

# **AGREEMENT BETWEEN THE GOVERNMENT OF THE UNION OF MYANMAR AND THE GOVERNMENT OF THE STATE OF KUWAIT FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS**

The Government of the Union of Myanmar and the Government of the State of Kuwait, (hereinafter referred to as the "Contracting States");

Desiring to create favorable conditions for the development of economic cooperation 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 of such investments will be conducive to the stimulation of business initiative and to the increase of prosperity in both Contracting States;

Have agreed as follows:

## **Article 1. Definitions**

For the purposes of this Agreement:

1. The term 'investment' shall mean every kind of asset in the territory of one Contracting State that is owned or controlled directly or indirectly by an investor of the other Contracting State, and includes assets or rights consisting or taking the form of:

(a) a company shares, stocks, and other forms of equity participation, and bonds, debentures, and other forms of debt interests in a company, and other debts and loans and securities issued by any investor of a Contracting State;

(b) claims to money and claims to any other assets or performance pursuant to a contract having an economic value;

(c) intellectual property rights, including, but not limited to, copyrights, trademarks, patents, industrial designs and patterns and technical processes, know-how, trade secrets, trade names and goodwill;

(d) any right conferred by law, contract or by virtue of any licenses or permits granted pursuant to law, including rights to prospect, explore, extract, or utilize natural resources, and rights to undertake other economic or commercial activities or to render services;

(e) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

The term "investment" shall also apply to "returns" retained for the purpose of re-investment and to proceeds from "liquidation" as these terms are defined hereinafter.

Any change in the form in which assets or rights are invested or reinvested shall not affect their character as investments.

2. The term "investor" with respect to a Contracting State shall mean:

(a) the Government of that Contracting State;

(b) a natural person holding the nationality or citizenship of that Contracting State in accordance with its applicable laws;

(c) any legal person constituted or incorporated under the laws and regulations of that Contracting State, such as institutions development ' funds, agencies, foundations and other statutory establishments and authorities, and companies.

3. The term "company" shall mean any legal entity, whether or not organized for the purpose of pecuniary gain, and whether privately or governmentally owned or controlled, which is constituted under the laws of a Contracting State or is owned or effectively controlled by investors of a Contracting State, and includes corporations, trusts, partnerships, Sole

proprietorships, branches, joint ventures, associations or other similar organizations.

4. The term "returns" shall mean amounts yielded by an investment, irrespective of the form in which they are paid, and in particular, though not exclusively, include profits, interest, capital gains, dividends, royalties, and management fees, technical assistance or other payments or fees, and payments in kind, regardless of its type.

5. The term "liquidation" shall mean any disposal effected for the purpose of completely or partly giving up an investment.

6. The term "territory" shall mean the territory of a Contracting State including any area beyond the territorial sea which in accordance with international law has been or may hereafter be designated under the laws of a Contracting State, as an area over which a Contracting State may exercise sovereign rights or jurisdiction.

7. The term "freely convertible currency" shall mean any currency that the International Monetary Fund determines\*, from time to time, as freely usable currency in accordance with the Articles of Agreement of the International Monetary Fund and any amendment thereto.

8. The term "without delay" shall mean such period as is normally required for the completion of necessary formalities for the transfer of payments. The said period shall commence on the day on which the request for transfer has been submitted and may on no account exceed one month.

## **Article 2. Promotion and Protection of Investments**

1. Each Contracting State shall encourage and create favourable conditions for investments of investors of the other Contracting State in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such investments.

2. Investments of investors of a Contracting State shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting State in a manner consistent with recognized principles of International Law and the provisions of this Agreement. Neither Contracting State shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in the territory of investors of the other Contracting State. Each Contracting State shall observe any obligation or commitment it may have entered into with regard to investments of investors of the other Contracting State.

3. Once established, investments of investors of either Contracting State shall not be subject to additional performance requirements which may be detrimental to their viability or adversely affect their use, management, conduct, operation, expansion, sale or other disposition.

## **Article 3. Treatment of Investments**

1. With respect to the use, management, conduct, operation, expansion and sale or other disposition of investments made in its territory by investors of the other Contracting State, each Contracting State shall accord treatment no less favorable than that it accords, in similar situations, to investments of its own investors or investors of any third state, whichever is most favorable to those investments.

2. However, the provisions of this Article shall not be construed so as to oblige one Contracting State to extend to the investors of the other Contracting State the benefit of any treatment, preference or privilege resulting from:

(a) any customs union, economic union, free trade area, monetary union, or any other form of regional economic arrangement or other similar international agreement, to which either of the Contracting States is or may become a party;

(b) any international, regional or bilateral agreement or other similar arrangement or any domestic legislation relating wholly or mainly to taxation.

