

[TRANSLATION – TRADUCTION]

AGREEMENT ON THE PROMOTION AND RECIPROCAL PROTECTION
OF INVESTMENTS BETWEEN THE UNITED MEXICAN STATES AND
THE KINGDOM OF SPAIN

The United Mexican States and the Kingdom of Spain, hereinafter referred to as "the Contracting Parties";

Wishing to intensify economic cooperation for the mutual benefit of both countries;

Intending to create favourable conditions for investments made by either Contracting Party in the territory of the other; and

Recognizing that the promotion and protection of investments under this Agreement stimulate initiatives in this field;

Have agreed as follows:

CHAPTER 1: GENERAL PROVISIONS

Article 1. Definitions

For the purposes of this Agreement,

1. ICSID shall mean the International Centre for Settlement of Investment Disputes;
2. The ICSID Convention shall mean the Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
3. The New York Convention shall mean the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
4. The term "investment" shall mean, in particular, the following assets owned or controlled by investors of one of the Contracting Parties and established in the territory of the other Contracting Party in accordance with the legislation of the latter:
 - (a) an enterprise;
 - (b) shares, partnership interests and other forms of participation in the capital of an enterprise;
 - (c) debt instruments of an enterprise :
 - (i) when the enterprise is a subsidiary of the investor, or
 - (ii) when the debt instrument has an original maturity of at least three years,but does not include an obligation of a Contracting Party or a State enterprise, irrespective of the original maturity;
 - (d) a loan to an enterprise :
 - (i) when the enterprise is a subsidiary of the investor, or
 - (ii) when the loan has an original maturity of at least three years,

but does not include a loan to a Contracting Party or to a State enterprise, irrespective of the original maturity;

(e) movable or immovable property, as well as mortgages, pledges, usufructs or other tangible or intangible property, including all intellectual and industrial property rights, acquired or used for economic activities or other business purposes;

(f) rights resulting from the contribution of capital or other resources in the territory of one Contracting Party for the development of an economic activity in the territory of the other Contracting Party, including those derived from a contract or concession;

This definition shall not include any monetary claims arising exclusively from:

(i) Commercial contracts for the sale of property or services by a national or an enterprise in the territory of one Contracting Party to an enterprise in the territory of the other Contracting Party; or

(ii) The granting of credit in relation to a commercial transaction, such as the financing of trade, with the exception of a loan covered by subparagraph (d);

5. The term "investors" shall mean:

(a) Physical persons who are nationals of one of the Contracting Parties in accordance with its laws; or

(b) Any enterprise, meaning any legal entity — including companies, associations of companies, trading corporate entities, branch offices and other organizations — which is established or, in any case, properly organized in accordance with the law of one of the Contracting Parties and has its head office in the territory of that Contracting Party; which has made an investment in the territory of the other Contracting Party.

6. The term "territory" shall mean the territory of each Contracting Party, including inland waters and territorial seas, as well as the exclusive economic zone and the continental shelf that extends outside the limits of the territorial sea of each of the Contracting Parties, over which they have or may have jurisdiction or sovereign rights under international law;

7. UNCITRAL Arbitration Rules shall mean the Arbitration Rules of the United Nations Commission on International Trade Law.

Article II. Promotion and Acceptance

1. Each Contracting Party shall accept investments by investors of the other Contracting Party in accordance with its legislation.

2. In order to promote reciprocal investment flows, the Contracting Parties shall exchange information concerning conditions and opportunities for investment in their territories.

CHAPTER II: PROTECTION OF INVESTMENT

Article III. National Treatment and Most-Favoured-Nation Treatment

1. Each Contracting Party shall give in its territory to the investments of investors of the other Contracting Party treatment that shall be no less favourable than that given in similar circumstances to the investments of its own investors or to the investments of investors of any third State, whichever is more favourable to the investor.

2. Each Contracting Party shall give to the investors of the other Contracting Party, in respect of the administration, maintenance, use, enjoyment and sale or, where appropriate, liquidation of investments made in its territory, treatment no less favourable than that given in similar circumstances to its own investors or to investors of any third State, whichever is more favourable to the investor.

3. The treatment granted under paragraphs 1 and 2 above shall not be interpreted as an obligation on either of the Contracting Parties to extend to the investors of the other Contracting Party and to their investments the benefits of any treatment, preference or privilege resulting from:

(a) its current or future association with or participation in a free trade zone, customs, economic or monetary union or any other form of regional economic organization or similar international agreement, or

(b) any international agreement dealing wholly or mainly with taxation or any national provision or legislation relating wholly or in part to taxation.

