

AGREEMENT BETWEEN THE GOVERNMENT OF THE KINGDOM OF DENMARK AND THE GOVERNMENT OF MALAYSIA FOR THE MUTUAL PROMOTION AND PROTECTION OF INVESTMENTS

Preamble

The Government of the Kingdom of Denmark and the Government of Malaysia, hereinafter referred to as "the Contracting Parties";

DESIRING to create favourable conditions for investments and to promote greater economic co-operation between nationals and companies of one Contracting Party in the territory of the other Contracting Party with a view to stimulating the productive use of resources;

RECOGNIZING that a fair and equitable treatment of investments on a reciprocal basis will serve this aim,

HAVE AGREED as follows:

Article 1. Definitions

For the purpose of this Agreement,

(1)

(a) "Investment" means every kind of asset as well as any right of participation in any company including any share of the capital to which nationals or companies are entitled as well as any capital appreciation and in particular, though not exclusively, includes:

(i) Movable and immovable property and other property rights such as mortgages, liens or pledges, privileges, guarantees and any other similar rights as defined in conformity with the law of the Contracting Party in the territory of which the goods in question are situated;

(ii) Shares, stock and debentures of companies or interests in the property of such companies in the territory of one Contracting Party;

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

(iv) Copyrights, industrial property rights, know-how, technical processes, trade marks, trade-names and goodwill;

(v) Business concessions conferred by law or under contract, including the concessions to search for, cultivate, extract or exploit natural resources;

(vi) Goods that under a leasing agreement, in relation and incidental to an investment under this Agreement, are placed at the disposal of a lessee being a national or a company of either Contracting Party in the territory of one Contracting Party by a lessor, being a national or a company of either Contracting Party, in conformity with its laws, regulations and administrative practices shall be treated not less favourable than an investment.

(b) The said term "investment" shall refer:

(i) In respect of investments in the territory of Malaysia, to all investments made in accordance with the legislation and administrative practices of Malaysia, including all investments made in projects classified by the appropriate Ministry of Malaysia as "approved projects", and

(ii) In respect of investments in the territory of Denmark, to all investments made in accordance with the legislation and administrative practices of Denmark;

- (c) Any alteration of the form in which assets are invested shall not affect their classification as investment, provided that such alteration is not contrary to the approval, if any, granted in respect of the assets originally invested;
- (2) "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees;
- (3) "Nationals" means:
- (a) In respect of Malaysia, any person who is a citizen of Malaysia according to its constitution;
- (b) In respect of Denmark, any physical person deriving their status as Danish national from Danish law;
- (4) "Companies" means:
- (a) In respect of Malaysia, any company incorporated in the territory of Malaysia, or any juridical person or association of persons or sole proprietorship which is lawfully constituted or incorporated in the territory of Malaysia;
- (b) In respect of Denmark, corporations, firms or associations incorporated or constituted under the law in force in any part of Denmark;
- (5) "Territory" means:
- (a) In respect of Malaysia, all land territory comprising Malaysia, the territorial sea and airspace above;
- (b) In respect of Denmark, the territory under its sovereignty and the sea and submarine areas over which Denmark exercises, in conformity with international law, sovereignty, sovereign rights or jurisdiction. This Agreement shall not apply to the Faroe Islands and Greenland;
- (6) The term "without undue delay", within the meaning of Articles 6, 7 and 8 of this Agreement, means the transfer of funds within such period as is normally required for the completion of transfer formalities and in any case not later than three months. The said period shall commence on the day on which the relevant request for such transfer has been submitted to the relevant authority;
- (7) The term "freely usable currency" means the United States Dollar, Pound Sterling, Deutsch Mark, French Franc, 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 of Investment

Each Contracting Party shall in its territory promote as far as possible the investment by nationals and companies of the other Contracting Party and admit such investments in accordance with its legislation and administrative practices.

Article 3. Protection of Investment

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

Article 4. National and Most-favoured-nation Treatment

Neither Contracting Party shall in its territory;

- (a) Subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State;
- (b) Subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments or returns, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

Article 5. Exceptions

The provisions of this Agreement relative to the granting of treatment not less favourable than that accorded to the nationals or companies of any third State shall not be construed so as to oblige the Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from;

(i) Any existing or future customs union or free trade area or a common external tariff area or a monetary union or similar international agreement to which either of the Contracting Parties is or may become a party; or

(ii) The adoption of any 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 agreement or arrangement relating wholly or mainly to taxation or any domestic legislation resulting from such an agreement or arrangement.

Article 6. Expropriation and Compensation

(1) Investments or returns of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party, on a basis of nondiscrimination and against prompt, adequate and effective compensation. Such compensation shall amount to the value of the investment or returns expropriated immediately before the expropriation or impending expropriation become public knowledge, and shall be made without undue delay, and any delayed payment shall include interest at a normal rate or an appropriate rate as agreed upon by both parties until the date of payment. It shall be effectively realisable and be freely transferable. The legality of any such expropriation and the amount of compensation shall be determined by the due process of law in the territory of the Contracting Party making the expropriation.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary in respect of the shareholders of such a company.

