Arbitral Tribunal under the ICSID Convention. The Respondent will elaborate in detail on each of those issues in order to show to this Arbitral Tribunal that the

only proper order to make is to dismiss the Claimant's claim with costs.

**B. SUMMARY OF CLAIMANT'S CLAIM**

7. On **30.9.2004**, pursuant to Article 2 of the ICSID Convention, the Claimant filed its Request for Arbitration wherein the Claimant alleges that:
  - (a) The Respondent has confiscated the Claimant's property;
  - (b) The Claimant has been denied the due process of law in Malaysia;
  - (c) The Claimant's claim is justiciable under the IGA ; and
  - (d) The Claimant has exhausted all domestic remedies available in the Federation of Malaysia prior to the filing of the Request for Arbitration dated 30.9.2004.
8. The Respondent disputes the Claimant's claim.

**C. THE FACTS**

**(i) The Background**

9. In 1988 the Claimant (at the particular time known as Pacific Sea Resources Sdn. Bhd.) (PSR) applied to salvage the Diana Wreck.

10. A Committee comprising the representatives from Ministries of Finance, Foreign Affairs, Culture and Tourism, National Museum Department, Marine Department and the Attorney General's Chambers was set up to formulate guidelines and procedures concerning salvage contracts.
11. The Committee met on 14.9.1988<sup>1</sup> to formulate guidelines and determine the selection criteria in the approval of applications for survey and salvage wrecks in Malaysian waters. The meeting also deliberated upon the application by PSR, its proposals with regard to apportionment of proceeds, the draft agreement by PSR and the comments by the Marine Department in respect of the draft agreement.
12. On 14.6.1990 there was a negotiation with PSR in respect of survey and salvage of the Diana Wreck.<sup>2</sup> The draft agreement was discussed. Members present included six (6) from Ministry of Finance, two (2) from PSR, two (2) from Marine Department and one (1) each from Ministry of Transport and Ministry of Culture and Tourism.
13. Subsequently there were several meetings held in the Ministry of Finance to finalize the draft survey and salvage agreement. On 9.7.1990 the final draft was approved by the Committee.<sup>3</sup>

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1 Annex 1  
2 Annex 2  
3 Annex 3

14. On 5.5.1991 a letter of offer to PSR for the survey and salvage works of the Diana Wreck was issued by the Marine Department.<sup>4</sup>
15. A letter purporting to be from the Claimant dated 16.5.1991 was sent to the Marine Department carrying further comments on the Salvage Contract as well as seeking clarification on certain articles of the Salvage Contract.<sup>5</sup> It also informed the change of the Claimant's name from PSR to Malaysian Historical Salvors Sdn. Bhd. (MHS) and the letter was signed by Mr. Dorian Ball on behalf of Mr. Don Robinowe. According to the Explanatory Note in Exhibit D of the Claimant's Request, the Claimant's change of name took place on 17.7.1991.
16. Contract No. IPL 3/1991 (Salvage Contract) was entered into between the Claimant and the Respondent on 3.8.1991 "to survey, identify, classify, research, restore, preserve, appraise, market, sell/auction and carry out a scientific survey and salvage of the wreck and content of Diana". The Salvage Contract was for a period of eighteen (18) months.<sup>6</sup>
17. During the negotiations of the Salvage Contract and at the signing of the Salvage Contract, no shareholder held majority shares.
18. Before the expiry of the Salvage Contract, which was on 3.2.1993, the Claimant wrote to the Respondent requesting for

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4 Annex 4  
5 Annex 5  
6 Annex 6

- the scope of the survey area to be amended and for the Salvage Contract to be extended. The Salvage Contract was varied and extended to 36 months from the signing of the contract on 12.4.1993.<sup>7</sup> The Salvage Contract was further extended to 3.3.1995<sup>8</sup> and yet again extended to 3.6.1995.<sup>9</sup>
19. On 3.6.1994 the Claimant completed the salvage works and the artifacts recovered together with several tons of broken items were known as “Shards”. The artifacts were then identified and an inventory of the said artifacts was prepared by the Claimant at its shore base in Tanjung Bidara, Malacca.
  20. On 22.9.1994 the Claimant, Respondent and Christie’s Amsterdam B.V. entered into an Auction Contract.<sup>10</sup>
  21. On 6.3.1995 and 7.3.1995 the auction took place in the Netherlands and NLG4,879,490 was raised. The Claimant alleges that prior to the commencement of the auction, the Respondent withdrew 650 items from the auction on behalf of the National Museum Department for the purposes of study and exhibition.
  22. The Claimant claims that no public exhibition was ever held in respect of the DIANA Cargo.
  23. By 3.7.1995, a dispute had arisen between the Claimant and the Respondent.

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7 Annex 7  
8 Annex 8  
9 Annex 9  
10 Annex 10

24. Pursuant to Clause 32.1 of the Salvage Contract the Claimant represented by a Malaysian law firm of Messrs. Azman Davidson & Co wrote a letter dated 12.7.1995 to the Director of the Marine Department, Malaysia giving Notice that a dispute had arisen and requested the Respondent to choose one of two names proposed as arbitrators.<sup>11</sup>
25. By letter dated 10.8.1995 the Respondent agreed to refer to arbitration but did not agree to the names of the Arbitrators proposed.<sup>12</sup>
26. The Claimant then proceeded to file an application in the Kuala Lumpur High Court seeking for an order that the Court appoint a suitable arbitrator to conduct the arbitration between the Claimant and the Respondent.<sup>13</sup>
27. On 27.5.1996, the Kuala Lumpur High Court ordered by consent that the arbitration be settled in accordance with UNCITRAL Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur (KLRCA Rules).<sup>14</sup>
28. In compliance with the above Court order, on 19.8.1996 the Kuala Lumpur Regional Centre for Arbitration (KLRCA) appointed Mr. Justice (rtd) Richard Talalla as the sole arbitrator.<sup>15</sup>

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11 Annex 11  
12 Annex 12  
13 Annex 13  
14 Annex 14  
15 Annex 15

29. On 27.9.1996 the Claimant commenced the arbitration proceedings in Malaysia pursuant to Clause 32 of the Salvage Contract. The Claimant's primary claims<sup>16</sup> are summarized below:

- (a) The Claimant is entitled to 70% of the full Appraised Value of the items withdrawn from the auction by the Respondent;
- (b) The Claimant suffered loss due to the incorrect exchange rate and interest or damage for late payment of their share of the proceeds of the auction;
- (c) The Claimant suffered loss in respect of the Appraised Value of 'Bought-In' items not sold at the auction;
- (d) The Claimant claims a debt due under the Salvage Contract from the auction proceeds;
- (e) Breach of the terms and conditions of the Salvage Contract on the part of the Respondent in respect of the Shards;
- (f) Breach of the terms and conditions of the Salvage Contract on the part of the Respondent in failing to act within reasonable time thereby causing delay in the auction;

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16 Annex 16 (Due to their voluminous nature the documents are not attached. However, if the Arbitral Tribunal so requires, the same will be made available)

- (g) Breach of the terms and conditions of the Salvage Contract on the part of the Respondent in wrongfully exercising its rights to withdraw items from the auction causing severely depressed auction results and loss and damage to the Claimant;
- (h) Damages in respect of the Shards at the Pameran DIANA Muzium Samudera Melaka and a declaration that the exhibition can no longer continue without the consent of both parties;
- (i) A declaration that the Respondent is under a contractual obligation enforceable by the Claimant to utilize all the 650 items withdrawn by the Respondent from the auction for the purpose of study and exhibition at the National Museum in cooperation with the Claimant and a declaration that the Claimant is entitled to 50% of the profits from such an exhibition;
- (j) Damages for the Respondents breach of its obligations to exhibit the 650 withdrawn items;
- (k) General Damages for breach of copyright and/or contract in respect of the alleged unauthorized release of the video by the Respondent;
- (l) Breach of duty of confidentiality on the part of the Respondent in failing to keep the existence and the location of other wrecks from being divulged;

30. On 2.7.1998 the Arbitrator dismissed the Claimant's claim.<sup>17</sup>
31. On 11.8.1998 the Claimant filed an application<sup>18</sup> in the Kuala Lumpur High Court to set aside the Award or to remit the matter back to the Arbitrator pursuant to the provisions of the Malaysian Arbitration Act 1952. The following are the events that took place in the proceedings before the High Court:
- (a) On 7.9.1998 an Affidavit in Reply was filed by the Respondent.
  - (b) On 23.9.1998, the proceeding was postponed because the Claimant changed solicitors from Messrs. Azman, Davidson & Co. to Messrs. Karpal Singh & Company.
  - (c) At the same time the Court directed the Claimant to file written submissions within 3 weeks from 23.9.1998. Further the Respondent was to file written submissions-in-reply within 3 weeks. The Claimant was allowed 1 week to reply.
  - (d) By letter dated 29.10.1998 the Claimant requested a 2 week extension to file written submissions.
  - (e) On 2.11.1998 the Court granted the Claimant's request.

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17 Annex 17

18 Annex 18 (Due to their voluminous nature the documents are not attached. However, if the Arbitral Tribunal so requires, the same will be made available)

- (f) On 18.11.1998 the Claimant filed written submissions whilst the Respondent filed its written submissions on 22.12.1998.
32. On 4.2.1999 the Kuala Lumpur High Court dismissed the Claimant's application to set aside or to remit the arbitration award.<sup>19</sup> No Notice of Appeal to the Court of Appeal was ever lodged against the decision of the Kuala Lumpur High Court.
33. Instead of appealing to the Court of Appeal, the Claimant chose to file a complaint alleging misconduct of the Arbitrator to an International body known as the Chartered Institute of Arbitrators, London (CIAL).<sup>20</sup>
34. On 10.1.2001 the CIAL dismissed the Claimant's application for disciplinary action against the Arbitrator.

