AGREEMENT BETWEEN THE GOVERNMENT OF MALAYSIA AND THE GOVERNMENT OF THE REPUBLIC OF SAN MARINO ON THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of Malaysia and the Government of the Republic of San Marino hereinafter referred to singularly as Party and collectively as Parties;

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

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

Have agreed as follows:

Article 1. Scope

1. This Agreement shall apply to measures adopted or maintained by a Party relating to:

(a) investors of the other Party; and

(b) investments of investors of the other Party.

2. This Agreement shall apply to existing investments at the date of entry into force of this Agreement, as well as to investments made or acquired after the entry into force of this Agreement.

3. This Agreement shall not apply to:

(a) claims or disputes arising out of events which occurred prior to its entry into force;

(b) any taxation measure, except under Article 7 (Expropriation) and Article 9 (Transfers);

(c) subsidies or grants provided by a Party; and

(d) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purpose of this Agreement, a service supplied in the exercise of governmental authority means any service, which is supplied neither on a commercial basis nor in competition with one or more service supplier.

Article 2. Definitions

1. For the purposes of this Agreement:

(a) the term "investments" means every kind of asset, owned or controlled by an investor of a Party, in the territory of the other Party and invested in accordance with the laws, regulations and national policies of the other Party, and in particular, though not exclusively, includes:

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

(ii) bonds, debentures, loans and other forms of debt, including rights derived therefrom;

(iii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;

(iv) claims to money or claims to any performance under written contract having a financial value;

For greater certainty, investment does not mean claims to money that arise solely from:

(AA) commercial contracts for sale of goods or services; or

(BB) the extension of credit in connection with such commercial contracts.

(v) intellectual property rights, including copyrights, patent rights, and rights relating to utility models, trademarks, industrial designs, layout-designs of integrated circuits, new plant varieties, trade names, indications of source or geographical indications, undisclosed information, which are conferred pursuant to laws and regulations of each Party;

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

(vii) an enterprise. An "enterprise" is considered:

Owned by an investor if more than 50 percent of the equity interests in it is beneficially owned by the investor; and

Controlled by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions;

When an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.

For the purpose of the definition of investment in this Article, returns yielded by an investment shall be treated as investments. Any alteration of the form in which assets are invested or reinvested 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) the term "investor of a Party" means a natural person of a Party or an enterprise of a Party which is located in the territory of the Party;

(i) the term "natural person of a Party" means:

In respect of Malaysia, is a national of Malaysia or has the right of permanent residence in Malaysia pursuant to the laws, regulation and national policies of Malaysia; and

In respect of the Republic of San Marino, is a citizen of San Marino or permanently resides in San Marino in accordance with its laws;

(ii) the term "enterprise of a Party" means any entity duly constituted or organised under the law of a Party, and engaged in substantive business operations in the other Party. Such entity may either be for profit or otherwise, privately-owned or controlled or governmentally-owned or controlled, and includes any corporation, trust, partnership, joint venture, sole proprietorship, association, organisation, or company, or branch.

(c) the term "territory" means:

(i) with respect to Malaysia:

(AA) the territories of the Federation of Malaysia;

(BB) the territorial waters of Malaysia and the sea-bed and subsoil of the territorial waters, and the airspace above over which Malaysia has sovereignty; and

(CC) any area extending beyond the limits of the territorial waters of Malaysia, and the sea-bed and subsoil of any such area which has been or may hereafter be designated under the laws of Malaysia and in accordance with international law as an area over which Malaysia has sovereign rights or jurisdiction for the purposes of exploring and exploiting the natural resources, whether living or nonliving.

(ii) with respect to the Republic of San Marino, the territory of the Republic of San Marino, including any other area within which the Republic of San Marino, in accordance with international law, exercises sovereign rights or jurisdiction;

(d) the term "freely usable currency" means any currency that is widely used to make payments for international transactions and widely traded in the international principal exchange markets as defined under the Articles of Agreement of the International Monetary Fund, as may be amended;

(e) the term "returns" means income deriving from an investment and includes, in particular though not exclusively, profits, dividends, interests, capital gains, royalties, patents, licence fees, and other fees.

Article 3. Promotion and Protection of Investments

Each Party shall, in accordance with its laws, regulations and national policies, endeavour to encourage and create favourable conditions for investors of the other Party to invest in its territory.