Article IV. Minimum Level of Treatment

1. Each Contracting Party shall give to the investments of investors of the other Contracting Party treatment in accordance with international customary law, including fair and equitable treatment, as well as full protection and security.

2. A resolution to the effect that another provision of this Agreement or of a separate international agreement has been violated shall not establish that this article has been violated.

Article V. Nationalization and Expropriation

1. Neither of the Contracting Parties shall, directly or indirectly, expropriate or nationalize an investment through measures equivalent to expropriation or nationalization ("expropriation"), unless it is:

(a) for reasons of public interest;

(b) on a non-discriminatory basis;

(c) in accordance with the rule of law; and

(d) upon payment of indemnification in accordance with paragraph 2 below.

2. Indemnification:

(a) shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in the value due to advance public knowledge of the expropriation.

The valuation criteria shall include the current value, the value of the assets, including the declared fiscal value of tangible goods, as well as other criteria that may be appropriate for determining the fair market value;

(b) shall be paid without delay;

(c) shall include interest at a reasonable commercial rate for the currency in which said payment is made, from the date of expropriation to the date of payment;

(d) shall be fully payable in cash and freely transferable.

3. The affected investor shall have a right, in accordance with the law of the Contracting Party making the expropriation, to early review by the judicial authority or other competent and independent authority of that Contracting Party, as the case may be, in order to determine whether the expropriation and valuation of his investment have been carried out in accordance with the principles established in this article.

Article VI. Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, other armed conflicts, a state of national emergency, a rebellion or mutiny, or other similar circumstances, shall be accorded, by way of restitution, indemnification, compensation or other settlement, treatment no less favourable than that which the latter grants to its own investors and to investors of any third State.

Article VII. Transfers

1. Each Contracting Party shall guarantee that all transfers relating to an investment of an investor of the other Contracting Party are made freely and without delay. Transfers shall be made in a freely convertible currency at the market rate of exchange in effect on the date of transfer. Such transfers shall include:

(a) earnings, dividends, interest, capital gains, royalty payments, payments for administration, payments for technical assistance and other remuneration, as well as other sums derived from the investment;

(b) proceeds of the total or partial sale of the investment or the total or partial liquidation of the investment;

(c) payments made in accordance with a contract applying to an investor or his investment, including payments made in accordance with a loan agreement;

(d) payments derived from an indemnification for expropriation or compensation for loss; and

(e) payments derived from the application of provisions relating to dispute settlement.

2. Notwithstanding the provisions of the foregoing paragraph, a Contracting Party may prevent a transfer by applying its legislation in an equitable and non-discriminatory fashion and in good faith in the following cases:

- (a) bankruptcy, insolvency or protection of the rights of creditors;
- (b) issue of securities and securities trade or transactions;
- (c) criminal or administrative offences;
- (d) reports of transfers of foreign exchange or other monetary instruments; or
- (e) guarantee of compliance with court decisions in litigation proceedings.

3. In the event of a fundamental imbalance in its balance of payments or threat thereof, a Contracting Party may temporarily restrict transfers, provided that whatever measures or programmes the said Contracting Party implements are in accordance with international standards. Such restrictions shall be imposed in an equitable and non-discriminatory fashion and in good faith.

Article VIII. Subrogation

In the event that a Contracting Party or an agency designated by it has given a financial guarantee in respect of non-commercial risks connected with an investment made by its investors in the territory of the other Contracting Party, once it makes any payment under that guarantee, the first Contracting Party or its designated agency shall be the direct beneficiary of any payments to which the investor might have claim. Should there be any dispute, only the investor may initiate or participate in proceedings before national courts or submit that dispute to international arbitration tribunals in accordance with Chapter III.

CHAPTER III: SETTLEMENT OF DISPUTES

SECTION ONE: DISPUTES BETWEEN ONE CONTRACTING PARTY AND INVESTORS OF THE OTHER CONTRACTING PARTY

Article IX. Notification and Consultations

1. Any dispute which may arise between one of the Contracting Parties and an investor of the other Contracting Party due to alleged non-compliance with an obligation under this Agreement shall be notified in writing by the investor to the Contracting Party receiving the investment. As far as possible, the parties to the dispute shall endeavour to settle these differences by means of a friendly agreement.

2. The notification shall specify:

(a) the name and address of the disputing investor and, when the claim is made by an investor on behalf of an enterprise in accordance with article X, the name and address of the enterprise;

(b) the provisions of this Agreement alleged to have been breached and any other applicable provision;

(c) a summarized account of the factual and legal grounds for the claim; and

(d) the reparation sought and the approximate amount of the damages claimed.

