Agreement between the Swiss Confederation and the Republic of Cuba on the Promotion and Reciprocal Protection of Investments

Preamble

The Swiss Federal Council and the Government of the Republic of Cuba,

Desiring to intensify economic cooperation to the mutual benefit of both States;

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States;

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement:

(1) The term "investor" refers with regard to either Contracting Party to

(a) any natural person who, according to the law of that Contracting Party, is considered to be its citizen;

(b) any juridical person which is constituted or otherwise organised under the law of that Contracting Party and is engaged in substantive business operations in that Contracting Party;

(c) any juridical person not established under the law of that Contracting Party

(i) in which more than 50 per cent of the equity interest is beneficially owned by persons of that Contracting Party; or

(ii) in relation to which persons of that Contracting Party have the power to name a majority of its directors or otherwise legally direct its action.

(2) The term "investments" shall include every kind of asset and particularly:

(a) movable and immovable property as well as any other rights in rem, such as mortgages, liens, pledges;

(b) shares, parts or any other kind of participation in companies;

(c) claims to money or to any performance having an economic value;

(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

A change in the form in which assets are invested does not affect their character as investments.

(3) The term "returns" means the amounts yielded by an. investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees.

(4) "Territory" means the territory of each Contracting Party and includes the maritime areas adjacent to the coast of the State concerned, i.e. the exclusive economic zone and the continental shelf, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

Article 2. Scope

This Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its legislation, prior to or after the entry into force of the Agreement, by investors of the other Contracting Party. It shall, however, not be applicable to disputes which have arisen prior to its entry into force.

Article 3. Promotion, Admission

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) Each Contracting Party shall grant, in accordance with its laws and regulations, the necessary permits in connection with such an investment, including permits for the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance, as well as authorisations required for the activities of consultants or experts.

Article 4. Protection, Treatment

(1) Investments and returns of investors of each Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party and shall at all times be accorded fair and equitable treatment. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.

(2) Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.

(3) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union, a common market or a similar regional organisation or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

(4) With respect to the national treatment principle provided for by paragraph (2) of this Article it is understood that the treatment of Cuban State companies or other Cuban national entities may only be used as a comparative basis to the extent such entities operate as investors, i.e., under the law at present applicable, as a party to a joint venture or an international economic association.

Article 5. Free Transfer

(1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of the payments relating to these investments, particularly of:

(a) returns;

(b) repayments of loans;

(c) amounts assigned to cover expenses relating to the management of the investment;

(d) royalties and other payments deriving from rights enumerated in Article 1, paragraph (2), letters (c), (d) and (e) of this Agreement;

(c) additional contributions of capital necessary for the maintenance or development of the investment;

(d) the proceeds of the sale or of the partial or total liquidation of the investment, including possible increment values.

(2) Unless otherwise agreed by the investor with the Contracting Party concerned, transfers shall be made at the exchange rate in force on the date of transfer pursuant to the exchange regulations of the Contracting Party in whose territory the investment was made. Any transfer formalities shall be completed without delay.

(3) For the avoidance of doubt it is confirmed that the right of an investor to freely transfer payments in relation to his investment is without prejudice to any fiscal obligation such an investor may have.

Article 6. Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation 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 that Party, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The investor affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his case and of the valuation of his investment in accordance with the principles set out in this paragraph.

(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 investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors.

Article 7. Compensation for Losses

(1) Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, 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 its own investors or investors of any other State whichever is more favourable to the investor concerned. Resulting payments shall be freely transferable.

(2) Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:

(a) requisitioning of their property by its forces or authorities, or

(b) destruction of their property by its forcC?s or authorities, which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

Article 8. Other Obligations

(1) If provisions in the legislation of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement

(2) Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

Article 9. Principle of Subrogation

Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.

Article 10. Settlement of Disputes between an Investor and the Host State

(1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.

(2) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of

the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce; or

(c) an international arbitrator or ad hoe arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

(3) If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the investor concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

(4) In the event of both Contracting Parties having become members of the Convention of Washington mentioned in paragraph (2), letter (a) above, disputes under this Article may, as an alternative to the procedure mentioned in paragraph (3) above, be submitted by the investor to the International Centre for the Settlement of Investment Disputes.

Article 11. Disputes between Contracting Parties

(1) Where a dispute arises concerning this Agreement, the -Parties agree to consult and negotiate on any matter related to its interpretation or application. The Parties shall accord the necessary consideration and opportunity for such consultations and negotiations.

(2) In the event that the consultations and negotiations fail to resolve the dispute within a period of six months from the date of request for consultations, either of the Parties may, unless they have otherwise agreed, submit the dispute to an arbitral tribunal composed of three members. Each Party shall appoint one arbitrator. The third arbitrator, who will be the Chairman of the arbitral tribunal and a national of a third State, shall be appointed by agreement of the other two arbitrators. If any of the arbitrators are unable to perform the duties, a substituting arbitrator shall be appointed as provided for in this Article.

(3) Should one of the Parties fail to appoint its arbitrator within two months after the other Party has submitted the dispute to an arbitral tribunal and has appointed its arbitrator, the latter Party may request the President of the International Court of Justice to make the corresponding appointment If the latter is prevented from making such appointment or is a national of either Party, the Vice President or the most senior member of the Court shall make such an appointment

(4) In the event that the two arbitrators appointed by the Parties are unable to reach an agreement within two months after their appointment concerning the third arbitrator, either Party may request the President of the International Court of Justice to make the corresponding appointment If the latter is prevented from making such an appointment or is a national of either Party, the Vice President or the most senior member of the Court shall make such an appointment.

(5) The tribunal shall determine its own procedures, unless the Parties agree otherwise. The tribunal shall decide the dispute according to this Agreement and to other relevant agreements between the Parties and to the principles of international law and shall take into account, as may be appropriate, relevant domestic laws.

The tribunal shall reach its decision by a majority of votes. Such a decision shall be final and binding for both Parties.

(6) Each 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 Parties.

Article 12. Entry Into Force

This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective constitutional requirements for the entry into force of this Agreement have been complied with.

Article 13. Duration and Termination

(1) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other.

(2) In respect of investments made before the date of termination of the present Agreement the provisions thereof shall continue to be effective for a further period of twenty years from that date.

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

Done in duplicate at Havana, on June 28th 1996, in the English, Spanish and French languages, each text being equally authentic.

For the Swiss Federal Council

For the Government of the Republic of Cuba