Article 4. Most-favoured-nation Treatment

1. Each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to investors of a third State and to their investments, with respect to management, conduct, operation, liquidation, sale, transfer or other disposition of investments.

2. Notwithstanding paragraph 1, if a Party accords more favourable treatment to investors of another Party or third State and their investments by virtue of any future agreements or arrangements to which that Party is a party, it shall not be obliged to accord such treatment to investors of another Party and their investments. However, upon request from another Party, it shall accord adequate opportunity to negotiate the benefits granted therein.

3. The treatment, as set forth in paragraph 1 and paragraph 2, shall not include:

(a) any preferential treatment accorded to investors and their investments under any existing bilateral, regional or international agreements, or any forms of economic or regional cooperation with any third State; and

(b) any existing or future preferential treatment accorded to investors and their investments in any agreement or arrangement between or among ASEAN Member States.

4. For greater certainty, this Article shall not apply to procedures regarding Settlement of Investment Disputes between a Party and an Investor of the Other Party which are available in other agreements to which either Party is a party.

Article 5. Minimum Standard of Treatment

1. Each Party shall accord to investments treatment in accordance with the Customary International Law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of fair and equitable treatment and full protection and security in paragraph 1 do not require treatment in addition to or beyond that which is required by the Customary International Law minimum standard of treatment of aliens, and do not create additional substantive rights.

3. A breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Article 6. Compensation for Losses

Investors of one Party whose investments in the territory of the other 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 Party shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Party accords to investors of any third State.

Article 7. Expropriation

1. A Party shall not expropriate or nationalise an investment of an investor of the other Party, either directly or indirectly, except under the following conditions:

(a) the measures are taken for a lawful or public purpose and under due process of law;

(b) the measures are non-discriminatory; and

(c) the measures are accompanied by the payment of prompt, adequate and effective compensation.

2. Such compensation shall be equivalent to the fair market value of the expropriated investments:

(a) at the time when or immediately before the expropriation was publicly announced; or

(b) when the expropriation occurred,

which ever is the earlier.

3. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.

4. The compensation shall be paid without unreasonable delay and it shall be:

(a) Effectively realisable;

(b) Freely transferable; and

(c) Freely convertible into any freely usable currency.

5. Any unreasonable delay in payment of compensation shall carry an interest at prevailing commercial rate unless such rate is prescribed by law.

6. For the avoidance of doubt, any measure of expropriation relating to land shall be defined as in the Parties respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.

7. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the Agreement on Trade Related Aspects of Intellectual Property Rights contained in Annex 1C to the WTO Agreement.

8. Investors of either Party whose Investments have been affected by expropriation shall be entitled to prompt review of their case in relation to the valuation of its investment and the payment of compensation in accordance with the provision of this Article by a judicial authority or any other competent authority of the host Party for the Investment.

9. Article 7 shall be interpreted in accordance with Annex (Expropriation).

Article 8. Subrogation

1. If a Party or its designated agency makes a payment to its own investors under a guarantee or a contract of insurance given in respect of investments in the territory of the other Party, the latter Party shall recognise:

(a) the assignment of any rights or claims from such investors to the former Party or its designated agency; and

(b) that the former Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of those investors.

2. The subrogated rights or claims shall not exceed the original rights or claims of the investor.

3. In the exercise of subrogated rights or claims, a Party or the agency of the Party exercising such rights or claims shall disclose the coverage of the claims arrangement with its investors to the other Party.

Article 9. Transfers

1. Each Party shall allow all transfers relating to investment to be made freely without any unreasonable delay into and out of its territory in a freely usable currency. Such transfers shall include, in particular, though not exclusively:

(a) the initial capital and additional amounts to maintain or increase an investment;

(b) returns;

(c) the proceeds from the total or partial sale or liquidation of any investment made by investors of the other Party;

(d) payments made under a contract including loan payments in connection with investments;

(e) the earnings, remuneration and other compensations of national of one Party who are employed and allowed to work in connection with an investment in the territory of the other Party;

(f) payments made pursuant to Article 6 (Compensation for Losses) and Article 7 (Expropriation); and

(g) payments arising out of the settlement of a dispute by any means.

2. The exchange rates 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 the transfer 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.

