

AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE GOVERNMENT OF THE REPUBLIC OF CHILE FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of Malaysia and The Republic of Chile, hereinafter referred to as the Contracting Parties;

Desiring to expand and deepen economic and industrial cooperation on a long term basis, and in particular, to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognising the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties;

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement:

(a) "investments" means every kind of asset and in particular, though not exclusively, includes:

(i) Movable and immovable property and any other property rights such as mortgages, liens and pledges;

(ii) Shares, stocks and debentures of companies or interests in the property of such companies;

(iii) A claim to money or a claim to any performance having financial value;

(iv) Intellectual and industrial property rights, including copyrights, patents, trademarks, tradenames, industrial designs, trade secrets, processes, and know-how and goodwill;

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

(b) The said term "investments" shall refer to all investments approved by the appropriate Ministries or authorities of the Contracting Parties in accordance with its legislation and national policies.

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

(c) "investor" means:

(i) Any natural person possessing the nationality of the Contracting Party in accordance with its laws; or

(ii) Any corporation, partnership, trust, joint-venture, organisation, association or enterprise incorporated or duly constituted in accordance with applicable laws of that Contracting Party and have their seat territory of that same and operations in the Contracting Party.

(d) "returns" means the amount yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees.

(e) "territory" means:

(i) With respect to Malaysia, all land territory comprising the Federation of Malaysia, the territorial sea, its bed and subsoil, and airspace above.

(ii) With respect to the Republic of Chile includes the areas of the exclusive economic zone and the continental shelf insofar

as the international law permits the Contracting Party to exercise sovereign rights or jurisdiction in these areas.

(f) "freely convertible currency" means the United States Dollar, Pound Sterling, Deutschmark, French Franc, Japanese Yen, or any other currency that is widely used to make payments for international transactions and widely traded in the international principal exchange markets.

Article 2. Promotion and Protection of Investment

1. Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory and subject to its rights to exercise powers conferred by its laws, regulations and national policies, shall admit such investments.

2. Investments of investors of either Contracting Party shall at all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

Article 3. Most-favoured-nation Provisions

1. Investments made by investors of either Party in the territory of the other Contracting Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.

2. Investors of one the territory of the Contracting Party whose investments in other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national 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 investors of any third State.

3. The provision of this Agreement relative to the granting of treatment not less favourable than that accorded to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from:

(a) Any existing or future customs union or free trade area or a common market or a monetary union or similar international regional cooperation agreement or other to which either forms of of the Contracting Parties is or may become a party; or 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

(b) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Article 4. Expropriation

Neither Contracting Party shall take any measures of expropriation, nationalisation or any other dispossession, having an effect equivalent to nationalisation or expropriation against the investments of an investor of the other Contracting Party except under the following conditions:

(a) The measures taken for a lawful purpose and under due process of law;

(b) The measures are non discriminatory;

(c) The measures are accompanied by provisions for the payment of prompt, adequate, and effective compensation. Such compensation shall be based on the market value of the investments affected immediately before the measure of dispossession became public knowledge, and it shall be freely transferable in freely usable currencies from the Contracting Party. Any unreasonable delay in payment of compensation shall carry an appropriate interest at a commercially reasonable rate as agreed upon by both parties or at such rate as prescribed by law.

Article 5. Repatriation of Investment

1. Each Contracting Party shall, subject to its laws, regulations and national policies allow without unreasonable delay the transfer in any freely usable currency:

(a) The net profit, dividends, royalties, technical assistance and technical fees, interest and other usual investment income from any of the investors of the other Contracting Party;

- (b) The proceeds from total or partial liquidation of any investment made by investors of the other Contracting Party;
 - (c) Funds in repayment of borrowings/ loans given by investors of one Contracting Party which both Contracting Parties have recognized as investment; and
 - (d) The earnings and other compensations of nationals of the Contracting Party who are employed and allowed to work in connection with an investment in the territory of the other Contracting Party.
2. The exchange rate applicable to such transfer in paragraph (1) of this Article shall be the rate of exchange prevailing at the time of remittance.
3. The Contracting Parties undertake to accord to transfers referred to in paragraph (1) of this Article a treatment as favourable as that accorded to the transfer originating from investments made by investors of any third State.

Article 6. Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. 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 18 March 1965 any dispute arising between that Contracting Party and an investor of the other Contracting Party which involves:

(i) An obligation entered into by that Contracting Party with the investor of the other Contracting Party regarding an investment by such investor: or

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

2. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by investors 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.