Article 7. Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of either Contracting Party who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other Contracting Party 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.

(3) Payments resulting from any provisions in this Article shall be in a freely usable currency and be freely transferable without undue delay.

Article 8. Repatriation and Transfer of Capital and Returns

(1) Each Contracting Party shall, subject to the right of each Contracting Party to exercise on a non-discriminatory basis the powers conferred by its laws, regulations and administrative practices, allow without undue delay the transfer in any freely usable currency of:

(a) The net profits, dividends, royalties, technical assistance and technical fees, interest and other returns, accruing from any investments of the nationals or companies of the other Contracting Party;

(b) The invested capital or the proceeds of the total or partial liquidation of any investment made by nationals or companies of the other Contracting Party;

(c) Funds in repayment of loans given by nationals or companies of one Contracting Party to the nationals or companies of the other Contracting Party which both Contracting Parties have recognized as investments;

(d) The earnings of nationals of the other Contracting Party who are allowed to work in connection with an investment in its territory.

(2) The exchange rates applicable to such transfer in the paragraph (1) shall be the rate of exchange prevailing at the time of remittance. paragraph (1) shall be the rate of exchange prevailing at the time of remittance.

(3) The Contracting Parties undertake to accord to such transfer referred to in paragraph (1) of this Article a treatment as favourable as that accorded to transfer originating from investments made by its own nationals or companies or nationals or companies of any third State.

Article 9. Subrogation

If a Contracting Party makes payment to its own nationals or companies under a guarantee it has accorded in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 10, recognize:

(a) The assignment, whether under the law or pursuant to a legal transaction in that country, of any right or claim by the investor to the former Contracting Party, as well as

(b) That the former Contracting Party is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and shall assume the obligations related to the investment.

Article 10. Arbitration and Conciliation

(1) Each Contracting Party consents to submit any dispute that may arise out of or in relation to an investment made in its territory by a national or a company of the other Contracting Party for settlement in accordance with the provisions of this Article.

(2) Each Contracting Party 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 18th March 1965 (hereinafter referred to as "the Convention") any dispute arising between that Contracting Party and a national or company of the other Party which involves:

(a) An obligation entered into by that Party with the national or company of the other Party regarding an investment by such national or company; or

(b) An alleged breach of any right conferred or created by this Agreement with respect to an investment by such national or company.

(3) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party, in which before such a dispute arises the majority of 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 purposes of the Convention as a company of the other Contracting Party.

(4)

(a) If any dispute of the type referred in paragraph 2 should arise, the Party and the national or company concerned shall seek to resolve the dispute through consultation and negotiation. If the dispute cannot be thus resolved within three (3) months, then, if the national or company concerned also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party 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 a dispute shall not be submitted to the Centre as long as such a dispute which has been submitted by the national or company concerned is still pending before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is party to the dispute.

(b) In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the opinion of

the national or company concerned shall prevail. The Contracting Party which is a party to the dispute shall not raise as an objection, defence, or right or set-off 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 or will receive pursuant to an insurance or guarantee contract an indemnity or other compensation for all or part of his or its losses or damages.

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

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

(b) The other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal.

Article 11. Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation and application of this Agreement should, as far as possible, be settled through negotiations between the Contracting Parties. If such a dispute cannot be settled within three months from the beginning of negotiation, it shall upon the request of either Contracting Party, be submitted to an arbitral tribunal.

(2) Such an arbitral tribunal shall be constituted for each individual case in the following way:

(a) Within three months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State, who on approval by the Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within three months from the date of appointment of the other two members;

(b) If within any of the periods specified the necessary appointments have not been held, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he, too, 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 Party shall be invited to make the necessary appointments.

(3) The arbitral tribunal shall base its decision on the provisions of this Agreement in conformity with the principles of law. It shall reach its decision by a majority of votes. Such decision shall be final and binding on both Contracting Parties.

(4) Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties. The tribunal shall determine its own procedure.

Article 12. Other Obligations

Nothing in this Agreement shall prejudice any rights or benefits accruing under national or international law to interests of a national or a company of one Contracting Party.

Article 13. Application to Investments

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.

Article 14. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force on the exchange of instruments of ratification.

(2) This Agreement shall remain in force for a period of ten (10) years and shall continue in force thereafter unless terminated in accordance with paragraph (3) of this Article.

(3) Either Contracting Party may by giving one (1) year's written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten (10) year period or any time thereafter.

(4) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 13 shall remain in force for a further period of ten years from that date.

Done in duplicate in Kuala Lumpur on this 6th day of January 1992 in Danish, Bahasa Malaysia and English languages, all three texts being equally authentic.

In the case of divergence between the texts of this Agreement, the English text shall prevail.

For the Government of the Kingdom of Denmark Per Stig Møller For the Government of Malaysia Datuk Seri Rafidah