

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

The Government of Malaysia and the Government of The Republic of Cuba, hereinafter referred to as the "Contracting 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 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 business initiative with a view to promoting the economic prosperity of both Contracting Parties;

Have agreed as follows:

Article 1.

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, pledges and any other similar rights;

(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 designs, 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;

b) "returns" means the amount yielded by an investment and in particular, though not exclusively, includes profits, interests, capital gains, dividends, royalties or fees;

c) "investor" means any natural or physical or legal person of either Contracting Party making investments in the territory of the other Contracting Party, where:

(i) "natural person" means, any physical person possessing the citizenship of or permanently residing in the territory of a Contracting Party in accordance with its laws;

(ii) "legal person" means, any corporation, partnership, trust, joint-venture, organisation, association or enterprise incorporated or duly constituted in accordance with applicable law of that 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 Cuba, in addition to the areas within the land boundaries, the maritime areas are also included. These include the marine and submarine areas over which the Cuban State has sovereignty or, in accordance with international law, exercises sovereign rights and jurisdiction;

(e) "freely usable currency" means any currency agreed upon by the Parties which is used to effect payments in international transactions and is quoted on the main international markets.

(i) The term "investments" referred to in paragraph 1(a) shall only refer to all investments made in accordance with the law, regulations and national policies of the Contracting Parties.

(ii) 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.

Article 2. Protection and Promotion of Investments

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 by investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party.

Article 3. Most-favored-nation Provisions

1. Investments made by investors of either Contracting Party in the territory of the other 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. Each Contracting Party shall accord to investors of the other Contracting Party, in regard to the management, maintenance, use, enjoyment, or disposal in its territory, of investments a fair and equitable treatment which is no less favourable than that which it accords to investors of any third state.

3. The provisions 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 of 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 4. 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 territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, regards restitution, indemnification, compensation other settlement, no less favourable than that which latter Contracting Party accords to investors of third State.

2. Compensation paid under this Article shall be freely transferable in accordance with Article 6 of this Agreement.

Article 5. Expropriation

Neither Contracting Party shall take any measures of expropriation or nationalization against the investments of an investor of the other Contracting Party except under the following conditions:

(a) the measures are 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 amount to 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 interest at prevailing commercial rate as agreed upon by both parties unless such rate is prescribed by law.

Article 6. Transfers

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

- (a) the net profits, dividends, royalties, 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) capital and additional amounts to maintain or increase the investment;
- (d) 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;
- (e) the net earnings and other compensations of national of one 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 rates applicable to such transfer in the 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 transfers referred to in paragraph 1 of this Article a treatment as favourable as that accorded to transfer originating from investments made by investors of any third State.

Article 7. Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Disputes between an investor of a Contracting Party and the other Contracting Party, in relation to an investment in the territory of that Contracting Party, shall, if possible, be settled by the disputing parties in an amicable way.

2. If such disputes cannot thus be settled within six (6) months from the date either party requested amicable settlement, the investor concerned may submit the dispute to:

- a) the competent courts of the Contracting Party in the territory of which the investment has been made;
- b) the Arbitration Tribunal of the International Chamber of Commerce in Paris; or
- c) an international arbitrator or ad-hoc Arbitration Tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Such Rules can be modified by written agreement of the Parties to the dispute. The awards of the Arbitration Tribunal shall be final and binding on both parties to the dispute.

Article 8. 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 (2) 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 (2) 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 the 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 member 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 9. Subrogation

1. If either Contracting Party or its designated agency makes a payment to one of its investors under any financial guarantee against non-commercial risks it has granted in regard of an investment in the territory of the other Contracting Party, the latter shall recognise:

a) the assignment of any right or claim of that investor, under law or legal transaction, to the first Contracting Party or its designated agency, as well as;

b) that the first Contracting Party or its designated agency is entitled, by virtue of the principle of subrogation to exercise such rights and claims of the said investor, and shall take over the obligations relating to the investment.

2. The subrogated rights and claims shall not exceed the rights and claims which the investor is entitled to exercise.

Article 10. Application to Investments

This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its laws, regulations or national policies by investors of the other Contracting Party prior to as well as after the entry into force of this Agreement. It shall however not be applicable to divergencies or disputes which have arisen prior to its entry into force.

Article 11. Amendment

This agreement may be amended by mutual consent of both Contracting Parties at any time after it is in force. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement prior to the date of such alteration or modification until such rights and obligations are fully implemented.

Article 12. 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, unless terminated in accordance with paragraph 3 of this Article.

3. Either Contracting Party may by giving one (1) years 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 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 in duplicate at Havana, this 26th day of September of 1997 in Spanish, Bahasa Indonesia and the English Language, all texts being equally authentic.

In case of any divergence of interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF MALAYSIA

FOR THE GOVERNMENT OF THE REPUBLIC OF CUBA