3.

(i) If any dispute of the type referred to in paragraph 1 should arise, the Contracting Party and the investor concerned shall seek to resolve the dispute amicably through consultation and negotiation.

(ii) If the dispute cannot thus be resolved within three (3) months from the date at which it occurred, it shall be submitted at the request of the investor:

(a) Either to the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is party to the dispute; or

(b) To international arbitration as provided for in paragraph 1 of this Article.

(iii) Once the investor has submitted the dispute to either the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is party to the dispute; or to international arbitration as provided under paragraph 1 of this Article, the election of one or the other procedure will be final.

(iv) The arbitration decision shall be final and binding on both parties.

(v) In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure, in the case where the dispute is referred to international arbitration, the opinion of the investor concerned shall prevail. The Contracting Party 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 or will receive, pursuant to an insurance or guarantee contract, an indemnity or other compensation for all or part of his or its losses and damages.

4. Neither Contracting Party shall pursue through diplomatic channels a dispute referred to the Centre unless:

(i) 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

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

Article 7. Settlement of Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this agreement should, if possible, be settled through diplomatic channels.
2. If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.
3. Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two 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 two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.
4. If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, 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 members 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.
5. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. 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, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

Article 8. Subrogation

If a Contracting Party makes a payment to one of its investors under a guarantee it has accorded in respect of an investment, the other Contracting Party shall recognize, without prejudice to the rights of the first contracting party under article 6, the transfer of any right or title of that Contracting Party to the investor and the former subrogation of the first contracting party to any right or title.

Article 9. Scope

This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its laws, rules or regulations by investors of the other Contracting Party, whether made before or after the entry into force of this Agreement. however, it shall not apply to differences or disputes which have arisen prior to its entry into force.

Article 10. Entry Into Force , Duration and Termination

1. This Agreement shall enter into force thirty (30) days after the date on which the Governments of the Contracting Parties that have notified each other have complied with their constitutional requirements for the entry into force of the Agreement.
2. This Agreement shall remain in force for a period of ten (10) years and shall continue in force unless it is denounced in accordance with paragraph (3) of this article.
3. A Contracting Party may terminate this Agreement at any time after the initial period of ten (10) years by written notice to the other Contracting Party with one (1) year in advance.
4. With respect to investments made or acquired prior to the date of termination of this Agreement, the provisions of this Agreement shall remain in force for a period of ten (10) years from such date of termination.

Done in duplicate at Kuala Lumpur this day, 11 November 1992 in English, Malay and English languages, all texts being equally authentic. in case of divergence, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF CHILE

FOR THE GOVERNMENT OF MALAYSIA

PROTOCOL

At the signing of the Agreement between the Republic of Chile and the Government of Malaysia for the promotion and protection of investments, the undersigned Plenipotentiaries have agreed on the following provisions, which is considered as an integral part of this Agreement.

- a) Notwithstanding the provisions of article 5, the Republic of Chile reserves the right to authorize the repatriation of capital at the latest after three years have elapsed from the date of its entry by the investor.
- b) The special programme under Chilean exchange operations for the conversion of external debt, the Republic of Chile shall accord to Malaysian investors the right to return any investment made under this programme, after 10 years have elapsed since the date of their placement, and to implement the transfer of profits, after 4 years. profits of the first four years shall be transferable to the fifth year in annual instalments of 25 per cent respectively. this shall not prejudice the right of the investor to choose the reduction of the terms specified in the special rules established by the Central Bank of Chile.
- c) In no case shall the Malay investors, in respect of matters of transfers, less favourable to investors of any third State. if, subsequently develop new laws and regulations, such investors shall not be in a worse situation which were in the date of initiation of the investment.
- d) The nationals of one Contracting Party, having their residence in the territory of the other Contracting Party in which it is situated their investment, may, with respect to articles 5 and 6 of this Agreement, the treatment accorded to nationals of that Contracting Party, provided that the investment has been a transfer of capital from outside the respective Territory.
- e) This Protocol shall remain in force for a period of ten years and shall be extended by the period is as agreed by both contracting parties or until the date on which the Republic of Chile to liberalize their exchange rate policy which, whichever occurs first.

Done at Kuala Lumpur on 11 November 1992 in originals in the English language, Spanish and Malay, each text being equally authentic. in case of divergence, the English text shall prevail.