**(ii) Shareholding Structure of the Claimant**

35. The Claimant is a company presently registered in Malaysia having a registered address at IPCO Sdn Bhd, 26<sup>th</sup> Floor, Menara Promet, Jalan Sultan Ismail, 50250 Kuala Lumpur, Malaysia.
36. As at 30.9.2004 the shareholders<sup>21</sup> of the Claimant were:
- (a) Dorian Francis Ball, a British national;

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19 Annex 19 (Amended Order included)  
20 Claimant's Request for Arbitration – Exhibit F  
21 Claimant's Request for Arbitration - page 4

- (b) Maureen Deirdre Keough Ball, an American national; and
  - (c) Noor Ahmad Bin Muhammad, a Malaysian national.
37. At that material time the majority shareholder in the Claimant was Dorian Francis Ball, who owns 140,002 shares in the Claimant.<sup>22</sup>
38. The Claimant was known as Pacific Sea Resources Sdn. Bhd. on 16.6.1988. The shareholders with equal shareholding were:
- (a) Don Rabinowe, an American national; and
  - (b) Bill Mathers, an American national.<sup>23</sup>
39. On 7.2.1991 Bill Mathers sold his share in the Claimant to Dorian Francis Ball.<sup>24</sup>
40. On 17.7.1991, the Claimant changed its name from Pacific Sea Resources Sdn Bhd to Malaysian Historical Salvors Sdn Bhd (its current name).<sup>25</sup>
41. On 10.7.1991, Michael Flecker, an Australian national was allotted a third share in the Claimant.<sup>26</sup>

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22 *supra*

23 Annex 20

24 *supra*

25 Claimant's Request for Arbitration – Exhibit B

26 Annex 21

42. On 3.8.1991 the Salvage Contract was executed. At that time the shareholders of the Claimant were:
- (a) Dorian Francis Ball, a British national (1 share);
  - (b) Don Rabinowe, an American national (1 share); and
  - (c) Michael Flecker, an Australian national (1 share).<sup>27</sup>
43. On 20.8.1991 Michael Flecker sold his share to Don Rabinowe.<sup>28</sup>
44. On 29.11.1991 Don Rabinowe sold his shares to Dorian Francis Ball.<sup>29</sup> This date differs from the date as stated in the Claimant's Request. Claimant in its Request had stated that Dorian Francis Ball became the majority shareholder on 11.12.1991. Only at this point of time can it be said that the majority shareholding in the Claimant was held by a British national.

**(iii) Claimant's Request for ICSID Arbitration**

45. On 30.9.2004 the Claimant filed its request to commence arbitration proceedings under the ICSID.
46. The Claimant has not furnished evidence required by Rule 2 Institution Rules that "all necessary internal actions to authorize" Mr. Ball to initiate this claim [see *Annex 53*].

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27 Annex 20  
28 *supra*  
29 *supra*

47. On 1.11.2004 the ICSID Secretariat requested the Claimant to provide further information.<sup>30</sup>
48. On 30.11.2004 the Claimant replied to the ICSID Secretariat wherein it alleged that the contractual relationship between the Claimant and the Respondent amounted to an “investment” within the meaning of the IGA and alleged that the Respondent had breached the terms and conditions of the IGA.<sup>31</sup>
49. On 18.2.2005 the ICSID Secretariat requested that the Claimant provide further information about the classification of an “investment” as envisaged in Article 1(1)(b)(ii) of the IGA, i.e. the meaning of “approved project”.<sup>32</sup>
50. On 4.3.2005 the Claimant informed the ICSID Secretariat that since the Salvage Contract was executed between the parties and had been “signed, approved, supervised and controlled by the Malaysian Government and its various ministries and agencies”, the Claimant was awarded “approved project” status within the meaning of Article 1(1)(b) (ii) of the IGA.<sup>33</sup>
51. On 18.4.2005 the Claimant reiterated its position as advocated in its letter to the ICSID Secretariat dated 4.3.2005.<sup>34</sup>
52. On 14.6.2005 the ICSID Secretariat registered the Claimant’s Request for Arbitration.<sup>35</sup>

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30 Annex 22  
31 Annex 23  
32 Annex 24  
33 Annex 25  
34 Annex 26

53. On 23.12.2005 the Respondent sent a Notice of Objection to Jurisdiction to the ICSID Secretariat.<sup>36</sup>
54. The Claimant through their letter dated 25.12.2005 raised objections towards the Respondent's Notice and requested the Arbitral Tribunal to make a ruling.<sup>37</sup>
55. On 29.12.2005 a preliminary hearing was held between parties, wherein the Respondent again informed the Arbitral Tribunal that it was objecting to the jurisdiction of the Arbitral Tribunal. Accordingly, the Arbitral Tribunal directed that:
- (a) Parties to simultaneously file their Memorials on Jurisdiction with the ICSID Secretariat by 16.3.2006; and
  - (b) Parties to simultaneously file Reply Memorials with the ICSID Secretariat by 17.7.2006.

**D. ORIGINS OF THE IGA BETWEEN THE UNITED KINGDOM AND THE GOVERNMENT OF MALAYSIA**

56. The Government of United Kingdom of Great Britain and Northern Ireland and the Respondent explored the possibility of entering into an Investment Guarantee Agreement and the Government of United Kingdom of Great Britain and Northern

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35 Annex 27  
36 Annex 28  
37 Annex 29

Ireland submitted a draft copy of the Model Investment Protection Agreement on 22 June 1972.<sup>38</sup>

57. The purpose of the proposed Agreement was to promote greater economic cooperation between the two countries through the encouragement and reciprocal protection of investments.
58. During the negotiations held between 5.12.1977 – 8.12.1977 regarding the proposed Agreement attended by representatives of the Respondent and the United Kingdom, the Respondent proposed an addition to the definition of the term “investment” in Article 1. The Respondent proposed a restriction qualifying the type of investments in Malaysia which would be covered under the proposed Agreement.<sup>39</sup>
59. Further to the negotiations, the Government of the United Kingdom sought an explanation about the application and operation of “Article 1(1)(B)(II)”. The query was “whether administrative practice would enable the necessary approval to be obtained for non-manufacturing investments such as services, plantations and portfolio investments and whether in practice such approval has been given if sought?”<sup>40</sup>
60. By letter dated 31.3.1978, the Respondent explained that the provisions of the said Article actually related to the legislative and administrative procedures for approving projects by the relevant authorities in Malaysia. While manufacturing

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38 Annexure 30 & 31

39 Annex 32 (See Annex 33 - illustration of significance of “investment”)

40 Annex 34

activities would generally be governed by legislation namely the Industrial Co-ordination Act 1975 (amended in 1977), approvals for non-manufacturing activities would have to be obtained according to administrative procedures and practices in Malaysia.<sup>41</sup>

61. Through letter dated 17.4.1978, the British High Commission in Malaysia requested further clarification as to whether in practice approval had been sought and given for non-manufacturing investments such as services, plantations and portfolio investments.<sup>42</sup>
62. The Respondent through their letter dated 24.4.1978 said that Article 1(a)(ii) as it stands covered non-manufacturing activities such as services, plantations and portfolio investments and that in practice approvals for such non-manufacturing activities had been granted by the Government in the past.<sup>43</sup>
63. The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments was signed on 21.5.1981 (IGA) and the IGA came into force on 21.10.1988.<sup>44</sup>

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41 Annex 35  
42 Annex 36  
43 Annex 37  
44 Annex 38

**E. PROCEDURE FOR AN “INVESTMENT” TO QUALIFY AS AN “APPROVED PROJECT” WITHIN THE AMBIT OF THE IGA**

64. The IGA applies to investments made in accordance with the provisions of Article 10.<sup>45</sup> Article 10 requires **investments** to be:

- (a) made in the territory of either Contracting Party;
- (b) in accordance with its legislation or rules or regulations;  
and
- (c) by nationals or companies of the other Contracting Party.

65. Even if the requirements in (a) to (c) above are satisfied, the “investment” mentioned in Article 10 must be an investment within the definition of Article 1.

66. Article 1(1)(a) defines “investment”. The list of items included under “investments” includes two separate conditions as found in Article 1(1)(b) – one applicable to investments made in Malaysia and the other applicable to those made in the United Kingdom of Great Britain and Northern Ireland.<sup>46</sup>

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45 Article 10 of the IGA states:

- 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.