4. Notwithstanding paragraphs 1 and 2 above, a Party may delay or prevent a transfer referred to paragraph 1 of this Article through the equitable, non-discriminatory and good-faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities;

(c) criminal or penal offences;

(d) financial reporting or record keeping of transfers to assist law enforcement or financial regulatory authorities;

(e) ensuring compliances with orders or judgments in adjudicatory proceedings;

(f) obligations of investors arising from social security and public retirement plans; or

(g) taxation.

5, Nothing in this Agreement shall affect the rights and obligations of each Party as a member of the International Monetary Fund, including the use of exchange actions which are in conformity with the Articles of Agreement of the International Monetary Fund.

Article 10. Settlement of Investments Disputes between a Party and an Investor of the other Party

1. Any dispute between a Party (hereinafter referred to in this Article as the disputing Party) and an investor of the other Party (hereinafter referred to in this Article as the disputing investor) that has incurred loss or damage by reason of or arising out of an alleged breach of any rights conferred by this Agreement with respect to the investment of the disputing investor, shall as far as possible, be settled by the parties to the dispute in an amicable way.

2. If the dispute cannot be settled within six (6) months from the date on which the dispute has been notified by either party, it shall be submitted upon request and choice of the disputing investor:

(a) to conciliation or arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter referred to in this Article as ICSID) done at Washington on 18 March 1965, in the event both Parties shall have become a party to the Conventions; or

(b) to an international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(c) to the Kuala Lumpur Regional Centre for Arbitration (KLRCA); or

(d) to the competent court of the disputing Party.

Each Party gives its consent to the submission of disputes to conciliation or arbitration set out in subparagraphs (a), (b) or (c). Such consent is conditional upon the submission of the disputing investors written waiver of its right to initiate or continue any proceedings before the courts or administrative tribunals of either Party, or other dispute settlement procedures, any proceedings with respect to any measure alleged to constitute a breach of any rights conferred by this Agreement with respect to the investment of the disputing investor.

3. An investor shall not be entitled to make a claim, if more than three (3) years have elapsed from the date on which the investor first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

4. The disputing investor who intends to submit the dispute pursuant to paragraph 2 shall give to the disputing Party written notice of intent to do so at least ninety (90) days before the claim is submitted. The notice of intent shall specify:

(a) the name and address of the disputing investor and its legal representative;

(b) the specific measures of the disputing Party at issue and a brief summary of the factual and legal basis of the dispute sufficient to present the problem clearly, including the provisions of this Agreement alleged to have been breached;

(c) the relief sought, and where appropriate, the approximate amount of damages claimed; and

(d) the dispute settlement procedures set forth in paragraph 2 which the disputing investor will seek.

5. The applicable arbitration rules shall govern the arbitration referred to in this Article except to the extent modified in this Article.

6. Unless the disputing investor and the disputing Party (hereinafter referred to as the disputing parties) agree otherwise, an arbitral tribunal established under subparagraphs 2(a), (b) and (c) shall comprise three (3) arbitrators, one (1) arbitrator appointed by each of the disputing parties and the third, who shall be the presiding Arbitrator, appointed by the two arbitrators appointed by the disputing parties. If the disputing investor or the disputing Party fails to appoint an arbitrator within sixty (60) days from the date on which the investment dispute was submitted to arbitration, the Chairman of the Administrative Council of ICSID in the case of arbitration referred to in subparagraph 2(a), or the Secretary-General of the Permanent Court of Arbitration (PCA) in the case of arbitration referred to in subparagraph 2(b), or the Director of KLRCA, in the case of arbitration referred to in subparagraph 2(c), on the request of either of the disputing parties, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed from the ICSID, PCA or KLRCA Panel of Arbitrators respectively subject to the requirements of paragraph 7.

7. Unless the disputing parties agree otherwise, the third arbitrator shall not be of the same nationality as the disputing investor, nor be a national of the disputing Party, nor have his or her usual place of residence in the territory of either Party, nor be employed by either of the disputing parties, nor have dealt with the investment dispute in any capacity.

8. The award shall include:

(a) a judgment as to whether or not there has been a breach by the disputing Party of any rights conferred by this Agreement in respect of the disputing investor and its investments; and

(b) a remedy if there has been such breach. The remedy shall be limited to one or both of the following:

(i) payment of monetary damages and applicable interest; and

(ii) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

Costs may also be awarded in accordance with the applicable arbitration rules.

