



# **Bilateral Investment Treaty between Malaysia and Indonesia**

**DEZAN SHIRA & ASSOCIATES**

Corporate Establishment, Tax, Accounting & Payroll Throughout Asia

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Dezan Shira & Associates is a specialist foreign direct investment practice, providing corporate establishment, business advisory, tax advisory and compliance, accounting, payroll, due diligence and financial review services to multinationals investing in emerging Asia.

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

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

Bearing in mind the friendly and cooperative relations existing between the two countries and their peoples;

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;

Considering the Agreement amongst the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the promotion and protection of investments signed on 15<sup>th</sup> December 1987;

Have agreed as follows:

**ARTICLE I**

**Definitions**

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1. For the purpose of this Agreement :
  - (a) "Investments" means any kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, in conformity with the laws, regulations and national policies of the latter, including, but not exclusively:

- (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 rights with respect to copyrights, patents, trademarks, tradenames, industrial design, trade secrets, technical 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.

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 approval, if any, granted in respect of the assets originally invested.

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

- (c) “investors” means :
- (i) any natural persons who are citizens of either Contracting Party in accordance with its law who invest in the territory of the other Contracting Party; 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 who invests in the territory of the other Contracting Party;
- (d) “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 Indonesia, the territory of the Republic of Indonesia as defined in its laws and parts of the continental shelf and adjacent seas over which the Republic of Indonesia has sovereignty, sovereign rights or jurisdiction in accordance with the 1982 United Nations Convention on the Law of the Sea.
- (e) “freely usable currency” means the United States dollar, pound sterling, Deutschemark, French franc, Japanese yen, Netherlands guilders or any other currency that is widely used to make payments for international transactions and widely traded in the international principle exchange markets.

## **ARTICLE II**

### **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, in accordance with its laws, regulations and national policies, shall admit such investments.
2. Investments of investors of each Contracting Party shall at all time be accorded equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party.

## **ARTICLE III**

### **Most-Favoured-Nation Provisions**

1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party and/or returns accrued, shall receive treatment which is fair and equitable, and not less favourable than that accorded to any third State.
2. Each Contracting Party shall not in its territory subjects investors of the other Contracting Party, as regard their management, use, enjoyment or disposal of investment, as well as to any activity connected with these investments, to treatment less favourable than that which it 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 agreement or other forms or regional cooperation to which either 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 IV**

##### **Expropriation**

Each Contracting Party shall not take any measures of expropriation, nationalization or any other dispossession, having effect equivalent to nationalization or expropriation against the investments of an investor of the other Contracting Party except under the following conditions:

- (a) the measures are taken for a lawful purposes or public 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 amount to the fair market value immediately before the measure of dispossession became public knowledge. Such market value shall be determined in accordance with internationally acknowledged practices and methods or, where such fair market value cannot be determined, it shall be such reasonable amount as may be mutually agreed between the Contracting Parties hereto, and it shall be freely transferable in freely usable currencies from Contracting Party. Any unreasonable delay in payment of compensation shall carry an interest at prevailing commercial rate as agreed upon by both parties unless such rate is prescribed by law.

#### **ARTICLE V**

## **Compensation for Losses**

1. Investors of one Contracting Party, whose investments in the 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 restitutions, indemnification, compensation or other settlement.
2. The treatment shall not be less favourable than that which the latter Contracting party accords to investors of any third State.

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## **ARTICLE VI**

### **Repatriation of Investment**

1. Each Contracting Party shall, subject to its laws, regulations and national policies in respect to investments by investors of the other Contracting Party allow without unreasonable delay the transfer of:
  - (a) the net profits, dividends, royalties, technical assistance and technical assistance and technical fees, interest and other current income, accruing from any investment of the investors of the other Contracting Party;
  - (b) the proceeds from the 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 to the investors of the other Contracting Party which both Contracting parties have recognised as investment; and

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- (e) the earnings and other compensation of investors of the other Contracting Party who are employed and allowed to work in connection with an investment in the territory of the other Contracting Party.
- 2. To the extent the investor of either Contracting Party has not made another arrangement with the appropriate authorities of the other Contracting Party in whose territory the investment is situated, currency transfer made pursuant to paragraph 1 of this Article shall be permitted in the currency of the original investment or any other freely usable currency.
- 3. The exchange rates applicable to such transfer in paragraph 1 of this Article shall be the rare exchange prevailing at the time of remittance.

