

Our reference VASAS/341736

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Your Excellencies,

Notice of Dispute under the 1987 ASEAN Agreement for the Promotion and Protection of Investments

We write as legal representatives of the estate of Ms Boonsom Boonyanit (the **Investor**) to notify you of the existence of a dispute between the Investor and Malaysia under the 1987 ASEAN Agreement for the Promotion and Protection of Investments (the **Treaty**). The Treaty was signed on 15 December 1987 and entered into force on 2 August 1998. This Notice of Dispute (**Notice**) is issued pursuant to Article X.1 of the Treaty. If the settlement negotiations required by the Treaty are unsuccessful or prove to be futile, the Investor will submit the dispute to arbitration pursuant to Article VII.2 of the Treaty.

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Ms Boonyanit and her estate attract protection under the Treaty

Ms Boonyanit (now deceased) and her estate qualify as nationals for the purposes of Article I.1 of the Treaty, which provides that "[t]he term 'nationals' shall be defined in the respective Constitutions and laws of each of the Contracting Parties." Ms Boonyanit was solely a Thai citizen throughout the entirety of her life, she held a Thai passport, and her estate is treated as a Thai entity under Thai law. Her estate therefore qualifies for protection under Article I.1 of the Treaty.

Ms Boonyanit's investment in Malaysia

In 1967, Ms Boonyanit acquired significant property holdings in Malaysia¹ and she registered as the owner of such properties under Malaysia's Torrens Title land registration system. She held that property from 1967 until her death on 23 May 2000. These property holdings constitute an "investment" under Article I.3.a of the Treaty, which defines "investment" expansively to include, *inter alia*, "every kind of asset and in particular ... (a) movable and immovable property and any other property rights such as mortgages liens and pledges." Ms Boonyanit's estate likewise holds "claims to money" associated with her real estate investment, under Article I.3.c of the Treaty.

In 1988-89, another individual, purportedly named Ms Boonsom Boonyanit and also professedly a Thai national, purported to act as owner of the land and, in that false capacity, sought to sell the land to a third party, Adorna Properties Sdn Bhd (**Adorna**). To do so, she forged Ms Boonsom Boonyanit's signature on the documents transferring the land to Adorna. On 15 December 1988, a sale and purchase agreement was signed, and the lands were transferred to Adorna on 24 May 1989.

Malaysia's unlawful treatment of the Investor

Upon discovering that her property had been fraudulently transferred, Ms Boonyanit challenged the sale, and the re-registration of title that followed it, in the Malaysian courts. In that litigation, it was uncontested that the signature on the relevant documents of transfer had been forged.

During the 1990s, Ms Boonyanit pursued litigation in the Malaysian courts to obtain relief in relation to the fraudulent transfer of her investment. After suffering an initial defeat in the High Court, Ms Boonyanit subsequently prevailed in the Court of Appeal. Notwithstanding the fact that (1) the Court of Appeal's decision set out the correct position under Malaysian law, and (2) the transfer of Ms Boonyanit's investments was unquestionably fraudulent, on 13 December 2000, the Federal Court of Malaysia ultimately overruled the Court of Appeal and held that Adorna had acquired immediate indefeasible title to the properties notwithstanding the fraudulent transfer. The Federal Court's ruling contravened the operation of Malaysia's Torrens Title system and the National Land Code 1965, reversed settled law in Malaysia, and denied Ms Boonyanit the value and enjoyment of her investment. On 27 August 2004, the Federal Court refused to revise its decision under the relevant Malaysian court rules, exhausting all domestic legal remedies available to the Investor. In light of the Federal Court's ruling, Adorna developed Ms. Boonyanit's real estate investment to a significant profit.

The Federal Court's decision in *Adorna* was patently erroneous and unjust, so much so that the Federal Court itself subsequently confirmed as much. Thus, in the 21 January 2010 *Tan Ying Hong v Tan Sian San* decision, the Federal Court confirmed that a *bona fide* purchaser for value and without notice did **not** acquire an indefeasible title to property from a seller who fraudulently purported to have title to it (*i.e.* the opposite conclusion reached in the *Adorna* case). In so doing, the Federal Court confirmed that the decision reached in Ms Boonyanit's case was profoundly wrong and had no basis whatsoever under Malaysian law. Indeed, the Federal Court itself confirmed that the *Adorna* decision had wrongly denied Ms Boonyanit the rights to and enjoyment of her investment. In particular, the decision expressly acknowledged that the *Adorna* decision:

- (a) disturbed what "was once thought to be a settled question of law until the decision of the Court";²

¹ The property is identified as 3606 & 3607 Mukim 18, Tanjung Bungah, Penang, and covers approximately 80,000 square feet.