46 Annex 38 – Article 1

67. In the case of “investments” made in Malaysia the condition is that they will be protected only if made in “approved projects”. It is clear that the Respondent’s obligation to protect “investments” is limited only to “investments” in “approved projects”.
68. It should also be noted that under Article 1(1)(b)(i) even in the case of the United Kingdom of Great Britain and Northern Ireland not all investments are accorded protection under the IGA. With regard to such investments, only investments made in accordance with its legislation will be accorded protection under the IGA.
69. It must be recalled that the IGA involved in the present case was concluded in 1981. At that time the Respondent was in need of foreign direct investment and long term capital investments in fixed assets in labour intensive manufacturing and other manufacturing industries and related infrastructure. The Respondent wanted to create favourable conditions for greater investments in these sectors. The Respondent recognized that the encouragement and reciprocal protection under the IGA would be conducive to the stimulation of individual business initiatives and would increase prosperity in both States.
70. On 8.3.2006, an officer of the Attorney-General’s Chambers of Malaysia interviewed the Auditor General of Malaysia who had been involved in the negotiation and preparation of the IGA. The Auditor General was asked of his recollection on the policy, intention and scope of coverage of IGAs, in particular

with regard the same to this IGA.<sup>47</sup> His response confirms the averments in paragraph 67 above. His response is further confirmed by the Memorandum on the Policy Underlying the Investment Guarantee Agreement from the Ministry of International Trade and Industry of Malaysia to the Attorney General Chambers dated 11.11.1999.<sup>48</sup>

71. According to the Auditor General the Respondent clearly intended this IGA to protect foreign investments against nationalization and expropriation without compensation. Although the Federal Constitution provided for such protection the IGA was intended to further assure such investors and guarantee the repatriation of their investments.
72. However, this protection under the IGA is not automatic as it is subject to the conditions in Article 1(1)(b).
73. Attention is drawn to previous bilateral investment guarantee agreements (IGAs) or investment protection treaties (BITs) concluded by the Respondent. These IGAs and BITs demonstrate the importance to the Respondent of being able to select the kind of foreign investments that the Respondent wishes to be made in its territory – that is only investments which have been classified as “approved projects” and which contribute to the manufacturing and industrial capacity of the country.
74. This can be illustrated by reference to paragraph 2 of the BIT of 21.4.1959 between the Federation of Malaya and United

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47 Annex 39

48 Annex 40

States of America relating to the guarantee of private investments which provides -

*“The Government of the United States of America agrees that it will issue no guaranty with regard to any project **unless it is approved by the Government of the Federation of Malaya.**”<sup>49</sup>*

The limiting effect of this provision in practice is shown in Annex 42.

75. The Agreement between the Federation of Malaya and the Federal Republic of Germany concerning the Promotion and Reciprocal Protection of Investments of 22.12.1960 included the following provision in Article 1(1)(i) -

*“The said term [investment] shall refer:*

*.....*

- (ii) in respect of investments in the territory of the Federation of Malaya, to all investments made in projects **classified by the appropriate Ministry of the Federation of Malaya in accordance with its legislation and administrative practice as an “approved project.”***<sup>50</sup>

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49 Annex 41  
50 Annex 43

76. Under the Malaysia/Germany IGA, the Respondent had granted several approvals, and thus made the protection afforded by the treaty applicable only to investments directed at setting up manufacturing facilities, factories, workshops, ship-yards, etc.<sup>51</sup>

77. On 1.3.1978, a similar provision was included in the investment protection agreement concluded between the Respondent and Switzerland. Article 2(3) provided in the relevant part:

“(a) the term “investment” shall comprise every kind of asset....

(b) provided that such asset when invested:

(i) in Malaysia, is invested in a project classified by the appropriate Ministry in Malaysia in accordance with its **legislation and administrative practice as an ‘approved project’....**<sup>52</sup>

78. Yet again, on 22.11.1979 a similar provision on “approved project” was included in the investment protection agreement between the Respondent and The Belgo-Luxemburg Economic Union. Article 1(3)(i) states -

“Provided that such assets when invested:-

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51 Annex 44

52 Annex 45

(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;<sup>53</sup>

(ii) ...”

79. Altogether between 1959 and 1993 the limitation of protection to investments in approved projects appeared in 24 out of 27 IGAs concluded by the Respondent.<sup>54</sup>

80. The IGA involved in the present dispute has not been amended and the limitation on the scope of its protection remains operative and continues to be applicable.

81. It should be noted that although the Respondent’s policy is to only give protection to long-term capital investment in the manufacturing sector, Article 1(1)(b)(ii) of the IGA also covers non-manufacturing activities such as services and plantations. In practice approvals for such non-manufacturing activities had been granted by the Government.<sup>55</sup>

82. The words actually used in Article 1(1)(b)(ii) of the IGA, are by themselves sufficient to make it clear that the protection thereby accorded does not cover all investments in projects invested in Malaysia. It only covers investments in “approved projects”. Thus to get protection under the IGA, the Claimant

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53 Annex 46  
54 Annex 47  
55 Annex 37 and 49

must apply for the investment to be considered as an approved project so as to enjoy the protection under the IGA.

83. The Respondent chose to use the word “appropriate Ministry of Malaysia” and did not name the Ministry of International Trade and Industry in Article 1(1)(b)(ii) of the IGA or in all the other IGAs which carry the similar provision because if there is a change in legislative and administrative practices it will not require an amendment of the relevant provision in the IGAs.
84. The “appropriate Ministry of Malaysia” as envisaged in Article 1(1)(b) is the **Ministry of International Trade and Industry in Malaysia [MITI]** (formerly known as Ministry of Commerce and Industry and later changed to Ministry of Trade and Industry). [See Ministerial Functions Orders 1990, 1991 and 1995 made pursuant to the Ministerial Functions Act 1969 (Act 2)].<sup>56</sup> All applications, immaterial of whether they are from companies investing in the manufacturing or non-manufacturing sector, should be forwarded to MITI in order to be accorded the protection under the IGAs.<sup>57</sup>
85. The Industrial Division of MITI will then scrutinize the application and forward it to the relevant authorities for their feedback. After receiving and going through the feedback, the Industrial Division will then prepare a recommendation for the Secretary General’s/Deputy Secretary General’s for approval. A notification of whether the investment has been accorded

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56 Annex 48  
57 Annex 49 and 50

- coverage or not under the IGA concerned will be sent to the applicant.<sup>58</sup>
86. At no time did the Claimant make an application for its investment in the Salvage Contract to be considered as an “approved project”. This is despite the numerous opportunities available to the Claimant when its shareholding structure underwent changes presenting it with the possibility of eligibility for consideration under the terms of the IGA.
87. Certainly on 3.8.1991 the Claimant could have availed itself to the protection under the BIT between the Federation of Malaya and United States of America. But it did not.
88. On 29.11.1991/11.12.1991<sup>59</sup> the Claimant had a British national holding majority shareholding. Since that date [this issue applies for either date] the Claimant failed to take any steps towards seeking protection under the IGA.
89. Instead, from the time of filing the Request till to date the Claimant insisted that its investment is an “approved project” as envisaged under Article 1(1)(b)(ii) of the IGA since the Salvage Contract was “signed, approved, supervised and control by the Malaysian Government and its various ministries and agencies”.<sup>60</sup>
90. The Respondent had written to the Claimant on 16.1.2006 requesting for documents to support the Claimant’s averment

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58 Annex 49

59 See paragraph 44 of this Memorial

60 Annexure 25 and 26

that the Claimant's investment is an "approved project" in accordance with the IGA.<sup>61</sup> The Claimant in their letters dated 29.1.2006<sup>62</sup> and 25.2.2006<sup>63</sup> merely reiterated that "The Malaysian Government's execution (signature) of the August 3, 1991 contract pursuant to which MHS invested and performed (the "Contract") is clear and unequivocal evidence and proof of the approval of the investment project in accordance with the UK/Malaysia BIT".

#### F. ISSUES FOR CONSIDERATION

91. As asserted at paragraph 2 above the issues concern lack of jurisdiction and competence of this Arbitral Tribunal. Unless and until the following issues are answered in the Claimant's favour the Respondent submits that the Arbitral Tribunal lacks jurisdiction and competence to arbitrate in this dispute.
  
92. The following issues for consideration are:
  - (i) Whether the Claimant has the *locus standi* to institute proceedings before the ICSID Tribunal?
  
  - (ii) Whether the Claimant's claim is an "investment" within the meaning under Article 25(1) of the ICSID Convention?
  
  - (iii) Whether the Claimant's claim is an "approved project" pursuant to Article 1(1)(b) of the IGA?

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61 Annex 51  
62 Annex 52  
63 Annex 53

- (iv) Whether the Arbitral Tribunal has jurisdiction to determine a pure contractual claim?
- (v) Whether the Claimant has been denied access to justice in the Malaysian Courts?
- (vi) Whether the Claimant has exhausted all domestic remedies prior to instituting the request for arbitration before ICSID?

#### **G. SUBMISSIONS**

93. At the outset it has to be observed that the discussions and submissions on the issues (i) to (iv) will deal with matters which are not only inter-related but will overlap. Hence repetition will be inevitable.

#### **ISSUE (I) – NO LOCUS STANDI**

94. The Respondent submits that the Claimant has no *locus standi* to institute arbitration proceedings under the IGA read together with the ICSID Convention. This reasoning is premised on the following **undisputed** facts:

- (a) At the time of the execution of the Salvage Contract on **3.8.1991**, the registered shareholders of the Claimant (previously known as Pacific Sea Resources Sdn Bhd) were:
  - i. Donald Bruce Rabinowe, an American national;

- ii. Dorian Francis Ball, a British national; and
- iii. Michael Flecker, an Australian national.<sup>64</sup>

95. All 3 shareholders had equal shares in the Claimant. It therefore follows that the Claimant could not be deemed to be a British Company within the meaning of Article 7 of the IGA since two thirds of its shares were owned by Donald Bruce Rabinowe, an American national and Michael Flecker, an Australian national.

96. On the Claimant's own admission it is clear that Dorian Francis Ball, a British national became the majority shareholder of the Claimant on 29.11.1991/11.12.1991.<sup>65</sup>

97. In light of the above, the Respondent submits that the Claimant is not entitled to rely on the provisions of the IGA as at the time of the execution of the Salvage Contract dated **3.8.1991** the Claimant was not a British company. Accordingly, the Claimant was not entitled to seek protection under the IGA.

98. The fact that on 29.11.1991/11.12.1991,<sup>66</sup> Mr. Dorian Francis Ball became the majority shareholder is of no consequence as the Claimant still did not become entitled to the protection under the IGA.