9. The award rendered in accordance with paragraph 8 shall be final and binding upon the disputing parties. The disputing Party shall carry out without delay the provisions of any such award and provide in the disputing Party for the enforcement of such award in accordance with its relevant laws and regulations.

10. Neither Party shall, in respect of a dispute which one of its investors shall have submitted to arbitration in accordance with paragraph 2, give diplomatic protection, or bring an international claim before another forum, unless the other Party shall have failed to abide by, and comply with, the award in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

11. Each disputing Party shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the presiding arbitrator in discharging his arbitral function and the remaining costs of the tribunal shall be borne equally by the disputing parties. The arbitral tribunal may, however, apportion each of such costs between the Parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

12. The provisions of this Article shall not prejudice the Parties from using the procedures specified in Article 11 (Settlement of Disputes between the Parties) where a dispute concerns the interpretation or application of this Agreement.

Article 11. Settlement of Investments Disputes between the Parties

1. Disputes between the Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled by consultation.

2. If the dispute between the Parties cannot thus be settled, within six (6) months it shall upon the request of either Party be submitted to an arbitral tribunal in accordance with the provisions of this Article. Such submission shall be notified in writing to the other Party.

3. Such an arbitral tribunal shall be constituted for each individual case in the following way. Within three months of the receipt through diplomatic channels of the request for arbitration, each Party shall appoint one member of the arbitral

tribunal. Those two members shall then select a national of a third State who on approval by the two Parties shall be appointed Chairman of the arbitral tribunal. The Chairman shall be appointed within two (2) months from the date of appointment of the other two members.

4. If the necessary appointments have not been made within the periods specified in paragraph 3 of this Article, either Party may, in the absence of any other agreement, invite the Secretary-General of the Permanent Court of Arbitration to make the necessary appointments. If the Secretary-General is a national of either party or is otherwise prevented from discharging the said function, the official of the Permanent Court of Arbitration next in seniority who is not a national of either Party or is not otherwise prevented from discharging the said function, 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 Parties. Each Party shall bear the cost of its own member of the arbitral tribunal and of its representation in the arbitral proceeding; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Parties. The arbitral tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties, and this award shall be binding on both Parties.

6. The arbitral tribunal shall determine its own procedures after consultation with the Parties.

Article 12. Confidentiality

Where a Party provides information to the other Party in accordance with this Agreement and designates the information as confidential, the other Party shall maintain the confidentiality of the information. Such information shall be used only for the purposes specified, and shall not be otherwise disclosed without the specific permission of the Party providing the information.

Article 13. Protection of Intellectual Property Rights

1. The protection of intellectual property rights shall be enforced in conformity with the respective national laws and regulations of the Parties and with international agreements signed by both Parties.

2. The use of the name, logo and/or official emblem of either Party on any publication, documents and/or paper is prohibited without the prior written approval of either Party.

Article 14. Amendment

1. Either Party may request, in writing, amendments of all or any part of this Agreement.

2. Any amendment agreed to by the Parties shall be reduced into writing and shall form part of this Agreement.

3. Such amendment shall come into force on such date as may be determined by the Parties.

4. Any amendment shall not prejudice the rights and obligations arising from or based on this Agreement before or up to the date of such amendment.

Article 15. 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 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, unless terminated in accordance with paragraph 3 of this Article.

3. Either Party may by giving one (1) year written notice to the other 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 all of the other Articles 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 at Kuala Lumpur, Malaysia on this 27 September 2012 in two (2) original texts in the English language.

For the Government of Malaysia

DATO'SRI MUSTAPA MOHAMED

MINISTER OF INTERNATIONAL TRADE AND INDUSTRY

For the Government of The Republic of San Marino

DR. MAURO MONTANARI

AMBASSADOR OF SAN MARINO TO MALAYSIA

Annex . Expropriation

1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

2. Article 7 (Expropriation) addresses two situations:

(a) the first situation is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

(b) the second situation is indirect expropriation, where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the financial value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(b) whether the government action breaches the governments prior binding written commitment to the investor whether by contract, licence or other legal document; and

(c) the character of the government action, including, its objective and whether the action is disproportionate to such objective.

4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute indirect expropriation.