² *Tan Ying Hong v Tan Sian San and Others*, Federal Court of Malaysia, Civil Appeal No. 029f-10-2009(C), 21 January 2010, at para. 6.

- (b) had "a far reaching effect on the land law and land administration of this country";³
- (c) had been regarded by some as being "*per incuriam* and should not be treated as binding";⁴
- (d) attracted "much criticism ... by academic writers", including on the plain matter of logic that it meant "land owners may, one morning, find themselves no longer owning their landed properties without any fault, doing or knowledge on their part";⁵
- (e) was "clearly wrongly decided";⁶
- (f) fell within a category of cases that can be called "wrong, uncertain, unjust or outmoded or obsolete";⁷ and
- (g) had "clearly gone against the intention of Parliament", "needs to [be] remedied forthwith" and was "highly regrettable".⁸

Indeed, the Federal Court expressly admitted that "the error committed by" it in Ms Boonyanit's case against Adorna was "obvious and blatant".⁹ By the Federal Court's own admissions, therefore, it is clear that the Malaysian courts acted wrongfully and egregiously when denying Ms Boonyanit the rights to and enjoyment of her investment.

Malaysia's Acts and Omissions Violate the Treaty

The Treaty imposes upon Malaysia a number of obligations in relation to its treatment of Ms Boonyanit's investment. In particular, Article III of the Treaty, entitled "General Obligations", requires, *inter alia*, that Malaysia:

- (a) accord investments "at all times . . . fair and equitable treatment" (Article III.2);
- (b) provide investments with "full protection and [sic] in the territory of the host country" (Article III.2); and
- (c) "observe any obligation arising from a particular commitment it may have entered into Title with regard to a specific investment of nationals or companies of the other Contracting Parties" Article III.2).

Malaysia's commitment to protect the investments of Thai investors is reiterated in Article IV, entitled "Treatment", which entitles Thai investments, including Ms Boonyanit's property investments, to be provided with:

- (a) "fair and equitable treatment" within Malaysia (Article IV.2);
- (b) "full protection" (Article IV.1);
- (c) most-favoured nation treatment (Article IV.2);¹⁰
- (d) protection from "unjustified or discriminatory measures" impairing "the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments;" (Article IV.1); and

³ *Id.*

⁴ *Id.* at para. 25.

⁵ *Id.* at para. 26.

⁶ *Id.* at para. 27.

⁷ *Id.* at para. 29.

⁸ *Id.* at para. 40.

⁹ *Id.* at para. 11.

¹⁰ This provision in turn allows the Investor to invoke protections in other treaties signed by Malaysia that afford an investor from the States with which Malaysia concluded those other treaties more favourable treatment than that afforded to the Investor under the Treaty. The Investor notifies Malaysia of its right to invoke Article IV.2 of the Treaty to rely on such protections in other treaties in this arbitration.

- (e) freedom from "expropriation nationalisation or any measure equivalent thereto . . . except for public use, or public purpose, or in the public interest, and under due process of law, on a non-discriminatory basis and upon payment of adequate compensation." (Article VI).

In light of the foregoing facts and circumstances described in this Notice, amongst others, it is clear that Malaysia contravened its obligations under the Treaty in relation to Ms Boonyanit's investment. For example, the Federal Court's decision in *Adorna* constitutes a breach of Malaysia's obligation to accord Ms Boonyanit's investment fair and equitable treatment in accordance with Article VI.2 of the Treaty. Likewise, and again only by way of example, Malaysia failed to provide Ms Boonyanit's investment with full protection, in breach of Article IV.1 of the Treaty, engaged in unjustified measures impairing management, maintenance, use, enjoyment and disposition of Ms Boonyanit's investment, in breach of Article IV.1 of the Treaty, and engaged in measures equivalent to expropriation without justification, in breach of Article VI of the Treaty.

In light of the foregoing, the Investor is left with no other option but to notify you of the aforementioned dispute. While the Investor is prepared to commence arbitration, it likewise is open to discussing an amicable settlement pursuant to Article X.1 of the Treaty. Failing such an amicable settlement, however, the Investor will commence international arbitration against Malaysia to recover its losses following the expiry of the six-month negotiating period, in accordance with Article X.2 of the Treaty. Without prejudice to further assessments to be made by expert quantum witnesses, the Investor currently considers the material damage incurred in relation to Ms Boonyanit's investment to be several tens of millions of dollars.

The Investor's offer to negotiate is made without prejudice to any position it may take subsequently in any legal proceedings, and all rights are reserved in this respect.

Yours faithfully



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