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64 Annex 27

65 See paragraph 44 in this Memorial

66 *supra*

99. It follows that when the dispute arose on 3.7.1995 the dispute was purely related to the contractual terms of an agreement and not an investment. This was certainly never in the contemplation of Article 7 of the IGA and the Claimant does not fall within the purview of the IGA or ICSID Convention as a company able to request for an arbitration of “the legal dispute” concerning an “investment” under the IGA.
100. In any event, the change of the shareholding of the Claimant to one where the majority of the shares were owned by Mr. Dorian Francis Ball, a British national, does not *ipso facto* entitle the Claimant to the protection under the IGA. The terms and conditions of the IGA must first be fulfilled. In this case those terms and conditions are not fulfilled.
101. For the above reasons stipulated above, this Arbitral Tribunal has no jurisdiction to determine the dispute between the parties under the ICSID Convention.

**ISSUE (II) - “INVESTMENT” AND ARTICLE 25(1) OF THE ICSID CONVENTION**

102. Article 25(1) of the ICSID Convention pertaining to the jurisdiction of the ICSID Centre provides that:

*“(1) 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.”*

103. The definition of the term “investment” in Article 25(1) of the ICSID Convention is not expressly provided for in the ICSID Convention.<sup>67</sup>

104. The Respondent submits that the term “investment” must be read as a reference to an investment in the territory of the Contracting State concerned, in this instance, the territory of the Respondent. This interpretation is compelled by virtue of the terms of the IGA itself.

105. Article 7(1) of the IGA expressly provides -

*“(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between the Contracting Party and a national or **company** of the other*

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<sup>67</sup> See paragraphs 26 & 27 of the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

*Contracting Party concerning an investment of the latter in the territory of the former. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which **before such a dispute arises the majority** of the shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purpose of the Convention as a company of the other Contracting Party. If any such dispute should arise and agreement cannot be reached within **three months** between the parties to this dispute through pursuit of **local remedies or otherwise**, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.”*

102. Article 1(1) of the IGA provides -

***'For the purposes of this Agreement***

***(1)(a) "investment" means every kind of asset and in particular, though not exclusively, includes:***

*(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;*

*(ii) shares, stock and debentures of companies or interest in the property of such companies;*

***(iii) claims to money or to any performance under contract having a financial value;***

*(iv) intellectual property rights and goodwill;*

*(v) business concessions conferred by law or under contract,, including concessions to search for, cultivate, extract or exploit natural resources.*

*(b) The said term shall refer:*

- (i) *in respect of **investments** in the territory of the United Kingdom of Great Britain and Northern Ireland, to all investments made in accordance with its legislation, and*
  
- (ii) *in respect of **investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an “approved project”.***

106. At the outset, the Respondent submits that the Claimant’s Request for Arbitration does not establish that there exists a legal dispute arising directly out of an investment, which the Respondent has consented to settle under the ICSID Convention. Accordingly, the onus is on the Claimant to establish that its alleged dispute between parties relates to an “investment” such as to satisfy Article 25(1) of the ICSID Convention read together with Article 7(1) and Article 1 of the IGA.

107. The Salvage Contract entered into on 3.8.1991 was between the Respondent and the Claimant. In view of the Claimant’s shareholding structure at that time at least two IGAs could have been applicable, that is the IGA and the BIT of 21.4.1959 between the Federation of Malaya and United States of America. However since at the time of the Contract the Claimant was not majority owned by a British national the

Claimant does not fall within the purview of the IGA. That being so the ICSID Convention does not apply to confer jurisdiction on the Arbitral Tribunal.

108. In any event, the Respondent submits that a salvage contract in the nature of this Salvage Contract between the parties does not amount to an “investment” within the meaning of Article 25(1) of the ICSID Convention read together with Article 7(1) and Article 1 of the IGA. The reasoning is premised on the following grounds:

- (a) The relationship between the Claimant and the Respondent is contractual;
- (b) The scope of that contractual relationship between the Claimant and the Respondent is to survey, identify, classify, research, restore, preserve, appraise, market, sell/auction and carry out a scientific survey and salvage of the wreck and content of Diana;
- (c) That contractual relationship between the Claimant and the Respondent is in the nature of a service contract and **NOT** an investment contract. The Respondent enters into numerous service contracts all the time.

[ In **Joy Mining Machinery Limited v The Arab Republic of Egypt**<sup>68</sup> the Arbitral Tribunal in ruling that it had no jurisdiction to determine the dispute between

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68 Annex 54 - ICSID Case No. ARB/03/11

parties as the bank guarantee did not amount to an investment, held at **pages 502-503** that:

***“58. The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the United Nations Convention on Contracts for the International Sale of Goods, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration.***

***59. The Tribunal is aware of the many ICSID and other arbitral decisions noted above and the fact that they have progressively given a broader meaning to the concept of investment. But in all those cases there was a specific***

***connection to ICSID, either because the activity in question was beyond doubt an investment or because there was an arbitration clause involved. The same holds true of concession contracts in which the investor is called to perform a public service on behalf of the State.”***

- (d) The Claimant has failed and/or neglected to provide particulars so as to substantiate its allegation that the contractual relationship between the parties amounts to an investment within the meaning of Article 25(1) of the ICSID Convention read together with Article 7(1) and Article 1 of the IGA;
- (e) The Salvage Contract does not fall within the traditional definitions of “investment” as it does not amount to direct foreign investment and/or portfolio investment;
- (f) The words actually used in Article 1(1)(b)(ii) of the IGA, are by themselves sufficient to make it clear that the protection thereby accorded does not cover all investment in projects invested in Malaysia. It only covers investments in “approved projects”. The Respondent does not give protection automatically. Thus to get protection under the IGA, the Claimant should apply for the investment to be accorded protection under the IGA;
- (g) Article 1(1)(b)(ii) of the IGA also covers non-manufacturing activities such as services, plantations and portfolio investments. In practice approvals for such

non-manufacturing activities had been granted by the Respondent although the policy then was to give protection only to long-term capital investment in the manufacturing sector;<sup>69</sup>

- (h) Notwithstanding that the Claimant became a British owned company on 29.11.1991/11.12.1991,<sup>70</sup> the fact remains that the Claimant did not apply for protection under the IGA. In any event even if protection was applied for, the investment in the Salvage Contract would not have been approved as an “approved project”<sup>71</sup> [this issue applies to either date].

109. In the circumstances, the Respondent submits that the Arbitral Tribunal has no jurisdiction and competence to arbitrate over this dispute as the requirements of Article 25(1) of the ICSID Convention have not been satisfied.

### **ISSUE (III) – SALVAGE CONTRACT NOT AN “APPROVED PROJECT”**

110. For this Arbitral Tribunal to be seised of this dispute, the Claimant must satisfy Article 25(1) of the ICSID Convention read together with Article 7(1) and Article 1 of the IGA. Accordingly, the Claimant must also establish that the Salvage Contract is an “approved project”. The term “approved project” is not expressly defined in the IGA.

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69 Annex 37 & 49

70 See paragraph 44 of this Memorial

71 Annex 39 & 40

111. In order to ascertain whether a project is classified as an “approved project” due consideration must be given to the procedure for registering a project as an “approved project” with the Ministry of International Trade and Industry in Malaysia.

- ***Procedural Requirements***

112. In Malaysia, a party seeking to obtain “approved project” status under the IGA and similar IGAs is required to comply with certain procedures<sup>72</sup> as exemplified by the following:

- (a) The party has to submit an application to MITI for its investment to be classified as an “approved project” in order to enjoy protection under the relevant IGA;<sup>73</sup>
- (b) The Industrial Division of MITI will then scrutinize the application and forward it to the relevant government agencies and/or authorities for their comments;<sup>74</sup>
- (c) Upon receipt of the comments from the relevant government agencies and/or authorities, the Industrial Division forwards the application for approval to the Secretary General/Deputy Secretary General of MITI;<sup>75</sup>

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72 Annex 49 & 50

73 *supra*

74 *supra*

75 *supra*

(d) MITI's decision of approval or rejection of the party's application for "approved project" status under the relevant IGA will be conveyed in writing.

113. At the time the Salvage Contract was concluded, the Claimant was not entitled to the protection of the IGA. Although it became majority British owned on 29.11.1991/11.12.1991,<sup>76</sup> it did not apply to MITI to be classified as an "approved project" [this issue applies for either date]. Assuming for a moment the Claimant had made an application, the Respondent says it still would have been rejected.

114. For completeness, the Respondent submits that the Respondent has a consistent approach in awarding "approved project" status under IGAs in relation to other contracting nations.

- ***"Approved Projects" under the BIT of 21.4.1959 between the Federation of Malaya and United States of America***

115. In respect of the BIT of 21.4.1959 between the Federation of Malaya and United States of America, the Respondent's approach has been consistent with the practice adopted in relation to the IGA. The reasoning is premised on the following grounds:

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76 See paragraph 44 of the Memorial

- (a) Parties actually submit applications seeking protection under the BIT of 21.4.1959 between the Federation of Malaya and United States of America; and
- (b) Parties are notified in writing of approval by the Respondent.<sup>77</sup>

- ***“Approved Project” under the German/Malaysia IGA***

116. In respect of the German/Malaysia IGA, the Respondent’s approach has also been consistent with the practice adopted in relation to the IGA. The reasoning is premised on the following grounds:

- (a) Germany and the Respondent adopt a consistent approach in respect of a party seeking “approved project” status under the German/Malaysia IGA; and
- (b) Parties are notified in writing of approval by the Respondent.<sup>78</sup>

117. The procedure for obtaining coverage under the IGAs has been consistent. The onus lies on the party seeking protection under the IGAs to make an application to MITI. It is immaterial whether the protection sought under the relevant IGAs is for manufacturing or non-manufacturing sectors.<sup>79</sup>

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77 See item C in Annex 42  
78 Annex 44  
79 Annex 49

118. In the circumstances it is evident that the Salvage Contract does not amount to an “approved project”. The reasoning is premised on the following grounds:

- (a) The Claimant never applied to MITI for “approved project” status [see MITI’s letter attached to *Annex 50*];
- (b) The Claimant has failed and/or neglected to furnish documentation to establish that it did apply for “approved project” status;
- (c) MITI never designated the Salvage Contract to recover the artifacts from the Diana wreckage as an “approved project” in accordance with its established procedures;
- (c) The Claimant has not provided any documentation of written notification from MITI that its investment in the Salvage Contract is an “approved project”.