The notification shall be accompanied by documentation proving the identity of the disputing investor and, where appropriate, of the enterprise. Similarly, where necessary, it shall be accompanied by a proxy document from the legal representative or a document providing due authority to act on behalf of the disputing investor.

3. If the dispute cannot be settled in this way within six months from the date of the written notification mentioned in paragraph 1 above, it shall be submitted to the dispute settlement mechanism stipulated in this Section.

Article X. Purpose, Scope of Application and Time Limits

1. An investor who alleges before a judicial or administrative tribunal that the Contracting Party has failed to comply with an obligation under this Agreement may not submit a claim in accordance with this Section. Nor may an investor submit a claim in accordance with this Section on behalf of an enterprise if that enterprise alleges before a judicial or administrative tribunal that the Contracting Party has failed to comply with an obligation under this Agreement.

2. An enterprise established in accordance with the law of a Contracting Party may not submit a claim to arbitration against that Contracting Party.

3. An investor of a Contracting Party may, on his own behalf or on behalf of an enterprise owned by him or under his direct or indirect control, submit a claim to arbitration to the effect that the other Contracting Party has failed to comply with an obligation under this Agreement, provided that the investor or his investment has suffered losses or damages by virtue of the alleged violation or as a consequence thereof.

4. An investor may not submit a claim in accordance with this Section if more than three years have elapsed from the date on which the investor had, or should have had, knowledge of the alleged violation and of the losses or damages suffered.

5. A disputing investor may submit a claim to arbitration only if:

(a) the investor gives his consent to arbitration in accordance with the procedures laid down in this Section; and

(b) the investor waives his right to initiate or continue any proceedings before an administrative or judicial tribunal in accordance with the legislation of one Contracting Party or other dispute settlement procedures in respect of the measure by the disputing Contracting Party that constitutes an alleged failure to comply with an obligation under this Agreement, with the exception of procedures requesting the application of declarative or extraordinary precautionary measures having a suspensive effect, which do not involve the payment of damages, before an administrative or judicial tribunal in accordance with the legislation of the disputing Contracting Party. When the claim concerns the loss or impairment of participation in an enterprise of the other Contracting Party which is a legal entity owned by the investor or under the investor's control, the enterprise shall also submit such a waiver.

6. A disputing investor may submit a claim to arbitration on behalf of an enterprise of the other Contracting Party which is a legal entity owned by the investor or under the investor's control only if both the investor and the enterprise:

(a) give their consent to arbitration in accordance with the procedures laid down in this Section; and

(b) waive their right to initiate or continue any proceedings before an administrative or judicial tribunal in accordance with the legislation of one Contracting Party or other dispute settlement procedures in respect of the measure by the disputing Contracting Party that constitutes an alleged failure to comply with an obligation under this Agreement, with the exception of procedures requesting the application of declarative or extraordinary measures having a suspensive effect, which do not involve the payment of damages, before an administrative or judicial tribunal, in accordance with the legislation of the disputing Contracting Party.

7. The consent and the waiver required by this article shall be expressed in writing, transmitted to the disputing Contracting Party and included in the submission of the claim to arbitration.

Article XI. Referral to Arbitration

1. Provided that six months have elapsed since the notification referred to in article IX, the disputing investor may submit the claim to arbitration in accordance with:

(a) the ICSID Convention, provided that both Contracting Parties are States party thereto;

(b) the ICSID Additional Facility Rules, if one but not both of the Contracting Parties is a State party to the ICSID Convention;

(c) the UNCITRAL Arbitration Rules; or

(d) any other arbitration rules, if so agreed by the disputing parties.

2. The ICSID Convention or the rules mentioned shall govern the arbitration, except as modified by this Section.

Article XII. Consent

1. Each Contracting Party shall give its unconditional consent to the submission of a dispute to international arbitration in accordance with the procedures laid down in this Section.

2. The consent referred to in paragraph 1 above and the submission of a claim to arbitration by a disputing investor shall meet the requirements set out in:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules, which require the consent in writing of the parties; and

(b) Article II of the New York Convention, which requires an agreement in writing.

Article XIII. Number of Arbitrators and Method of Appointment

1. The tribunal shall be made up of three arbitrators, except in cases where the disputing parties agree on any other odd number of arbitrators. Each disputing party shall appoint one arbitrator; the third arbitrator, who shall be the president of the arbitration tribunal, shall be appointed by the disputing parties by mutual agreement.

