

AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE GOVERNMENT OF THE STATE OF KUWAIT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of Malaysia and the Government of the State of Kuwait (hereinafter collectively referred to as the Contracting States and each referred to as a Contracting State).

Desiring to create favourable conditions for greater economic co-operation between them and in particular for investments by investors of one Contracting State in the territory of the other Contracting State.

Recognizing that the encouragement and reciprocal protection under international agreements of such investments will be conducive to the stimulation of further economic cooperation between them and, in particular, to investments made by investors from a Contracting State in the territory of the other Contracting State.

Aware that the encouragement and mutual protection in accordance with international agreements will create an encouraging situation for the revitalization of the investment initiatives and will increase prosperity in both contracting countries.

Have agreed as follows

Article 1. Definitions

For the purposes of this Agreement:

(1) The term "investment" includes all types of assets invested by natural or legal persons of one of the two Contracting States in the territory of the other Contracting State in accordance with the laws, regulations and administrative procedures of that country. Without limiting the generality of the foregoing, the term "investment" includes:

(a) Movable and immovable property, as well as any in-kind property rights such as mortgages, debt concessions, debt guarantees, the right to use, and the like;

(b) The shares, stocks and bonds of companies, or any other rights and interests in those companies, loans and bonds issued by a Contracting State or any of the natural or juridical persons and returns retained for the purpose of re-investment;

(c) Claims to money or to any performance having economic value associated with an investment;

(d) copyrights, trademarks, patents, industrial designs and other industrial property rights, know-how, trade secrets, trade names and goodwill;

(e) any rights conferred by law or contract and any licences and permits pursuant to law, including the rights to search for extraction and exploitation of natural resources.

The said term shall refer:

(a) In respect of investments in the territory of Malaysia, to all investments made in project classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practices as an "approved project"; and

(b) in respect of investments in the territory of the State of Kuwait, to all investments approved and classified as investments by the competent authorities of the State of Kuwait in accordance with its legislation and administrative practices.

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

(2) The term 'investor' shall mean the Government of a Contracting State or any of its natural or juridical persons who invest in the territory of the other Contracting State.

(3) The term 'natural person' shall mean with respect to either Contracting State a natural person holding the nationality of that State in accordance with its laws.

(4) The term 'juridical person' shall mean with respect to either Contracting State, any entity established in accordance with, and recognized as a juridical person by the law of the State, such as public and private companies, corporations, business associations, authorities, partnerships, foundations, firms, institutions, establishments, agencies, development funds, enterprises, cooperatives, and organizations or other similar entities irrespective of whether their liabilities are limited or otherwise; and any entity established outside the jurisdiction of a Contracting State as a juridical person and in which such State or any of its nationals or any juridical person established within its jurisdiction has a predominating interest.

(5) The term 'returns' mean amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, share dividends, royalties or fees, and payment in kind.

(6) The term 'territory' means: -

i) With respect to Malaysia, all land territory comprising the Federation of Malaysia, the territorial sea and airspace above;

ii) With respect to Kuwait all land territory comprising the State of Kuwait, the territorial sea and airspace above.

(7) 'Associated activities' include the organization, control, operation, maintenance and disposition of juridical persons, branches, agencies, offices, factories or other facilities for the conduct of business; making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds, including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

(8) The term 'freely usable currency' means the United States Dollar, Pound Sterling, Deutschmarks, Swiss Francs, French Francs, Japanese Yen or other currency that is widely used to make payments for international transactions and for which there are ready buyers in the principal exchange markets.

Article 2. Promotion and Protection of Investments

(1) Each Contracting State shall encourage and create favourable conditions for investors of the other Contracting State to make investments in its territory and, in exercise of powers conferred by its laws, regulations and administrative practices shall admit such investments and activities associated therewith.

(2) Once established, investments shall at all times enjoy full protection and security, in a manner consistent with international law.

(3) Each Contracting State shall at all times ensure fair and equitable treatment to the investments of investors of the other Contracting State. Each Contracting State shall ensure that the management, maintenance, use, enjoyment, acquisition or disposal of investments or rights related to investment and its associated activities in its territory of investors of the other Contracting State shall not in any way be subjected to or impaired by arbitrary, unreasonable or discriminatory measures.