119. In the circumstances the Respondent submits that the Arbitral Tribunal has no jurisdiction and competence to adjudicate over this dispute as the mandatory requirements under Article 25(1) of the ICSID Convention read together with Article 7(1) and Article 1(1)(b) of the IGA have not been satisfied.

120. Support for the above submission and proposition can be found in the case of **Philippe Gruslin v The Government of Malaysia [ICSID Case No. ARB/99/3]**.<sup>80</sup> The Arbitral Tribunal

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80 Annex 55

in that case ruled that jurisdiction under the relevant treaty<sup>81</sup> could not be invoked by investors who did not have specific approval.

#### **ISSUE (IV) – PURE CONTRACTUAL CLAIM**

121. The salient terms of the Salvage Contract are set out below:

##### *“CLAUSE 4 – SERVICE FEE*

*4.1 In consideration of the Work done by the SALVOR, the GOVERNMENT shall pay the SALVOR a fee equivalent to the following:-*

*4.1.1. For the sum of appraised value (for Finds not Sold/Auctioned) and the Sale/Auction Value (for Finds/Sold Auctioned) of Finds under and including US Dollars Ten (10) Million, a seventy percent (70%) share of proceeds.*

*4.1.2. For the sum of appraised value (for Finds not Sold/Auctioned) and the Sale/Auction Value (for Finds Sold/Auctioned) of Finds above US Dollars Ten (10) Million and up to US Dollars Twenty (20) Million, a sixty percent (60%) share of the proceeds.*

- 4.1.3. *For the sum of appraised value (for Finds not Sold/Auctioned) and the Sale/Auction Value (for Finds Sold/Auctioned) of Finds above US Dollars Twenty (20) Million, a fifty percent (50%) share of the proceeds.”*

“CLAUSE 7 – TERMS OF PAYMENT

- 7.1 *The GOVERNMENT upon receipt of the proceeds of the sale/auction and subject to the payments being cleared by the issuing Bank shall pay the SALVOR in accordance with Clause 4.1 within thirty (30) days from the date of clearance by the issuing Bank.*
- 7.2 *The payment shall be made in Malaysian Ringgit calculated on the basis of the prevailing exchange rate quoted by Bank Negara at the date of the payment.*
- 7.3 *The GOVERNMENT may retain or deduct from or part of any payment due to the SALVOR which is in the opinion of the GOVERNMENT shall be for any outstanding obligations unfulfilled at the stage of payment. The SALVOR shall as so far as reasonable accept such retention or deduction made on the payment.”*

“CLAUSE 19 – SALE/AUCTION OF FINDS

19.1 *The GOVERNMENT shall decide on the method of disposal of the FINDS. The method shall take into consideration of the best attainable value of the FINDS.*

19.2 *If the GOVERNMENT decides that the method of disposal shall be by auction and upon written instructions to the SALVOR, the SALVOR shall within seven (7) days of the final assessment of value of the FINDS nominate at least two (2) Auction companies one (1) of which shall be appointed by the SALVOR who shall carry out and coordinate the sale of designated Finds.*

19.3 *The Sale/Auction shall be carried out at a place to be approved by the GOVERNMENT and all payments shall be made in the name of the GOVERNMENT or as directed by the GOVERNMENT.*

19.4 *The GOVERNMENT shall determine the items to be selected for the Sale/Auction and the reserve price of the FINDS.”*

“CLAUSE 32 – ARBITRATION

*32.1 Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia. The venue of Arbitration shall be in Kuala Lumpur.”*

122. The Respondent contends that this Arbitral Tribunal has no jurisdiction and competence because this is a pure contractual claim where the crux of the dispute is premised on a breach of the terms and conditions of the Salvage Contract.

123. In **SGS Societe General de Surveillance S.A. v Islamic Republic of Pakistan [ICSID Case No. ARB/01/13]**<sup>82</sup> the Arbitral Tribunal in addressing the issue of whether it had the jurisdiction to determine contractual claims held at **page 360-361** that -

*“161. We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as “disputes with respect to investments,” the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the factual subject matter of the dispute does not relate to the **legal basis** of the claims, or the cause of action asserted in the claims. In other words, from that description alone, without more,*

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*we believe that no implication necessarily arises that both BIT and purely **contractual** claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between the Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract. Both Claimant and Respondent have already submitted their respective claims sounding solely on the PSI Agreement to the PSI Agreement arbitrator. We recognize that the Claimant did so in a qualified manner and questioned the jurisdiction of the PSI Agreement arbitrator, albeit on grounds which do not appear to relate to the issue we here address. We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause so far as concerns the Claimant's contract claims, which do not also amount to BIT claims, and it is a clause that this Tribunal should respect. We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claim sounding solely in the contract. Obviously the parties can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such*

*contract claims will rest on the special agreement, not on the BIT.*

162. *We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breached of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.”*

124. It should be noted that in this instance, the Arbitral Tribunal had ruled that it had no jurisdiction over the contractual claims between SGS and the Islamic Republic of Pakistan in respect of the Pre-Shipment Inspection Agreement (PSI).

125. The Respondent submits that this Arbitral Tribunal should adopt a similar approach as in the **SGS Societe General de Surveillance S.A. v Islamic Republic of Pakistan** dispute. The reasoning is premised on the grounds that:

(a) Article 11 of the PSI Agreement in the **SGS Societe General de Surveillance S.A. v Islamic Republic of Pakistan** dispute reads as follows:

*“11.1 Arbitration. **Any dispute, controversy or claim arising out of, or relating to this Agreement**, or breach, termination or invalidity thereof, shall as far as it is possible, be settled amicably. Failing such amicable settlement, **any such dispute shall be settled by arbitration in***

**accordance with the Arbitration Act of the Territory as presently in force.** *The place of arbitration shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language.”*

- (b) Clause 32 of the Salvage Contract provides that:

**“32.1 Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia.** *The venue of Arbitration shall be in Kuala Lumpur.”*

- (c) As in the **SGS Societe General de Surveillance S.A. v Islamic Republic of Pakistan** dispute, the phrase **“any dispute”** in this particular dispute refers to disputes under the respective contracts between parties. Accordingly, judicial appreciation ought to be given to the **legal basis** of the claim between parties and **NOT** the **factual subject matter**; and
- (d) In doing so, there is **NO** implication that the parties to the IGA intended Article 7 of the IGA to cover a **purely contractual claim.**

126. Accordingly, this Arbitral Tribunal has no jurisdiction and competence to adjudicate over the dispute between parties.

## ISSUE (V) – DENIAL OF JUSTICE

127. The Claimant has firstly alleged that the Respondent had confiscated the Claimant's property rights and secondly denied the Claimant due process of law in respect of the claims which it says are justifiable under the IGA.<sup>83</sup>

128. The Claimant in its Request for Arbitration at Exhibit F which is entitled "Summary of the Claimant's Claim of Denial of Due Process of Law of Justice by Malaysia" alleges the following:

- (a) That the Claimant commenced arbitration under the auspices of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA") and that the Claimant's efforts at arbitration spanned several years beginning in July 1995 and that its attempts to vindicate its rights under the Salvage Contract and settle its claims by arbitration pursuant to the Arbitration Clause in the Salvage Contract were futile;
- (b) That it took the Respondent a year and a half to answer the Claimant's Demand for Arbitration and that an Arbitrator was duly appointed after an application was made by the Claimant to the High Court of Malaya in Kuala Lumpur;
- (c) That the Arbitrator was appointed *ex parte* by the KLRCA;

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83 See Claimant's Request – Exhibit F

- (d) That the Arbitrator appointed was unfamiliar with the institution of arbitration and with the UNCITRAL Arbitration Rules that the KLRCA had adopted;
- (e) That the reasons set out by the Arbitrator in his Award were unsatisfactory;
- (f) That the Claimant's efforts to challenge the Award in the KLRCA failed;
- (g) That the Claimant's efforts to challenge the Award in the Malaysian court system also failed on the grounds that the Judge of the High Court to whom the Claimant's application to set aside the Award was presented, apparently dismissed it without giving written reasons for its judgment. As a consequence, the Claimant did not deem it necessary to apply to the Court of Appeal by way of appeal; and
- (h) That the disciplinary proceedings instituted against the Arbitrator was also unsatisfactory in that its legal representative was excluded from the proceedings.

129. The allegations in Exhibit F of the Claimant's Request can be summarized as follows:

- (a) That there was a denial of justice to the Claimant by the Malaysian Court; and

- (b) That in the circumstances and on the facts of this reference to arbitration the Claimant did not need to exhaust the internal legal remedies available to the Claimant under the Malaysian Court System.

130. The Respondent will address each of these issues.

- ***Reference to Arbitration***

131. The Salvage Contract between the Claimant and the Respondent for the salvage of the Diana Wreck dated the 3.8.1991 has an Arbitration Clause in Clause 32 which reads as follows:

*“32.1. Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia. The venue of Arbitration shall be in Kuala Lumpur.”*

132. The Act that prevailed when the Salvage Contract was entered in 1991 was the Arbitration Act 1952.<sup>84</sup> The Arbitration Act 1952 is based on the English Arbitration Act 1950. The Claimant and the Respondent therefore voluntarily agreed to resolve their dispute within the meaning of the Arbitration Act 1952.

