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Our Ref. No. 96-434-CC
Indosuez Asset Management Asia Limited
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated February 14, 1997 requests that the staff confirm that it would not recommend any enforcement action to the Securities and Exchange Commission (the "Commission") under Section 7(d) of the Investment Company Act of 1940 ("Investment Company Act") if (i) certain foreign investment companies (the "Funds") managed by Indosuez Asset Management Asia Limited ("Indosuez") establish private depositary receipt facilities as described in your letter, and (ii) the Funds do not aggregate, for purposes of compliance with Section 7(d), the holders of shares purchased in offshore secondary market transactions not involving a Fund or its affiliates that are deposited in the depositary receipt facility with the holders of shares or depositary receipts acquired from the Fund or its affiliates in a U.S. private offering, as described in your letter.[1]

Background:

Indosuez is a Hong Kong-based investment adviser that advises non-U.S. clients, including the Funds. The Funds are closed-end investment funds organized under the laws of the Netherlands, the shares of which are traded on the London Stock Exchange and the Amsterdam Stock Exchange. You represent that the Funds are not registered under the Investment Company Act and the Funds have never publicly offered their shares in the United States. You state that the Funds may offer their shares privately in the United States, consistent with the staff's position in Touche Remnant & Co. (pub. avail. Aug. 27, 1984) ("Touche Remnant").[2]

You state that the Funds would like to establish a private depositary receipt program (the "Depositary Program") with a U.S. Bank (the "Depositary") pursuant to which certain U.S. shareholders of the Funds could deposit the Funds' shares in the Depositary Program in exchange for depository receipts (the "Receipts") representing

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[1] Section 7(d) prohibits a foreign investment company from using the U.S. mails or any means or instrumentality of interstate commerce to offer or sell its securities in connection with a public offering unless the Commission issues an order permitting the foreign investment company to register under the Investment Company Act.

[2] In Touche Remnant, the staff concluded that an unregistered foreign investment company could make a private offering in the United States concurrently with a public offering abroad without violating Section 7(d) only if after the private offering the investment company's securities are held by no more than 100 beneficial owners resident in the United States.

ownership interests in the deposited shares.[3] You represent that only "qualified institutional buyers" as defined by Rule 144A(a)(1) under the Securities Act ("Eligible Holders") will be permitted to exchange the Funds' shares for Receipts. You also represent that Eligible Holders may only transfer the Receipts to other Eligible Holders or in offshore secondary market transactions pursuant to Regulation S under the Securities Act.

You state that the Funds' role in the establishment and operation of the Depositary Program would be limited to (i) agreeing to make available the information required by Rule 144A(d)(4)(i) in order to permit the holders of the Receipts to rely upon Rule 144A in transferring Receipts, (ii) providing the Depositary with shareholder communications and reports that are provided to shareholders generally, (iii) paying an annual administration fee to the Depositary, and (iv) agreeing to indemnify the Depositary against certain liabilities. You state that the Receipts may be exchanged for the Fund shares that are represented by the Receipts upon the payment of certain fees. You also state that an Eligible Holder will be able to proceed directly against the Fund in the event of a dispute by making such an exchange.[4]

You state that the Funds' purposes in establishing the Depositary Program are (i) to have greater control over the market for its ordinary shares in the United States in order to monitor compliance with Section 7(d) and (ii) to facilitate the relationship with their U.S. residents shareholders. You represent that the Receipts will not be listed on a U.S. securities exchange or quoted on the National Association of Securities Dealers Automatic National Market System. You further represent that neither the Depositary, the Funds nor Indosuez will advertise the existence of the Depositary Program or take any action with respect to the Receipts or the Funds' shares that could reasonably be expected, or is intended, to condition the public market in the United States for the Funds' shares or otherwise facilitate the creation of a public secondary market for the Funds' shares in the United States.[5] Finally, you represent that with respect to both shares and Receipts, the Funds will comply fully with the limits on U.S. private offerings in the U.S. by foreign investment companies under Section 7(d) of the Investment Company Act.

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[3] You state that, because the Depositary Program is a private receipt facility, a registration statement on Form F-6 under the Securities Act of 1933 (the "Securities Act") is not required.

[4] Telephone conference between David Phelan, of Hale and Dorr, and Phillip S. Gillespie, of the staff, on Dec. 23, 1996.