## **Article 4. Compensation for Losses**

1. Except where Article 6 applies, when investments made by an investor of either Contracting State suffers a loss owing to war or other armed conflict, a state of national emergency, revolt, civil disturbances, insurrection, riot or other similar events in the territory of the other Contracting State, he shall be accorded by the latter Contracting State, treatment, as regards restitution, indemnification, compensation or other settlement, not less favorable than that the latter Contracting State accords to its own investors or investors of any third state, whichever is most favorable to the investor.

2. Without prejudice to paragraph 1, investors of one Contracting State who in any of the events referred to in that

paragraph suffers a loss in the territory of the other Contracting State resulting from:

(a) requisitioning of its investments or part thereof by its forces or authorities;

(b) destruction of its investments or part thereof 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 restitution or compensation which in either case shall be prompt, adequate and effective for the damages or losses they have suffered.

## **Article 5. Expropriation**

1. (a) Investments made by investors of any of the Contracting States in the territory of the other Contracting State shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalization, expropriation or dispossession (hereinafter collectively referred to as "expropriation") by the other Contracting State except for a public purpose related to the internal needs of that Contracting State and against prompt, adequate and effective compensation and on condition that such measures were taken on a non-discriminatory basis and in accordance with due process of law of general application.

(b) Such compensation shall amount to the actual value of the expropriated investments and shall be determined and computed in accordance with internationally recognized principles of valuation on the basis of the fair market value of the expropriated investment at the time immediately before the expropriatory action was taken or the impending expropriation became publicly known, whichever is earlier (hereinafter referred to as the "Valuation date"). Such compensation shall be calculated in a freely convertible currency to be chosen by the investor, on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at a commercial rate established on a market basis, however, in no event less than the prevailing LIBOR - rate of interest or equivalent, from the date of expropriation until the date of payment.

2. For further certainty, expropriation shall include situations where a Contracting State expropriates the assets of a company or enterprise that is incorporated or established under the laws in force in its own territory in which an investor of the other Contracting State has an investment, including through the ownership of shares, stocks, debentures or other rights or interests.

3. For the purposes of this Agreement, the term "expropriation" shall also include any interventions or regulatory measures by a Contracting State that have a de facto expropriatory effect, in that their effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment, such as the freezing or blocking of the investment, levying of arbitrary or excessive taxes on the investment, compulsory sale of all or part of the investment, or other comparable measures.

## **Article 6. Transfer of Payments Related to Investments**

1. Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of investments and payments in connection with them into and out of its territory.

2. Transfers of payments under paragraph (1) shall be affected without delay or restrictions and, except in the case of payments in kind and/or a freely convertible currency. In case of such delay in effecting the required transfers, the investor affected shall be entitled to receive interest for the period of such delay.

## **Article 7. Subrogation**

1. If a Contracting State or its designated agency (the "Indemnifying Party"), makes a payment under an indemnity or guarantee it has assumed in respect of an investment in the territory of the other Contracting State (the "Host State"), the Host State shall recognize:

(a) the assignment to the Indemnifying Party by law or by legal transaction of all the rights and claims resulting from such an investment;

(b) the right of the Indemnifying Party to exercise all such rights and enforce such claims and to assume all obligations related to the investment by virtue of subrogation.

2. The Indemnifying Party shall be entitled in all circumstances to the same treatment in respect of:

(a) the rights and claims acquired and the obligations assumed by it by virtue of the assignment referred to in paragraph 1 above;

(b) any payments received in pursuance of those rights and claims.

As the original investor was entitled to receive by virtue of this Agreement in respect of the investment concerned.

## **Article 8. Settlement of Disputes between a Contracting State and an Investor**

1. Disputes arising between a Contracting State and an investor of the other Contracting State in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably.

2. If such disputes cannot be settled within a period of six months from the date at which either party to the dispute requested amicable settlement by delivering a notice in writing to the other party, the dispute shall be submitted for resolution, at the election of the investor party to the dispute, through one of the following means:

(a) in accordance with any applicable, previously agreed dispute-settlement procedures;

(b) to international arbitration in accordance with the following paragraphs of this Article.