133. A dispute arose between the Claimant and the Respondent. On 3.7.1995 the Claimant represented by the Malaysian law firm of Messrs. Azman Davidson & Co. wrote a letter to the

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Director of the Marine Department, Malaysia<sup>85</sup> pursuant to Clause 32.1 requesting that the matter be referred to arbitration and requested the appointment of one of the following two persons as Sole Arbitrator:

(a) Raja Aziz Addruse;

(b) Mr. Khoo Eng Chin

134. The Claimant's counsel also gave notice that if a response was not received within 21 days it had instructions to apply to the High Court for the appointment of a Sole Arbitrator. The Claimant argues that the Attorney-General's Chambers of Malaysia did not respond for a period of one and a half years. The Claimant appears to rely on this as a delay attributable to the Respondent as part of its arguments of denial of justice.

135. The Claimant was advised by Mr. William S W Davidson, an extremely experienced and senior lawyer in the field of arbitration in the firm of Messrs. Azman Davidson & Co. It should be noted that Messrs. Azman Davidson & Co is a well-known law firm which deals with arbitration and would be familiar with the provisions of the Arbitration Act 1952 and the general arbitration laws in Malaysia. The firm of Messrs. Azman Davidson & Co. is referred to in various legal directories, namely:

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85 Annex 11

- (a) **Asia Pacific Legal 500** (2004/2005 Edition)<sup>86</sup>
- (b) **Asia Pacific Legal 500** (2005/2006 Edition)<sup>87</sup>
- (c) **Asia Law Profiles 2004**<sup>88</sup>
- (d) **Asian In-House Handbook** (2004-2005) Edition<sup>89</sup>

136. The Respondent submits that the Claimant’s counsel should, in those circumstances, have applied promptly under Section 12(a) of the Arbitration Act 1952<sup>90</sup> which reads as follows:

*“12. In any of the following cases:*

*(e) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;*

*(f) ...;*

*(g) ...;*

*(h) ...’*

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 87 Annex 59  
 88 Annex 60  
 89 Annex 61  
 90 Annex 57

*any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.”*

137. The Claimant ought to have taken the appropriate steps as it had given notice in its letter of 12.7.1995 to appoint an Arbitrator by the Court. That was a remedy open to the Claimant under Section 12(a) of the Arbitration Act 1952. The Claimant did not take advantage of this provision.
  
138. Therefore to allege that there was a delay on the part of the Respondent is irrelevant as it was within the purview and control of the Claimant and its counsel to take advantage of those specific provisions of Section 12(a) of the Arbitration Act 1952 to have an Arbitrator appointed in accordance with the provisions of the Arbitration Act 1952. The provisions of Clause 32.1 of the Salvage Contract also do not indicate the number of Arbitrators.

139. For the record, the Secretary General of the Treasury, Ministry of Finance, did respond on the 10.8.1995<sup>91</sup> and informed the Claimant's then Malaysian Solicitors, Messrs Azman Davidson & Co. that they did not agree with the Claimant's nominee of Arbitrators and the Claimant's then solicitors should have filed these applications promptly.
140. The Claimant only filed its application in the High Court in Malaya at Kuala Lumpur on 22.11.1995<sup>92</sup> in which it reiterated the appointment of Raja Aziz Addruse or Mr. Khoo Eng Chin as Arbitrator.
141. On 27.05.1996, pursuant to a Consent Order<sup>93</sup> between parties, the Claimant and the Respondent entered into a "new" ad-hoc Arbitration Agreement as they agreed to arbitrate under the UNCITRAL Arbitration Rules 1976 and the Rules of the KLRCA. Authority was conferred on the Director of the KLRCA to appoint a Sole Arbitrator within one month and that the Arbitrator must be experienced in law. The Claimant's solicitors, Messrs Azman Davidson & Co would presumably have advised the Claimant of the consequences to the amendment and variation to Clause 31 of the Salvage Contract as a consequence of the consent order.
142. The Respondent submits that the conduct of parties amounted to an amendment of the Arbitration Clause and its consequences and ramifications were the result of the Claimant's own conduct. There was no question of any

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92 Annex 13  
93 Annex 14

compulsion or coercion by the Respondent or the Malaysian Courts to adopt this variation to the Salvage Contract to arbitrate.

- ***Appointment of Mr. Justice (Rtd) Richard Talalla as Sole Arbitrator***

143. The Consent Order dated the 27.5.1996 specifically provided that the appointing authority would be the Director of the KLRCA.

144. The KLRCA was established in 1978 in Kuala Lumpur under the auspices of the Asian African Legal Consultative Committee, an intergovernmental organization comprising 45 States from the Asian-African region (of which Malaysia is a member) and which is headquartered in New Delhi.<sup>94</sup>

145. The rules of the KLRCA are the UNCITRAL Arbitration Rules of 1976 with certain modifications and adoptions. The UNCITRAL Rules have been recommended by the United Nations General Assembly by its Resolution No. XX3198 adopted on 15.12.1976 and have been widely accepted by the International Community. The KLRCA has a panel of arbitrators from which it appoints its arbitrators in respect of arbitration between the parties.

146. The Claimant now claims that it is not familiar with the mode of appointment of the Sole Arbitrator or the procedural practices by the KLRCA or the workings of the UNCITRAL

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94 Annex 62

Rules. But as explained, the Claimant was at all times advised and represented by very able legal counsel - Messrs Azman Davidson & Co. Certainly there was legal representation at the time of the appointment of Mr. Justice Richard Talalla (rtd.) as Sole Arbitrator.

147. The said firm, for the reasons set out above is a very experienced Malaysian law firm that specializes in arbitration and hence should have been aware of the UNCITRAL Arbitration Rules and the procedure for the appointment of Arbitrators. In the event the Claimant was not satisfied with the appointment of Mr. Justice Richard Talalla as Sole Arbitrator, then the Claimant should have taken advantage of the provisions of Articles 9 to 12 of the KLRCA Rules,<sup>95</sup> to challenge the appointment of Mr. Justice Richard Talalla. That appears not to have been done either at the inception of the arbitration or during the course of the arbitration.

- ***What is the nature of the Arbitration?***

148. On 12.6.1996, the KLRCA classified the arbitration as an international arbitration so that the provisions of **Section 34 of the Arbitration Act 1952**<sup>96</sup> which is set out below, applies:

***“34. Act not to apply to certain arbitrations.***

*(1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it*

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95 Annex 63

96 Annex 57

*relates to the **enforcement of an award**, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.*

- (2) *Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate.*
- (3) *The competent court for the purpose of such enforcement shall be the High Court.”*

149. The question of whether this is an international arbitration or a domestic arbitration for the purposes of the Arbitration Act 1952, will be dealt with subsequently in this Memorial. However, it is the Respondent's submission that it is not for the KLRCA to classify the arbitration as a domestic or

international despite the wording of the 4<sup>th</sup> paragraph of their Introduction to their Arbitration Rules which reads as follows:

“The facilities for arbitration under the auspices of the Centre can be availed of by the parties who may request for it, whether government, individuals or bodies corporate, provided the dispute is of an international character, that is to say, the parties belong to or are resident in two different jurisdictions, or the dispute involves international commercial interest.”

150. The Respondent's submission is that the dispute did not involve international commercial interests. Neither the Claimant nor the Respondent appeared to have responded to this letter of the KLRCA nor had they objected to the proposed classification. The Respondent submits that the Claimant had the benefit of legal advice on 12.6.1996 and if it did not want the provisions of Section 34 of the Arbitration Act 1952 to apply, then it should have written accordingly to the KLRCA especially bearing in mind that Clause 32.1 specifically stated that it was to be provided in accordance with “the Arbitration Laws of Malaysia” which would have been the Arbitration Act 1952.

- ***The Arbitral Proceedings***

151. The arbitral proceedings were conducted between 27.9.1996 and 25.8.1997 resulting in an Award. The Award was published on 2.7.1998.<sup>97</sup>

152. The Claimant and the Respondent were given an opportunity during the arbitration, to file pleadings, call witnesses, cross-examine witnesses and also lead expert evidence. The Claimant and the Respondent were also given the opportunity to file written legal submissions and such written submissions were indeed filed.<sup>98</sup>

- ***Malaysian Court Proceedings Subsequent to the Arbitration***

153. The Claimant being dissatisfied with the Award of the Arbitrator, then filed an Originating Motion dated 11.8.1998 to either remit the Award or alternatively, to set aside the Award under the provisions of Sections 23(1) and 24(2) of the Arbitration Act 1952.<sup>99</sup> The provisions of Sections 23 and 24 of the Arbitration Act 1952 are set out below:

*“23. Power to remit award.*

*(1) In all cases of reference to arbitration, the High Court may from time to time remit the*

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98 Due to the voluminous nature of these documents the same are not attached. The Respondent undertakes to make them available upon request.

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*matters referred, or any of them, to the reconsideration of the arbitrator or umpire.*

- (2) *Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.*

24. *Removal of arbitrator and setting aside of award.*

- (1) *Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.*
- (2) *Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.*
- (3) *Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.”*

154. On 4.2.1990, these proceedings came up before Mr. Justice Dato' Abdul Azmel bin Haji Maamor wherein His Lordship dismissed the Claimant's application with costs. The Claimant was represented by Mr. Gobind Singh Deo from the firm of Messrs. Karpal Singh & Company. Mr. Gobind Singh Deo is a

Partner in that firm where its senior partner Mr. Karpal Singh is one of Malaysia's most prominent advocate & solicitor. The Respondent submits that the Claimant would also have been duly advised by its legal counsel of its rights and the law under which the Malaysian Courts would remit an Award or set aside an Award.