(4) i) Each Contracting State shall endeavour to take the necessary measures and legislations for granting of appropriate facilities, incentives and other forms of encouragement for investments made by investors of the other Contracting State.

ii) Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, incentives and other forms of encouragement and the host State shall grant them all assistance, consents, approvals, licences and authorizations to such an extent and on such terms and conditions as shall, from time to time, be determined by the laws and regulations of the host State.

(5) With respect to its tax policies, each Contracting State should strive to accord fairness and equity in the treatment of investment of investors of the other Contracting State.

(6) The Contracting States shall periodically consult between themselves concerning investment opportunities within the territory of each other in various sectors of the economy to determine where investments from one Contracting State into the other may be most beneficial in the interest of both Contracting States.

(7) To attain the objectives of this Agreement, the Contracting States shall encourage and facilitate the formation and establishment of the appropriate joint legal entities between the investors of the Contracting States to establish, develop and execute investment projects in different economic sectors in accordance with the laws and regulations of the host State.

(8) Investors of either Contracting State shall be permitted to engage top managerial personnel of their choice regardless of nationality to the extent permitted by the laws of the host State. The Contracting States shall make available all necessary facilities including the issuance of visas and permits of stay to such managerial personnel and to their families in accordance with the laws, regulations and administrative practices of the two Contracting States.

(9) Each Contracting State shall seek as far as practicable to avoid performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

(10) Each Contracting State shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.

(11) Each Contracting State shall make public all laws, regulations, administrative practices and procedures that pertain to or affect investments.

Article 3. Most-favoured-nation Provisions

(1) Each Contracting State shall in its territory accord investments and returns of investors of the Other Contracting State treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State whichever is the most favourable.

(2) Each Contracting State shall in its territory accord investors of the other Contracting State, as regards management, maintenance, use, enjoyment, acquisition or disposal of their investments, or any other activity associated therewith, treatment not less favourable than that which it accords to its own investors or to investors of any third State whichever is the most favourable.

Article 4. Exception

The provisions of this Agreement relating to the granting of treatment not less favourable than that accorded to its own investors or the investors of any third State shall not be construed so as to oblige one Contracting State to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:-

- i) any existing or future customs union, an economic union or free trade area or a common external tariff area or a monetary union or similar international agreement or other forms of regional or sub-regional cooperation arrangement to which either of the Contracting States is or may become a party; or
- ii) the adoption of an agreement designed to lead to the formation or extension of such a union or area within a reasonable length of time; or
- iii) any international or regional or sub-regional agreement or other arrangement relating wholly or mainly to taxation or movement of capital or any domestic legislation relating wholly or mainly to taxation.

Article 5. Compensation for Damage or Loss

(1) Investors of one Contracting State whose investments in the territory of the other Contracting State suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or other similar events in the territory of the latter Contracting State shall be accorded by the latter Contracting State treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting State accords to its own investors or to investors of any third State whichever is the most favourable.

(2) Without prejudice to Paragraph (1) of this Article, investors of one Contracting State who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other Contracting State resulting from:

- (a) Requisition of their investment or property by its forces or authorities,
- (b) destruction of their investment or property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

Shall be accorded prompt and adequate compensation for the damage or loss sustained during the period of requisitioning or as a result of the destruction of the property. Resulting payments shall be in freely usable currency and freely transferable without undue delay.

Article 6. Nationalization or Expropriation

- (1) i) Investments of either Contracting State or its natural or juridical persons shall not be subject to sequestration, confiscation or any similar measures save with the order of a competent court issued in accordance with laws in force;
- ii) Investments of either Contracting State or any of its natural or juridical persons shall not be directly or indirectly nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting State except for a public purpose in the national interest of that State, for prompt, adequate and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with due process of law;
- iii) Such compensation shall be computed on the basis of the fair market value of the investment immediately prior to the point of time when the decision for nationalization or expropriation was announced or become publicly known and shall be determined in accordance with recognised principles of valuation such as market value. Where the market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account, inter alia, the capital invested, depreciation, capital already repatriated, replacement value, goodwill and other relevant factors. In the event that payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position no less favourable than the position in which he would have been had the compensation been paid immediately on the date of expropriation or nationalization. To achieve this goal the compensation shall include an appropriate interest at a commercially reasonable rate as agreed upon by both States or at such rate as prescribed by law, for the currency in which the investment is denominated from the date of nationalization or expropriation until the date of payment.
- iv) Where a Contracting State nationalizes or expropriates the investment of a juridical person which is established or licenced under the law in force in its territory and in which the other Contracting State or any of its investors owns shares, stocks, debentures or other rights or interest, it shall ensure that prompt, adequate and effective compensation is received and allowed to be repatriated. Such compensation shall be determined and paid in accordance with the provisions of Paragraph (1)(iii) of this Article.
- (2) The provisions of Paragraph (1) of this Article shall also apply to the current returns from an investment as well as, in the event of liquidation, to the proceeds from the liquidation.