[5] You state that the Funds may, from time to time, make investor presentations to Eligible Holders. Such presentations would be not, in your view, constitute a public offering of, or have the effect of facilitating the creation of a public secondary market for, the Funds' shares or the Receipts in the United States.

Offering of the Receipts under Section 7(d):

Custodial and trust receipt programs that issue receipts representing ownership of a portion of an underlying pool of securities may, under certain circumstances, be deemed investment companies under Section 3(a) of the Investment Company Act. The staff has taken the position, however, that custodial facilities or trust arrangements will not be deemed investment companies under Section 3(a) if, among other things, (i) the receipts issued by the trust or custody facility represent direct interests in particular securities held by the trust or custody facility, (ii) the trustee or custodian performs a purely administrative function, and (iii) the holders of the trust or custodial receipts have the ability to proceed against the issuer of the securities held by the trust or custody facility to the same extent as if the holders held the issuer's securities directly.[6] Under these circumstances, the trust or custody facility is essentially a vehicle to facilitate the ownership of the underlying securities, and the receipts are not viewed as securities separate from the underlying shares for purposes of the Investment Company Act.

As noted above, you represent that the Receipts represent an undivided interest in Fund shares deposited in the Depositary Program, the Depositary will perform purely administrative functions and the holders will have the right to proceed directly against the Fund. Accordingly, the Depositary Program does not appear to be an investment company under Section 3(a) of the Investment Company Act, and we would not view the Receipts as separate securities for purposes of the Investment Company Act. Moreover, because we do not view the Receipts as separate from the underlying Fund shares which they represent, we do not believe that the Depositary Program raises concerns under Section 7(d). In this regard, we emphasize that you represent that, when privately offering shares or Receipts in the United States, Indosuez and each Fund will comply fully with the private U.S. offering limits of Section 7(d) of the Investment Company Act, in that the total number of U.S. resident beneficial owners of both Receipts and shares purchased from a Fund, its agents, affiliates or intermediaries will not exceed 100.

Aggregation of Eligible Holders Under Section 7(d):

You also seek confirmation that, for purposes of determining compliance with the limits on private U.S. offerings permitted under Section 7(d) of the Investment Company Act, a Fund will not have to aggregate (i) Eligible Holders who deposit Fund shares in the Depositary Program that were purchased in offshore secondary market transactions not involving the Fund, its agents, affiliates or intermediaries ("Offshore Secondary Market Transactions") with (ii) those Eligible Holders who purchase Fund shares or Receipts either from the Fund in a U.S. private placement not requiring registration under the

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[6] See Commonwealth Bank of Australia (pub. avail. Sep. 23, 1996); Financial Guaranty Insurance Co. (pub. avail. Feb. 15, 1989); Financial Securities Assurance Co. (pub. avail. Mar. 30, 1988).

Securities Act, or from the Fund, its agents, affiliates or intermediaries in offshore transactions not requiring registration under the Securities Act. In Investment Funds Institute of Canada (pub. avail. Mar. 4, 1996) ("IFIC"), the staff recognized that, as a general matter, a foreign fund would not be deemed to have violated Section 7(d) if the 100 U.S. beneficial owner limit under Touche Remnant is exceeded due to the independent actions of its securityholders. Consistent with this principle, the Division stated that it would not recommend enforcement action under Section 7(d) if a foreign investment company that has offered its securities privately to U.S. investors has more than 100 securityholders resident in the United States solely as a result of (i) the relocation of its foreign securityholders to the United States, or (ii) Offshore Secondary Market Transactions.

We believe that the principles announced in IFIC are applicable in this case. The use of the Depositary Program by those Eligible Holders who have purchased a Fund's shares in Offshore Secondary Market Transactions should not, in our view, require the Fund to count those Eligible Holders towards the limits on private U.S. offerings imposed by Section 7(d). This determination is based, in particular, on your representations that the Funds, Indosuez and the Depositary will not, directly or indirectly, advertise the existence of, or promote the public use of, the Depositary Program or take any other action with respect to the Receipts or Fund shares that could reasonably be expected, or is intended, to condition the market in the United States for Fund shares or otherwise facilitate the creation of a public secondary market for Fund shares or Receipts in the United States.[7] We also note your representation that the Funds will institute procedures for determining which Eligible Holders and Fund shareholders should be counted for purposes of Section 7(d).