- ***Is the Arbitration a Domestic or International Arbitration?***

155. The answer to the question is important in view of the remedies that are available to the Claimant and Respondent.

156. The Respondent will contend that this is a domestic arbitration for the following reasons:

- (a) The Claimant is a Malaysian registered company;
- (b) The Contract was made in Malaysia and is subject to the Arbitration Laws of Malaysia in view of Clause 32.1 of the Salvage Contract;
- (c) The Respondent is the Government of Malaysia;
- (d) The subject matter of the dispute lies within the territorial waters of the Respondent; and
- (e) The application to appoint the Arbitrator was made pursuant to Section 12 of the Arbitration Act 1952.

157. There is no international element involved at all and therefore the Respondent will argue that the Malaysian Court in dealing with the application under Sections 23 or 24 of the Arbitration Act 1952 would have applied the following Malaysian cases on remission of the Award or setting aside of the Award.

158. The Respondent will contend that an Arbitral Award in Malaysia can only be remitted back to the Arbitrator with the consent of both the Claimant and the Respondent or alternatively, if the Arbitrator has misconducted himself. However, ultimately it is a question of discretion which has to be exercised judicially. See the following Malaysian cases:

- (i) **Ong Guan Teck v Hijias [1982] 1 MLJ 105;**<sup>100</sup>
- (ii) **C K Tay Sdn Bhd v Eng Huat Heng Construction & Trading Sdn Bhd [1989] 1 MLJ 389;**<sup>101</sup>
- (iii) **Maeda Construction Co. Ltd. v Building Design Team & Ors. [1991] 3 MLJ 24**<sup>102</sup>

The Respondent submits that as a general rule, the Arbitral Award is binding and conclusive on the parties and can only be set aside in exceptional circumstances. Even if an Arbitrator had erred in drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself will not be sufficient to warrant the setting aside of the Award under Malaysian law. The Respondent relies on the

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101 Annex 65  
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Malaysian authorities which are consistent with English law as it prevailed in England when the Arbitration Act 1950 was in force in England:

- (a) **Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210**;<sup>103</sup>
- (b) **Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428**;<sup>104</sup>
- (c) **Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd. [2004] 1 MLJ 401**<sup>105</sup>

159. The Claimant in this matter had agreed to arbitrate its differences with the Respondent pursuant to Clause 32 of the Salvage Contract. Arbitration is consensual and is a private matter between the Claimant and the Respondent. The Claimant was advised by a reputable firm of Advocates & Solicitors of Malaysia and would have been aware that under the Arbitration Act 1952 that the circumstances under which an Arbitral Award can be set aside under the Arbitration Act 1952 is limited. The Respondent too, is in a similar position insofar as the arbitration is concerned, in that if the Respondent wished to set aside the Award for whatever reasons, the Respondent too, would have been faced with the same problems under Malaysia law. In the circumstances it is wrong to say that there has been a denial of justice in this matter.

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103 Annex 67  
104 Annex 68  
105 Annex 69

- The Claimant chose to arbitrate the differences in accordance with the arbitration provision voluntarily and therefore, must accept the consequences of submitting to an arbitral process.
160. However, if the Respondent's argument that this was a domestic arbitration is not accepted and that it is an international arbitration, then the provisions of Section 34 of the Arbitration Act 1952 which has been specifically enacted, would apply. The position under Malaysian law in respect of Section 34 is that if the arbitration is international, then the provisions of the Arbitration Act 1952 or other written law of Malaysia will not apply to such arbitrations.
161. This is evident from the case of **Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd [1990] 3 MLJ 183 @ page 185**<sup>106</sup> where the Court held that in view of the crucial words in Section 34, the provisions of the Arbitration Act 1952 and other written law, shall not apply to any arbitrations held under the Rules of the Regional Centre for Arbitration at Kuala Lumpur.
162. The Malaysian Courts have held that they have no jurisdiction to supervise an arbitration held under the UNCITRAL Rules and also the Rules of the KLRCA and this is apparent from the decisions in **Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG [1993] 3 MLJ 68**<sup>107</sup> and **Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd. [1998] 2 MLJ 20**<sup>108</sup> The Courts have also held that in **Jati Erat Sdn Bhd v City Land Bhd. [2002] 1 CLJ**

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106 Annex 70  
107 Annex 71  
108 Annex 72

**346**<sup>109</sup> that it does not matter whether it is a domestic or international arbitration, once the UNCITRAL Rules or the Rules of the KLRCA are the rules governing the arbitration in question, then the provisions of Section 34 would apply.

163. The Malaysian Court of Appeal in **Thye Hin Enterprises Sdn. Bhd. v Daimler Chrysler Malaysia Sdn. Bhd. [2005] 1 MLJ 293**<sup>110</sup> has recently held that the Malaysian courts have jurisdiction to grant interim relief in respect of an arbitration held under the UCITRAL Rules and the Rules of the KLRCA. What this means is that it was open to the Claimant to take this matter further on appeal.
164. The Respondent therefore contends that the provisions of Section 34 affected the arbitration between the Claimant and the Respondent under the Salvage Contract only because the Claimant and the Respondent consented, with the benefit of legal advice of their respective legal advisers, to convert what was a domestic arbitration under the Arbitration Act 1952 to an ad hoc arbitration in which the governing rules were either the UNCITRAL Rules or the Rules of the KLRCA. This again, was a voluntary act on the part of the Claimant and the Respondent in this matter and therefore there cannot, in the circumstances, be said to be any denial of justice to the Claimant as the Claimant had voluntarily agree to resolve its disputes in this modified way and thereby departing from the express provisions of the Arbitration Clause in the Salvage Contract, thereby eliminating its rights, if any, to set aside the Award in the Malaysian court.

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110 Annex 74

165. The Respondent submits that a perusal of the Originating Motion, affidavits and written submissions filed by both the Claimant and Respondent would indicate that the Claimant in effect, was treating it as a domestic arbitration in view of the specific reference to Sections 23 and 24 of the Arbitration Act 1952.

166. The Respondent further argues that under the hierarchy of the Respondent's Court system, there is a right of appeal enshrined in Section 67 of the Courts of Judicature Act 1964<sup>111</sup> to the Court of Appeal of Malaysia. The Claimant therefore should have filed a Notice of Appeal from the decision of Mr. Justice Dato' Azmel handed down on 04.2.1990. The Claimant appears not to have done so and has therefore failed to exhaust its right of appeal within the meaning of the Courts of Judicature Act 1964.

167. The Claimant also would have the right subject to leave being granted, to take the matter further to the Federal Court, Malaysia's apex court pursuant to Section 96 of the Courts of Judicature Act 1964<sup>112</sup> if leave to appeal is granted. The statement of Tun Mohamed Dzaidin Haji Abdullah supports the above assertions.<sup>113</sup>

168. The issues that have to be answered is whether there has been, on these facts -

(a) a denial of justice; and

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111 Annex 75

112 *Supra* [See Annex 76 - Article 121 Federal Constitution of Malaysia establishing hierarchy of courts]

113 Annex 77

(b) a failure to exhaust internal remedies.

The Memorial will now address these issues.

169. The **first issue** is whether there is a denial of justice in respect of the arbitration. The Claimant and the Respondent voluntarily entered into an Agreement which provided for arbitration under the Arbitration Act 1952 and the Claimant and Respondent then voluntarily amended the provisions of the Agreement to provide for arbitration under the Rules of the KLRCA incorporating UNCITRAL Rules and gave the right to appoint the Arbitrator to the Director of the KLRCA.
170. The **second issue** is whether there was a denial of justice before the High Court in Malaya when the application to remit the Award and set aside the Award was considered by Mr. Justice Dato' Azmel.
- ***Was there a denial of justice in respect of (a) the arbitration proceedings; and (b) the High Court proceedings?***
171. The Respondent is of the view that the modern concept of the doctrine of denial of justice in international law requires that the Claimant must establish the following which was decided in the case of **Mondev International Limited v United States of America [2002] 6 ICSID Reports 192 @ paragraphs 116 & 123, 118 & 119:**<sup>114</sup>

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114 Annex 78

*“... To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith... the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in the 1920s.*

*... A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.*

*This sentence was qualified by the consideration that an arbitral tribunal ‘may not simply adopt its own idiosyncratic standard of what is ‘fair’ or ‘equitable’, without reference to established sources of law’.*”

172. The Respondent submits that that meaning of the national law should be left to the national judiciary. This reasoning is premised on the following grounds:

(1) **Vattel, Vol II @ paragraph 350**<sup>115</sup> -

*“In all cases open to doubt a sovereign should not entertain the complaints of his subjects against a foreign tribunal nor undertake to exempt them from the effect of*

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*a decision rendered in due form, for by doing so he would give rise to continual disturbances.”*

- (2) **Fitzmaurice (1932) at page 112-113**<sup>116</sup> where he stated -

*“mere error in the interpretation of the national law does not per se involve responsibility”. We may indeed refer to this proposition as the general rule.”*

- (3) **De Visscher at page 376**<sup>117</sup>.