Article 7. Repatriation of Capital and Returns

- (1) Each Contracting State shall guarantee without undue delay the transfer out of its territory in any freely usable currency of:
- (a) the net profits, dividends, royalties, technical assistance and technical service fees, interest and other returns, accruing from any investment by an investor of the other Contracting State;
- (b) the proceeds accruing from the sale, total or partial liquidation of any investment made by an investor of the other Contracting State;
- (c) funds in repayment of borrowings;
- (d) the earnings of nationals of the other Contracting State who are allowed to work in connection with an investment in its territory;
- (e) amounts spent for the management of the investment in the territory of the Contracting State or a third State; and
- (f) additional funds necessary for the maintenance of the investment.
- (2) Without restricting the generality of Article 3 of this Agreement the Contracting States undertake to accord to transfers referred to in Paragraph (1) of this Article a treatment as favourable as that accorded to transfers originating from investments made by investors of any third State.
- (3) The exchange rates applicable to such transfers in paragraph (1) of this Article shall be the rate of exchange prevailing at the time of remittance.
- (4) Such transfers as above shall, however, be subject to such reasonable regulatory procedures as shall, from time to time, be in force in the host State and shall likewise be Subject to the right of the government of the host State to impose reasonable restrictions for temporary periods not exceeding three months to meet situations of fundamental economic disequilibrium provided that at least 50% of such transfers are allowed to be repatriated during such periods.

Article 8. Subrogation

(1) If a Contracting State (or its designated Agency) makes payment to any of its investors under an indemnity or a guarantee it has granted in respect of an investment or any part thereof in the territory of the host State, or has otherwise become subrogated to any of the rights of such investors with respect to such investment, the host State shall recognize:

(a) The right of the other Contracting State (or its designated Agency) arising from the assignment, indemnity or other subrogation, whether under law or pursuant to a legal transaction, and

(b) That the other Contracting State (or its designated Agency) is entitled by virtue of subrogation to enforce such right.

(2) If such other Contracting State acquires any amounts in such manner as above, it shall be accorded in respect thereof treatment not less favourable than that accorded to the funds of investors of the host State or of any third State, whichever is most favourable, deriving from investments or associated activities similar to those in which the party indemnified was engaged.

Article 9. Settlement of Investment Disputes

(1) Each Contracting State consents to submit any disputes that may arise out of or in relation to an investment or associated activities made in its territory by an investor of the other Contracting State for settlement in accordance with the provisions of this Article.

(2) Each Contracting State 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 13 March, 1965 (hereinafter referred to as "the Convention") any dispute arising between that Contracting State and an investor of the other Contracting State which involves:

i) an obligation entered into by that Contracting State with the investor of the other Contracting State regarding an investment or associated activities by such investor; or

ii) An alleged breach of any right conferred or created by this Agreement with respect to an investment or associated activities by such investor.

(3) If a juridical person which is incorporated or constituted under the law in force in the territory of one Contracting State and in which before such a dispute arises the majority of shares are owned by investors of the other Contracting State shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as an investor of the other Contracting State.

(4) i) If any dispute of the type referred in paragraph 2 should arise, the Contracting State and the investor concerned shall seek to resolve the dispute through consultation and negotiation. If the dispute cannot thus be resolved within three (3) months, then if the investor concerned also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either Contracting State to the dispute may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as set forth in Articles 28 and 36 of the Convention, provided that the investor concerned has not submitted the dispute to the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting State that is party to the dispute.

ii) In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the opinion of the investor concerned shall prevail. The Contracting State which is a party to the dispute shall not raise as an objection, defence, or right of set-off at any stage of the proceedings or enforcement of an award the fact that the investor which is the other party to the dispute has received pursuant to an insurance or guarantee contract an indemnity or other compensation for all or part of its losses or damages.