We would not recommend that the Commission take any enforcement action under Section 7(d) of the Investment Company Act if Indosuez and the Funds establish the Depositary Program as set forth in your letter and described above.[8] Our position is based

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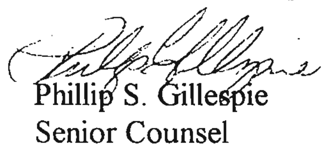
[7] In IFIC, the staff noted that an ADR facility could facilitate secondary market trading of a foreign investment company's securities in the United States. IFIC, at note 12. In light of its private nature, the Depositary Program would not, in our view, jeopardize the Funds' reliance on the position stated in IFIC. We believe that a depositary program that has the effect of facilitating the creation of a public secondary market in the United States, or for which a registration statement on Form F-6 under the Securities Act has been filed, would be inconsistent with the limits on private offerings under Section 7(d).

[8] You have not requested, nor do we express, any view as to the status of the Depositary Program or the offering of the Receipts under the Securities Act or the Securities Exchange Act of 1934.

on the facts and representations in your letter and in conversations with the staff. Different facts or representations may require a different conclusion.



Phillip S. Gillespie
Senior Counsel

Investment Company Act of 1940
Section 7(d)

HALE AND DORR
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February 14, 1997

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Associate Director and Chief Counsel
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Securities and Exchange Commission
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ACT ICA
SECTION 7(d)
RULE
PUBLIC AVAILABILITY 2/14/97

Dear Mr. Murphy:

We are writing to you on behalf of Indosuez Asset Management Asia Limited ("Indosuez"), IS Himalayan Fund, N.V. (the "Himalayan Fund") and other funds organized outside of the United States which are managed by Indosuez or one of its affiliates (collectively, the "Funds"). Indosuez is a Hong Kong based investment adviser organized in 1982 and advises non-U.S. clients, including investment funds sponsored by Indosuez, with respect to investments in securities of Asian issuers. Indosuez does not have any U.S. clients and is not registered under the Investment Advisers Act of 1940, as amended. The Funds are closed-end investment companies organized under the laws of the Netherlands, the shares of which are traded on The London and Amsterdam Stock Exchanges. The Funds are not registered under the Investment Company Act of 1940, as amended (the "1940 Act"). The Himalayan Fund invests in securities of issuers in the Indian subcontinent and had at December 31, 1995, net assets of approximately $256 million. In 1990, the Himalayan Fund made a public offering of its shares to investors outside of the United States, principally to investors in Asia and Europe. Each Fund has adopted procedures to monitor the number of record holders with U.S. addresses.

Request for No-action Position

On behalf of Indosuez and the Funds, we hereby request that the Division of Investment Management (the "Division") confirm that it would not recommend that

the Securities and Exchange Commission (the "Commission") take any enforcement action under the 1940 Act if a Fund cooperates in the establishment of a depositary receipt program with respect to its ordinary shares where (i) the depositary receipts may only be created by, and sold or otherwise transferred to, qualified institutional buyers, as defined in Rule 144A under the 1933 Act, or in offshore secondary transactions pursuant to Regulation S, (ii) the obligations of the Fund or Indosuez with respect to the depositary program are limited to (a) providing the information required by Rule 144A(d)(4)(i) under the Securities Act of 1933, as amended, (b) providing such other information or shareholder reports that are provided to the Fund's shareholders generally, and (c) paying certain administrative fees of the depositary bank and agreeing to indemnify the depository bank against certain liabilities, and (iii) the number of U.S. holders of depositary receipts and underlying ordinary shares that acquired such ordinary shares or depositary receipts from the Fund or its affiliates will not exceed 100. In addition, we request that the Division confirm that it would not recommend that the Commission take enforcement action if a Fund applied the limitation on U.S. holders in the Touche Remnant & Co. no action letter to ordinary shares (whether in the form of ordinary shares or depositary receipts) that are placed with U.S. persons by the Funds but exclude from the Touche Remnant & Co. limitation any U.S. holders who acquires ordinary shares or depositary receipts (i) in offshore secondary transactions to which the Funds or their affiliates are not a party or (ii) from a person who acquired the ordinary shares or depository receipts in such an offshore secondary transaction.

The Depositary Receipt Program

The Funds would like to participate with a U.S. bank (the "Depositary") in the establishment of a depositary receipt program (the "Depositary Program") pursuant to which shareholders of a Fund could deposit the Fund's ordinary shares in the Depositary Program in exchange for depositary receipts (the "Receipts") representing interests in the underlying ordinary shares. The Depositary Program would be operated through the Depositary's offices in the United States. The Depositary Program would be established pursuant to a Deposit Agreement among the Fund, the Depositary and the holders from time to time of the Receipts. The Depositary Agreement would specify the respective rights, obligations and agreements of each of the Fund, the Depositary and the holders of the Receipts.

