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Singapore explains stand on seeking WTO arbitration over CLOB issue

Samuel Tan

IN "Going to WTO over CLOB Issue" (NST, Dec 14, 1999), Hardev Kaur rejected Singapore Deputy Prime Minister Lee Hsien Loong's statement in the Singapore Parliament that Malaysia's actions are inconsistent with its obligations under the World Trade Organisation's General Agreement on Trade in Services (GATS).

First, Hardev argued that there is a "fundamental difference" between foreign exchanges on which Malaysian stocks continue to be traded, and the CLOB market which trades on an "over-the-counter" basis; and that Malaysian securities traded on the foreign exchanges are owned by investors while CLOB investors merely own an "interest" in the securities "in a form akin to options".

She concludes that "there is no basis for comparison and discrimination between Malaysian shares traded on the four foreign exchanges and on CLOB".

Investors' interest in CLOB securities was not "in a form akin to options".

CLOB investors were beneficial owners of exactly the same class of securities as were traded on the Kuala Lumpur Stock Exchange.

CLOB investors were, and continue to be, legally entitled to the same rights as other shareholders, including the payment of dividends, and issuance of rights and bonus shares.

That the securities were held in nominee and subnominee accounts in Malaysia does not alter this legal fact.

Until the Malaysian Central Depository Sdn Bhd (MCD) rules were amended in November 1998, CLOB investors also had unqualified rights to transfer, at any time, securities beneficially owned by them into individual securities accounts with authorised depository agents.

Second, Hardev repeats the allegation that CLOB was an "illegal market" and an "unregulated activity". But she offered no evidence to back up this assertion.

Trading on CLOB was not illegal, whether under Malaysian or Singaporean law.

Nor was the trading unregulated.

It was subject to the same securities regulations that apply to other markets offered by the SES.

All Malaysian companies that were traded on CLOB were listed on the KLSE and had to meet its continuing listing requirements.

Offshore trading of securities that are listed in a home market is a common international practice, because it offers a legal and convenient way for investors abroad to access such securities.

Third, Hardev's arguments do not address the legal issue at hand, i.e. Malaysia's WTO obligations.

Malaysia has from September 1998 mandated that MCD would not register in its books any transaction "intended to facilitate the dealing in securities or interest in securities outside a stock market of the Kuala Lumpur Stock Exchange".

However, Malaysia specifically exempted the London, Copenhagen and Tokyo stock exchanges.

It accorded these three "approved market place" status, but not Singapore - Securities Industry (Central Depositories)(Exemption)(No. 2) Order, 1998, PU (A) 395.

This is inconsistent with the most favoured-nation (MFN) clause of the WTO's General Agreement on Trade in Services.

The fact that CLOB operated through nominee accounts, unlike the other stock exchanges, is irrelevant to this legal claim.

Besides the MFN issue, Malaysia's action against CLOB also violates its commitments under GATS with respect to market access and national treatment on depository, trading and broking services.

Fourth, Hardev cites the listing and trading of Kinta Kellas Plc and Inch Kenneth Plc on the Stock Exchange of Singapore (SES, now known as Singapore Exchange Securities Trading Ltd) as indictaing that SES is "a recognised and an official market" for securities of Malaysian companies, in contrast with CLOB.

However, Kinta Kellas and Inch Kenneth are both incorporated in the UK, not Malaysia.

The KLSE has prohibited Malaysian companies listed on the KLSE from cross-listing their shares on the SES since Jan 1, 1990.

Fifth, Hardev questions how it is that "the Singapore authorities then (in January 1990), despite the loss of business and the massive reduction in trade, made no move to take the issue to the WTO".

The answer is that the WTO's General Agreement on Trade in Services came into being only on Jan 1, 1995.

Singapore could not have claimed MFN treatment for its financial marketplaces under WTO law prior to that.

Sixth, Hardev says that SES had unilaterally taken the decision to cease trading of CLOB securities, asking "how can Malaysia then be accused of denying the republic MFN status?"

The reality is that the Malaysian authorities had changed their rules and legislation to render the continued operation of CLOB no longer viable.

As Prime Minister Datuk Seri Dr Mahathir Mohamad wrote in his August 1999 commentary (printed in the Japanese daily Mainichi Shimbun) "since all shares must be registered with the KLSE in the name of the shareholder and sales outside the KLSE are not recognised, the business of CLOB stopped".

Malaysian securities continue to be traded on other exchanges not because of any intrinsic difference between that trading and CLOB's operations, but because the Malaysian authorities have explicitly chosen to permit one and prevent the other.

In the final analysis, whether or not Malaysia has breached its WTO obligations is not a matter of opinion, but a question of international law.

The forum for resolving any disagreement over this issue is the WTO Dispute Settlement Body.

Lee made his statement in Parliament after the Singapore Government had taken advice from WTO counsel.

As he said in Parliament, whether the matter is raised in the WTO is an issue to be considered carefully, and will depend on what progress we make in resolving the CLOB issue.