(5) In the event that the provisions of the Convention are not applicable the conciliation and arbitration shall take place in accordance with the United Nations Commission on International Trade Law Conciliation Rules, 1980 and Arbitration Rules, 1976.

(6) Neither Contracting State shall pursue through diplomatic channels any dispute referred to the Centre unless:

i) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decided that the dispute is not within the jurisdiction of the Centre, or

ii) the other Contracting State should fail to abide by or to comply with any award rendered by an arbitral tribunal.

Article 10. Settlement of Disputes between Contracting States

(1) Should any dispute arise concerning the interpretation or application of this Agreement the Governments of the Contracting States shall try to settle the same by negotiations.

(2) If the dispute cannot be so settled it shall, upon the request of either Contracting State, be submitted to an ad hoc Arbitral Tribunal in accordance with the provisions of this Article.

(3) The Arbitral Tribunal shall be constituted in the following way: within two months of the receipt of the request for arbitration, each Contracting State shall appoint one arbitrator. The two arbitrators shall then select a national of a third State who, on the approval by the two Contracting States, shall act as Chairman of the Tribunal (hereinafter referred to as the Chairman). The Chairman shall be appointed within two months from the date of appointment of the other two arbitrators.

(4) If within the period specified in Paragraph (3) of this Article either Contracting State shall not have appointed its arbitrator or the two arbitrators shall not have agreed on the Chairman, a request may be made to the President of the International Court of Justice to make the appointment. If he happens to be a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointment. If the Vice-President also happens to be a national of either Contracting State or is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting State shall be invited to make the appointment.

(5) The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding. Each Contracting State shall bear the cost of its own arbitrator and its counsel in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by both Contracting States. The Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting States. The Arbitral Tribunal shall determine its own procedure.

Article 11. Application to Investments

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

Article 12. Relation between Governments

The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting States.

Article 13. Application of other Rules and Special Commitments

(1) Where a matter is governed simultaneously both by this Agreement and by other agreements to which both the Contracting States are parties or general principles of law commonly recognized by both Contracting States or domestic law of the host State, nothing in this Agreement shall prevent either Contracting State or any of its investors who own investments in the territory of the other Contracting State from taking advantage of whichever rules are the more favourable to their cases.

(2) Investments subject to special contracts or commitments undertaken by one Contracting State with respect to the investors of the other Contracting State shall be governed, notwithstanding the provisions of this Agreement, by the terms of those contracts and commitments insofar as their provisions are more favourable than those provided by this Agreement.

(3) Each Contracting State shall observe any obligation it may have entered into in the documents of approval of investments or the approved investment contracts by investors of the other Contracting State.

Article 14. Entry Into Force

This Agreement shall enter into force thirty (30) days after the latter date on which either Contracting State notifies the other that its constitutional requirements for the entry into force of this Agreement have been fulfilled.

Article 15. Duration and Termination

(1) This Agreement shall remain in force for a period of thirty (30) years and shall continue in force thereafter for similar period or periods unless, one year before the expiry of the initial period or any subsequent period, either Contracting State notifies the other in writing of its intention to terminate the Agreement. The notice of termination shall become effective one year after it has been received by the other Contracting State.

(2) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of this-Agreement shall continue to be effective for a period of twenty (20) from the date of termination of the present Agreement.

In witness whereof the undersigned duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Kuwait, this Saturday 29th day of Rabi al Awal 1408 H corresponding to 21 day of November 1987, in the Bahasa Malaysia, the Arabic and English Languages, all texts being equally authentic.

In case of divergency, the English text shall prevail.

FOR THE GOVERNMENT OF MALAYSIA

FOR THE GOVERNMENT OF THE STATE OF KUWAIT

Protocol

On signing the Agreement between the Government of Malaysia and the Government of the State of Kuwait concerning the Promotion and Protection of Investments, the undersigned Plenipotentiaries have, in addition, agreed on the following provisions which should be regarded as an integral part of the said Agreement.

1. Application of the Agreement to Investments In the Maritime Zones

The two Contracting States agree that they may consult with each other with a view to applying the provisions of this Agreement to investments in the maritime zones in accordance with the applicable laws of the host State.