The Receipts would only be issued to, and transfers of Receipt would only be permitted to, qualified institutional buyers. A registration statement on Form F-6 is not required to be filed under the 1933 Act in connection with the Depositary Program. A holder of the Receipts could either transfer ownership of the Receipts, subject to compliance with the 1933 Act, or present the Receipts to the Depositary in exchange for the underlying ordinary shares. The holder of a Receipt would be deemed to agree pursuant to the terms of the Deposit Agreement that the holder would only transfer the Receipts or the underlying ordinary shares to qualified institutional buyers pursuant to Rule 144A under the 1933 Act or in accordance with Rule 904 of Regulation S. The Deposit Agreement would also prohibit the transfer of Receipts if as a result of such transfer the Fund would be required to register under the Investment Company Act.

The role of the Funds in the establishment and operation of the Depositary Program would be limited. A Fund would be a party to the Deposit Agreement. The only obligations of a Fund pursuant to Deposit Agreement or any other agreement related to the Depositary Program would be (i) to make available through the Depositary the information required by Rule 144A(d)(4)(i) in order to permit the holders of the Receipts to rely upon Rule 144A in transferring Receipts, (ii) to provide to the Depositary sufficient quantities of shareholder communications and reports provided to the shareholders of the Fund generally, (iii) to pay the annual administration fee of the Depositary, and (iv) to agree to indemnify the Depositary against certain liabilities.[1]

The Funds do not anticipate that, and it is not intended that, the establishment of a Depositary Program will result in the establishment of an active trading market in the United States for a Fund's ordinary shares or the Receipts. The Receipts will not be listed on a U.S. securities exchange or quoted in the National Association of Securities Dealer National Market System. Neither the Funds nor Indosuez would take any action, other than as contemplated by this letter, that could reasonably be expected, or is intended, to condition the market in the United States for the Funds' securities. While a Fund may make investor presentations from time to time to its existing or potential securityholders, it will only make such presentations to persons

[1] The holders of Receipts may also be required to pay fees to the Depositary in connection with the deposit and withdrawal of ordinary shares under the Depositary Program.

that the Fund reasonably believes to be qualified institutional buyers. None of the Depositary, the Funds or Indosuez will advertise the existence of the Depositary Program to the public. The Funds will also monitor the number of U.S. holders of Depository Receipts who acquired the Depository Receipts or the underlying ordinary shares directly from the Fund and any subsequent transfers of such Depository Receipts not involving an offshore secondary transaction.

Discussion and Legal Analysis

Section 7(d) of the 1940 Act prohibits any investment company organized outside the United States from making a public offering of its shares in the United States unless the Commission issues an order permitting the foreign investment company to register under the 1940 Act. Because Section 7(d) by its terms applies only to public offerings, a non-United States investment company may avoid application of Section 7(d) either by avoiding sales of its securities to U.S. persons or by only offering its securities in the United States in private offering. In Touche Remnant & Co. (publicly available August 27, 1984) and subsequent no-action letters, the Commission has taken the position that Section 7(d) permits an investment company organized outside of the United States to make a private offering of its securities in the United States in accordance with Rule 506 under the 1933 Act without registering the fund under the 1940 Act, provided that the fund has no more than 100 beneficial owners of its shares who are United States residents.[2] In the absence of any sales activity in the United States by a Fund or its agents, the fact that a fund organized outside of the United States has more than 100 U.S. shareholders does not constitute a violation of Section 7(d).

In its most recent no-action letter with respect to Section 7(d) of the 1940 Act, Investment Funds Institute of Canada (publicly available March 4, 1996), the Division indicated that it would not recommend enforcement action against investment companies organized in Canada if such funds have more than 100 U.S. resident shareholders as long as the 100 investor limit is exceeded because of U.S. resident securityholders who purchased shares while residing outside the United States and subsequently relocated to the United States. Holders of the shares of an investment

[2] See also "Protecting Investors: A Half Century of Investment Company Regulation," (the "1992 Report") at p. 200-202.

company who purchased shares while they were not resident in the United States would not be counted towards the 100 shareholder limit; the 100 shareholder limit would be applied to shareholders who acquired shares in private placements in the United States. The Division's position was subject to the conditions, among others, that the Fund has not engaged in activities that could reasonably be expected, or are intend, to condition the U.S. market with respect to the Fund's securities or to establish a trading market for such securities in the United States.