3. In the event that an investor elects to submit the dispute for resolution to international arbitration, the investor shall further provide its consent in writing for the dispute to be submitted to one of the following bodies:

(a) (1) The International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (the "Washington Convention"), if both Contracting States are parties to the Washington Convention and the Washington Convention is applicable to the dispute;

(2) The Centre, under the rules governing the Additional Facilities for the Administration of Proceedings by the Secretariat of the Centre (the "Additional Facility Rules"), if the Contracting State of the investor or the Contracting State to the dispute, but not both, is a party to the Washington Convention;

(b) an arbitral tribunal established under the Arbitration Rules (the "Rules") of the United Nations Commission on International Trade Law (UNCITRAL), as those Rules may be modified by the parties to the dispute (the Appointing Authority referred to under Article 7 of the Rules shall be the Secretary General of the Centre);

(c) an arbitral tribunal constituted pursuant to the arbitration rules of any arbitral institution mutually agreed upon between the parties to the dispute.

4. Notwithstanding the fact that the investor may have submitted a dispute to binding arbitration under paragraph 3, it may, prior to the institution of the arbitral proceeding or during the proceeding, seek before the judicial or administrative tribunals of the Contracting State that is a party to the dispute, interim injunctive relief for the preservation of its rights and interests, provided it does not include request for payment of any damages.

5. In any proceedings, judicial, arbitral or otherwise or in an enforcement of any decision or award, concerning an investment dispute between a Contracting State and an investor of the other Contracting State, a Contracting State shall not assert, as a defense, its sovereign immunity. Any counterclaim or right of set-off may not be based on the fact that the investor concerned has received or will receive, pursuant to an insurance contract, indemnification or other compensation for all or part of its alleged damages from any third party whomsoever, whether public or private, including such other Contracting State and its subdivisions, agencies or instrumentalities.

## **Article 9. Settlement of Disputes between the Contracting States**

1. The Contracting States shall, as far as possible, settle any dispute concerning the interpretation or application of this Agreement through consultations or other diplomatic channels.

2. If the dispute has not been settled within six months following the date on which such consultations or other diplomatic channels were requested by either Contracting State and unless the Contracting States otherwise agree in writing, either Contracting State may, by written notice to the other Contracting State, submit the dispute to an ad hoc arbitral tribunal in accordance with the following provisions of this Article.

3. The arbitral tribunal shall be constituted as follows: each Contracting State shall appoint one member, and these two members shall agree upon a national of a third state as Chairman of the arbitral tribunal to be appointed by the two

Contracting States. Such members shall be appointed within two months, and such Chairman within four months, from the date on which either Contracting State has informed the other Contracting State that it intends to submit the dispute to an arbitral tribunal.

4. If the periods specified in paragraph 3 above have not been complied with, either Contracting State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President of the International Court of Justice is a national of either Contracting State 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 State shall be invited to make the necessary appointments.

5. The arbitral tribunal shall take its decision by a majority of votes. Such decision shall be made in accordance with this Agreement and such recognized rules of international law as may be applicable and shall be final and binding on both Contracting States. Each Contracting State shall bear the costs of the member of the arbitral tribunal appointed by that Contracting State, as well as the costs for its representation in the arbitration proceedings. The expenses of the Chairman as well as any other costs of the arbitration proceedings shall be borne in equal parts by the two Contracting States. However, the arbitral tribunal may, at its discretion, direct that a higher proportion or all of such costs be paid by one of the Contracting States. In all other respects, the arbitral tribunal shall determine its own procedure.

## **Article 10. Relations between Contracting-states**

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

## **Article 11. Application of other Rules**

If the legislation of either Contracting State or obligations under international law existing at present or established hereafter between the Contracting States, in addition to this Agreement, contain rules, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favorable than is provided for by this Agreement, such rules shall to the extent that they are more favorable to the investor prevail over this Agreement.

## **Article 12. Scope of the Agreement**

This Agreement shall apply to all investments, whether existing at or made after the date of its entry into force by investors of either Contracting State in the territory of the other Contracting State.

## **Article 13. Entry Into Force**

Each Contracting State shall notify the other in writing when its constitutional requirements for the entry into force of this Agreement have been fulfilled, and the Agreement shall enter into force on the thirtieth day after the date of receipt of the later notification.

## **Article 14. Duration and Termination**

1. This Agreement shall remain in force for a period of ten (10) years and shall continue in force thereafter for similar period or periods unless, at least one year before the expiry of the initial or any subsequent period, either Contracting State notifies the other Contracting State in writing of its intention to terminate this Agreement.

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) years from the date of termination of this Agreement.

In witness whereof, the respective plenipotentiaries of both Contracting States have signed this Agreement.

Done at Nay Pyi Taw on 6th August 2008 in two originals in the Myanmar, Arabic and English languages, all texts being equally authentic. In case of divergency, the English text shall prevail.

For the Government of the Union of Myanmar

H.E.U Soe Tha Minister

Ministry of National Planning and Economic Development

For the Government of the State of Kuwait

H.E. Mustafa Jassim Al-Shamally Minister

Ministry of Finance