2. With Respect to Article 2:

The Kuwaiti companies and companies to be established jointly by Kuwaiti investors and Malaysian investors shall have the right to exercise the general powers granted under the Malaysian laws for the attainment of their general purposes and objects. They shall have the right to issue and execute any decision which they deem necessary to achieve their objectives. They shall have the right to establish subsidiary companies and/or to participate in other companies in the industrial, manufacturing, agricultural, touristic and high-technology projects which may be of mutual benefits to the interests of the two Contracting States.

3. With Respect to Article 3:

(a) National treatment shall not be accorded to investments in the banking and insurance sectors.

(b) All activities involving the purchase, sale, and transport of raw and secondary materials, energy, fuels, and means of production and operation of all types shall be accorded treatment not less favourable than that accorded to the investment or associated activities carried out by the nationals of the host State or third State investors whichever is the most favourable. There shall be no impediment to the normal exercise of such activities, provided they are carried out in accordance with the laws and regulations of the host country and taking into account the provisions of this agreement. Restricting any of these activities shall be deemed "treatment less favourable" if directed in a discriminatory way against investors of the other Contracting State. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of this Article.

(c) The Contracting States shall facilitate in the light of their domestic laws the issuance of entry visas and authorizations pertaining to sojourn, work and travel of the nationals of one Contracting State pursuant to an investment in the territory of the other Contracting State.

(d) Whenever goods or persons connected with the making of investments are to be transported, either Contracting State shall neither exclude nor hinder transportation enterprises of the other Contracting State and shall issue permits as required to carry out such transports. This includes the transportation of:

i) goods directly intended for an investment within the meaning of the present Agreement or acquired in the territory of either Contracting State or of any third State by or on behalf of an enterprise in which assets within the meaning of the present Agreement are invested;

ii) persons travelling in connection with the making of investments.

4. With Respect to Article 6:

(a) The provisions of this Article shall apply to any measure of expropriation, nationalization, dispossession or other similar measures such as freezing or blocking of assets or funds concerning investments made by investors of the other Contracting State wherever they may be, and irrespective of the place where they may be deposited.

(b) The provisions of this Article shall also apply to the transfer of an investment to public ownership, to the subjection of an investment to public control or to any other measure the effects of which would be tantamount to expropriation or nationalization. "Expropriation" shall mean the taking away or restricting of any property right which in itself or in conjunction with other rights constitutes an investment.

(c) Any undue delay in payment of compensation shall carry appropriate interest at commercially reasonable rate as agreed upon by both parties.

5. With Respect to Articles 5, 6 and 7:

(a) The term "without undue delay" within the meaning of Articles 5, 6 and 7 is deemed to be fulfilled if a repatriation is made within such period as is normally required according to international financial custom and not later, in any case, than three months.

(b) Invested returns shall enjoy the same facilities and protection as the original investment.

6. With Respect to Article 9:

6. Regarding the arbitration under the United Nations Commission on International Trade Law Arbitration Rules of 1976 referred to in paragraph (5) of Article 9, the Arbitral Tribunal shall be established as follows

(a) The Arbitral Tribunal shall consist of three arbitrators. Each party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a Chairman who shall be a national of a third State which has diplomatic relations with both Contracting States. The arbitrators shall be appointed within two months from the date when one of the parties to the dispute informed the other of its intention to submit the dispute to arbitration.

If the appointments are not made within the period mentioned above, either party may invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the required appointment within two months.

(b) The Arbitral Tribunal shall reach its decision by a majority of votes. Its award shall be final and binding on both parties to the dispute, and shall be entered in any court of jurisdiction.

(c) The Arbitral Award, shall be made, in accordance with the domestic laws, including the rules of conflict of the Contracting State which accepts the investment, and in accordance with the provisions of this Agreement as well as the principles of international law generally recognized and adopted by both Contracting States.

(d) Each party to the dispute shall bear the cost of its own arbitrator and of its counsel in the arbitration proceedings. The cost of the Chairman and the remaining costs of the Arbitral Tribunal shall be borne in equal parts by both parties to the dispute.

Done in duplicate at Kuwait, this Saturday 29th day of Rabi al Awal 1408 H corresponding to 21 day of November 1987, in the Bahasa Malaysia, the Arabic and English Languages, all texts being equally authentic.

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FOR THE GOVERNMENT OF MALAYSIA

FOR THE GOVERNMENT OF THE STATE OF KUWAIT