On the basis of the existing no-action letters, it is unclear whether in the Division's view the creation of a Depositary Program would be permissible under the Touche Remnant line of no-action letters and whether shares of the Funds acquired by U.S. persons in offshore secondary market transactions (and subsequent transfers of such shares) must be aggregated with purchasers of ordinary shares or receipts acquired from the Funds in private placement for purposes of the Touche Remnant limitation on U.S. holders. We believe that the establishment of the Depositary Program in the manner set forth in this letter should not be treated in a manner more restrictive than private placements of the Fund's securities to U.S. persons. We also believe that the Depositary Program does not involve a conditioning of the public market for a Fund's ordinary shares or the establishment of a trading market in such securities in a manner inconsistent with the Touche Remnant line of no-action letters.

We have been advised that the Fund's purposes in establishing the Depositary Program are (i) to have greater control over the market for its ordinary shares in the United States in order to monitor compliance with Section 7(d) of the 1940 Act and (ii) to facilitate its relationship with institutional buyers in the United States who acquire the Fund's shares in secondary transactions in non-U.S. markets or in transactions complying with Rule 506 of Regulation D. The Funds have the corporate authority to force the transfer of ordinary shares held by U.S. persons if that ownership would require the Fund to register under the U.S. securities laws. The Funds also believe that the Depositary Program will be attractive to U.S. institutions because it will eliminate foreign custody arrangements and currency exchange.

The Depositary Program will be limited to qualified institutional buyers and no general advertising of the Depositary Program will be conducted by the Depositary, the Fund or Indosuez. We understand that the staff looks to the definition of "directed selling efforts" in paragraph 902(b) of Regulation S under the

1933 Act for guidance with respect to what activities constitute conditioning of the market for a foreign fund's securities. The specific examples of directed selling efforts in Rule 902(b) generally contemplate activities, such as advertising or publication of quotations, that reasonably might be expected to heighten the public awareness of an offering of a foreign issuer's securities. The Funds may make presentations to existing or potential institutional shareholders in connection with private placements and ongoing investor relations. The Funds intend that the Depositary Program operates in a manner that does not constitute directed selling efforts. While holders of Receipts will be able to sell them to other qualified institutional buyers, the Receipts will not be listed on any exchange or any other domestic trading market.

The benefits of the program to the Funds and the holders of Receipts will be weakened if the Funds are required to aggregate the number of U.S. holders of Receipts or ordinary shares acquired from the Funds or their affiliates with U.S. holders of ordinary shares acquired or Receipts in offshore secondary market transactions (or subsequent transfer of such Receipts on ordinary shares) in applying the Touche Remnant limitation on the number of U.S. holders. If aggregation is required, neither the Funds nor the holders of Receipts could be assured that compliance concerns under the 1940 will not arise from secondary market transactions outside the United States in the Fund's ordinary shares. In order to safeguard against such inadvertent breach of the Touche Remnant limitation, the Funds would need to limit the number of holders of Receipts to substantially less than 100.

This request for no action relief is consistent with the objective of preventing circumvention of valid United States regulatory interests. The Funds have not and will not publicly offer their securities in the United States. The Funds will not at any time engaged in activities that could reasonably be expected, or are intended, to condition the United States market with respect to their securities or except for the establishment of the Depositary Program, to facilitate secondary market trading in the United States with respect to the Fund's securities. In sum, the relief requested would be limited to funds which, by the very nature of their limited activity and investors in the United States, have clearly sought no competitive advantage over domestic funds and have not created significant regulatory concerns.

In the 1992 Report, the Division proposed an amendment to Section 7(d) which would require a foreign fund to register only if: (i) it makes any public offering using United States jurisdictional means, or (ii) if the fund has more than 100 shareholders of record who are United States residents, the fund makes any offering (public or private) in the United States or facilitates secondary trading in the United States. 1992 Report, at 212. The relief sought herein is not inconsistent with the Division's proposal.

Should you have any questions regarding this request, please do not hesitate to contact David Phelan at (617) 526-6372.

Sincerely,

cc: John V. O'Hanlon
Karen L. McMillan
(Division of Investment Management)