*“The mere violation of internal law may never justify an international claim based on denial of justice. It may be that the defectiveness of internal law, the refusal to apply it, or its wrongful application by judges, constitute elements of proof of a denial of justice, in the international understanding of the expression; but in and of themselves they never constitute this denial.”*

173. There would only be a substantial denial of justice if the judgment of the national courts in this case, if the award of the Arbitral Tribunal and Mr. Justice Dato’ Azmel, is grossly unjust in that the Claimant was not afforded fair treatment, for instance, there should be some element of bias or some

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117 *supra*

violation of the right of due process. The Respondent relies again on the following passages from **De Visscher**:<sup>118</sup>

*“if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, even though it results in serious injustice, the state is not responsible .*

*There can be no question of the soundness of the above position. Yet, as every one who has had any practical experience of the matter knows, the rule that a state is not responsible for the bona fide errors of its courts can be, and all too frequently is, made use of in order to enable responsibility to be evaded in cases where there is a virtual certainty that bad faith has been present, but no conclusive proof of it....*

*One of the chief difficulties in applying the rule that the bona fide errors of courts do not involve responsibility lies in the fact that the question of whether there has been a ‘denial of justice’ cannot, strictly speaking, be answered merely by having regard to the degree of injustice involved. The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as ‘Was the court guilty of*

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*bias, fraud, dishonesty, lack of impartiality, or gross incompetence?’ It the answer to this question is in the negative, then, strictly speaking, it is immaterial how unjust the judgment may have been. The relevance of the degree of injustice really lies only in its evidential value. An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given.”*

174. Mr. Justice (rtd.) Richard Tallala heard the Arbitration over 40 days. The Claimant was represented by Counsel and was allowed to call witnesses, cross-examine the Respondent’s witnesses and filed appropriate submissions. The Claimant at no time complained to the KLRCA that the Arbitrator was biased or that the Claimant was being denied justice. The record of the Arbitration proceedings indicates that the Claimant was accorded due process.

175. Mr. Justice Dato’ Azmel read the Pleadings, Affidavits and Submissions and only after considering them, did he dismiss the Claimant’s application. It was not as alleged by the Claimant that the Judge dealt with it summarily and arbitrarily. The learned Judge gave an oral decision and he would have to give his written grounds, if there was an appeal to the Court of Appeal.

176. The Respondent submits that there is no enumerative approach of defining denial of justice. It is concerned with whether the norms of due process and fundamental fairness in the administration of justice were observed in this case. The purpose of the present ICSID Arbitration surely cannot be to constitute it as an international appellate forum to review the decisions of national courts. This sound principle was decided in the case of **Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States ICSID Case No. ARB(AF)/97/2.**<sup>119</sup>

177. The Claimant must establish that the conduct by the Arbitral Tribunal and the Malaysian Court is a breach of the Rules of international law or some treaty. It must be a direct violation of relevant obligations, which are imputable to the Respondent. There is no such evidence to that. It is therefore submitted that there can be no denial of justice to the Claimant.

## **ISSUE (VI) – EXHAUSTION OF DOMESTIC REMEDIES**

- ***Court Proceedings***

178. The facts clearly indicate that the Claimant bluntly refused to proceed by way of appeal to the Malaysian Court of Appeal, in exercise of its statutory rights. The Respondent also relies on the decision of **The Loewen Group, Inc and Raymond L.**

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**Loewen v United States of America [2004] ICSID Case No. ARB(AF)/98/3**<sup>120</sup> where it was held:

“No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State’s legal system.”

179. The Respondent contends that international law attaches responsibility to the Respondent only for judicial action and only if it is shown that there was no reasonably available national mechanism to correct the challenged court decision of the Arbitral Tribunal and the Malaysian Courts. There is no evidence that the Claimant in this matter was so deprived or prevented from exhausting its internal remedies of appeal to the superior courts.
180. The Respondent submits that the Claimant must establish in order to succeed on its claims for denial of justice and failure to exhaust all internal or domestic remedies that there was a failure of the Malaysian legal system as a whole, to satisfy minimum standards.
181. The Respondent therefore submits that the Claimant has failed to exhaust the internal legal remedies as required under Article 7 of the IGA.

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- ***Disciplinary Proceedings***

182. For completeness, the Respondent will address the issue of the disciplinary proceedings held by the Chartered Institute of Arbitrators UK (“Institute”). The Arbitrator Mr. Justice (rtd.) Richard Talalla was a Fellow of the Institute. The Claimant lodged a complaint for disciplinary action to be taken against Mr. Justice Richard Talalla (rtd.) to the Institute.

183. The Institute appointed 3 prominent international arbitrators to a disciplinary tribunal, namely Mr. Christopher Lau S.C. of Singapore, Mr. Chelva Rajah S.C. of Singapore and Mr. Andrew Rogers Q.C., as Chairman.

184. An inquiry was conducted in accordance with the rules and regulations of the Institute. This was not a Malaysian proceeding nor is the Institute an organ or agent of the Respondent. These were purely private and domestic remedies that were available to the Claimant against the Arbitrator. The findings are private and the Respondent is not privy to those findings nor was the Respondent represented at these proceedings.

185. Insofar as the Respondent is concerned those proceedings, with respect, are not an exhaustion of internal remedies. However, in relation to the Claimant these proceedings demonstrate that the Claimant was given every opportunity to ventilate its grievances against the conduct of the Arbitration.

186. The Chartered Institute of Arbitrators UK also dismissed the disciplinary complaint.
187. The claim before this Arbitral Tribunal is a claim under international law for violation of the IGA. It is for this Arbitral Tribunal to decide the issues in dispute in accordance with the IGA and the applicable rules of international law.
188. This Arbitral Tribunal ought to be concerned with domestic law only to the extent that it throws light to the issues in dispute and provides domestic avenues of redress for matters of which the Claimant complains. The Arbitral Tribunal cannot entertain what is in substance an appeal from a domestic judgment handed down by an Arbitral Tribunal or alternatively by a Malaysian High Court.
189. In order to establish a denial of justice, which amounts to a breach of international justice, the Claimant must establish manifest injustice in the sense of a lack of due process, leading to the outcome, which offends a sense of judicial propriety. It is useful to allude to the test of the NAFTA Tribunal in **Mondev International Limited v United States of America [2002] ICSID Case No. ARB(AF)/99/2**<sup>121</sup> where the Tribunal stated as follows:

*“the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the*

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*impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'.*"

190. The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest **International Law Commission (ILC) Draft Articles on State Responsibility [Text provisionally adopted on 31.5.2001, UN Doc. A/CN 4/L 602]**<sup>122</sup> demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law.

191. Judge Jimenez de Arechaga in the "**International Law in the Past Third of A Century**", **159 Recueil des Cours [1978] @ page 282**<sup>123</sup> stated as follows:

*"... an essential condition of a State being held responsible for a judicial decision in breach of municipal law that the decision must be a decision of a court of last resort, all remedies having been exhausted."*

192. The Respondent submits that where the Claimant complains that a judicial act of a Malaysian Judge or a Malaysian Arbitrator is in violation of international law the Claimant is

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under an obligation to use the opportunity to remedy that complaint by taking the matter to an appellate court.

193. In the circumstances, it is the obligation of the Claimant to exhaust the remedies which are effective and adequate and which are reasonably available to the Claimant. The Respondent submits that the Claimant has failed to exhaust all domestic remedies available to it in the Respondent's country as required under Article 7 of IGA read together with the Article 26 of the ICSID Convention.

194. The Respondent submits that the ICSID Arbitral Tribunal does not sit to perform the sole of an international review of the national courts' decisions or decisions of Arbitrators as though the international jurisdiction sees the ICSID panel as plenary appellate jurisdiction. What has to be demonstrated by the Claimant is that the court or the Arbitral Tribunal itself has violated the IGA. What the Claimant has to demonstrate is to show either a denial of justice or pretence of form to achieve an international unlawful end. In either case the Claimant has failed to do so.

#### **H. CONCLUSION**

195. As submitted at the outset of this Memorial the Respondent says that in order to consider the objection of the Respondent with regard the Arbitral Tribunal's jurisdiction and competence, the issues for consideration were:

- (i) Whether the Claimant has the *locus standi* to institute proceedings before the ICSID Tribunal?
- (ii) Whether the Claimant's claim is an "investment" within the meaning under Article 25(1) of the ICSID Convention?
- (iii) Whether the Claimant's claim is an "approved project" pursuant to Article 1(1)(b) of the IGA?
- (iv) Whether the Arbitral Tribunal has jurisdiction to determine a pure contractual claim?
- (v) Whether the Claimant has been denied access to justice in the Malaysian Courts?
- (vi) Whether the Claimant has exhausted all domestic remedies prior to instituting the request for arbitration before ICSID?

196. Having regard to the matters raised in this Memorial the Respondent submits that:

- (i) The Claimant has **NO** locus standi to institute arbitral proceedings under the ICSID Convention and/or IGA;
- (ii) The Salvage Contract between the Claimant and the Respondent **DOES NOT AMOUNT TO "INVESTMENT"** within the meaning of Articles 1 and 7 of the IGA read together with Article 25(1) of the ICSID Convention;

- (iii) The Salvage Contract is **NOT AN “APPROVED PROJECT”** within the meaning of Article 1(1)(b) of the IGA;
- (iv) The dispute between the parties is **PURELY CONTRACTUAL** and **NOT WITHIN** the jurisdiction of this Arbitral Tribunal;
- (v) The Claimant’s allegation that it has been denied justice in the Malaysian Courts is **ENTIRELY BASELESS**; and
- (vi) The Claimant **DID NOT EXHAUST** all the domestic remedies available to it in the Respondent’s country.

197. Accordingly, since any one of the answers to the above issues is in the negative the Respondent submits that in fact there is no legal dispute arising directly out of an investment within the meaning of Article 25(1) of the ICSID Convention. For the same reasons the Respondent submits that there is no consent on the part of the Respondent as required under Article 7 of the IGA.

198. With respect, the Respondent submits the Arbitral Tribunal ought to conclude that in respect of the question of whether the Arbitral Tribunal has the jurisdiction and competence to arbitrate this dispute, the answer surely and unequivocally is **NO.**

199. Wherefore, the Respondent requests that the Arbitral Tribunal:

- (a) Declare that the Claimant's claim does not fall within the jurisdiction of ICSID or of the Arbitral Tribunal; and
- (b) Order the Claimant to pay to the Respondent all costs reasonably incurred by the latter in connection with these proceedings.

Dated the 11<sup>th</sup> day of March 2006.



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The Respondent's Memorial on Its Objection to Jurisdiction is prepared 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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