## **ARTICLE VII**

### **Settlement of Investment Disputes Between A Contracting Party And An Investor Of The Other Contracting Party**

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- 1. Any dispute arising between a Contracting Party and an investor of the other Contracting Party which involve:
  - (i) an obligation entered into by that Contracting Party with the investors 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,shall be resolved amicably through consultation and negotiation.
- 2. In event that such a dispute cannot be settled amicably within six (6) months from the date of the written notification of such dispute, the investor may refer the dispute to either:

- (a) the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Contracting Party that is a party to the dispute; or
  - (b) 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.
3. Each Contracting Party shall not pursue through diplomatic channels any dispute referred to arbitration 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 VIII**  
**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, with the approval of 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 cost 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 IX**

**Subrogation**

If a Contracting Party or any of its designated agency has granted any guarantee against non-commercial risks in respects of an investment by its investor in the territory of the other Contracting Party and has made payment to such investor under that guarantee, the other Contracting Party shall recognize the transfer of the rights of such investor to the former Contracting Party or any of its designated agency. The subrogation of the latter shall not exceed the original rights of such investor.

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**ARTICLE X**

**Applicability of this Agreement**

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This Agreement shall apply to investments by investors of Malaysia in the territory of the Republic of Indonesia which have been previously granted admission in accordance with the Law No. 1 of 1967 concerning Foreign Investment and any law amending or replacing it, and to investments by investors of the Republic of Indonesia in the territory of Malaysia priory to as well as after the entry into force of this Agreement.

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**ARTICLE XI**

**Application of Other Provisions**

Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, nothing in this Agreement shall prevent either Contracting Party or any of its investors who own investments in the territory of the other contracting Party from taking advantage of whichever rules are more favourable to this case.

**ARTTIVLE XII**

### **Consultation and Amendment**

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1. Each Contracting Party may request that a consultation be held on any matter that both Contracting Parties agree to discuss.
2. This Agreement may amended at any time, if it deems necessary, by mutual consent.

### **ARTIVCLE XIII**

#### **Entry into Force, Duration and Termination**

1. This Agreement shall enter into force thirty (30) days after the later date on which the governments of the Contracting Parties have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled. The later date shall refer to the date on which the last notification letter is sent.
2. This Agreement shall remain in force for a period of ten (10) years, and shall continue in force thereafter for another period of 10 years and so forth, unless terminated in accordance with paragraph 3 of this Article.
3. Each 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 anytime thereafter.
4. With respect to investments made or acquired prior to the date of termination of this Agreement, the provisions of Article I to XI of this Agreement shall continue to be effective for a period of ten (10) years from such date of termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Jakarta, Indonesia, this 22<sup>nd</sup> day of January 1994, in Bahasa Malaysia, Bahasa Indonesia and English, all texts being equally authentic. In case of any divergency of interpretation, the English text shall prevail.

**For The Government  
Of Malaysia**

**For The Government of  
The Republic Of Indonesia**

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**RAFIDAH AZIZ**  
Minister of International  
Trade and Industry

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**SOESILO SIERDARMAN**  
Acting Minister for  
Foreign Affairs

### **PROTOCOL**

On signing the Agreement between the Government of Malaysia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, the undersigned have, in addition, agreed on the following provisions:

- (a) The term “national policies”:
  - (i) in respect of Malaysia shall mean any policies and administrative guidelines issued by the Government of Malaysia;  
and

(ii) in respect of the Republic of Indonesia shall mean the policies of Indonesia which have legal effect on foreign investment matters.

(b) In connection with Article 1, "Definitions", it has been the understanding that the territorial definition provided in paragraph 1(d ) (i) and paragraph 1(d) (ii) shall not include any part of territory or maritime areas over which the two Contracting Parties have claims to be settled.

This protocol shall constitute an integral part of the said Agreement.

Done in duplicate at Jakarta, Indonesia, this 22<sup>nd</sup> day of January 1994, in Bahasa Malaysia, Bahasa Indonesia and English, all texts being equally authentic. In case of divergency of interpretation, the English text shall prevail.

**For The Government  
Of Malaysia**

**For The Government of  
The Republic Of Indonesia**

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**RAFIDAH AZIZ**  
Minister of International  
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