2. The arbitrators appointed in accordance with this article must be experienced in the areas of international law and investments.

3. If a tribunal as defined in this article has not been set up within a period of 90 days from the date on which the claim was submitted to arbitration, whether because a Contracting Party has not appointed an arbitrator or because the disputing parties cannot agree on the appointment of a president for the arbitration tribunal, the Secretary-General of ICSID, at the request of either one of the disputing parties, shall name, at his discretion, the arbitrator or arbitrators not yet appointed. However, when appointing the president of the tribunal, the Secretary-General of ICSID must ensure that that president is not a national of the Contracting Party or a national of the Contracting Party of the disputing investor.

Article XIV. Consolidation of Proceedings

1. Proceedings may be consolidated in the following cases:

(a) When a disputing investor makes a claim as a representative of an enterprise under his direct or indirect control and, at the same time, one or more other investors having shares in the same business, but not a controlling share, make claims on their own behalf as a result of the same violations; or

(b) When two or more claims submitted to arbitration have a question of law or fact in common.

2. A disputing party that wishes consolidation to occur shall request the Secretary-General of ICISD to establish a tribunal and shall specify in its request:

(a) the name of the Contracting Party or of the disputing investors whose claims it wishes to consolidate;

(b) the nature of the consolidation order sought; and

(c) the grounds on which the order is sought.

3. The tribunal of consolidation shall be set up in accordance with the UNCITRAL Arbitration Rules and shall proceed in accordance with the provisions of those Rules, except as stipulated in this Section.

4. The tribunal of consolidation shall decide the jurisdiction to which the claims must be submitted and shall examine those claims together, unless it determines that the interests of either of the disputing parties would be prejudiced thereby.

5. If the tribunal of consolidation determines that the proceedings or claims submitted to arbitration in accordance with article X have a question of fact or law in common, that tribunal, in the interests of a fair and effective settlement and having heard the disputing parties, may assume jurisdiction and issue a ruling on:

- (a) all or some of the proceedings taken together; or
- (b) one or more of the claims contained in those proceedings, on the basis that so doing would assist in the resolution of the others.

6. Within a period of 60 days from the date on which the request was received, the Secretary-General of ICISD, having heard the disputing parties in respect of which a consolidation order is sought, shall establish a tribunal made up of three arbitrators. One arbitrator shall be a national of the disputing Contracting Party; the other arbitrator shall be a national of the Contracting Party of the investors. A third arbitrator, who shall act as the president of the arbitration tribunal, shall not be a national of either of the Contracting Parties. No provision in this paragraph shall prevent the disputing investors and the disputing Contracting Party from appointing the members of the tribunal by special agreement.

Article XV. Applicable Law

1. Any tribunal established in accordance with this Section shall issue its ruling in the disputes submitted to it in accordance with the provisions of this Agreement and the applicable rules and principles of international law.

2. Any interpretation set forth by the Contracting Parties by mutual agreement concerning a provision of this Agreement shall be binding on any tribunal established pursuant thereto.

Article XVI. Final Award

1. Where a tribunal established in accordance with this Section makes an award against a Contracting Party, the tribunal may award only, jointly or separately:

- (a) Monetary damages and any applicable interest;
- (b) The restitution of property, in which case the award shall provide that the Contracting Party may pay monetary damages plus any applicable interest in lieu of restitution.

2. If the claim was made by an investor on behalf of an enterprise:

- (a) An award granting monetary damages and any applicable interest shall provide for the sum to be paid to the enterprise;
- (b) An award of restitution of property shall provide for restitution to be made to the enterprise.

3. The award shall stipulate that it is made without prejudice to the rights that any person with a legal interest may have in the relief under applicable local legislation.

4. The arbitral award shall be public.

Article XVII. Enforcement of the Award

1. An award made by a tribunal established pursuant to this Section shall be binding only on the disputing parties and only in respect of the particular case.

2. The disputing parties shall abide by and comply with the award without delay.

3. The Contracting Party in question shall see to it that the award is duly enforced in its territory.

4. The disputing investor may appeal for enforcement of an arbitral award in accordance with the ICISD Convention or the New York Convention.

5. For the purposes of article 1 of the New York Convention, any claim submitted to arbitration in accordance with this Section shall be considered to have arisen from a commercial relationship or operation.

Article XVIII. Payments Pursuant to Contracts for Security or Guarantees

During an arbitral proceeding pursuant to this Section, a Contracting Party shall not use as a defence, counter-claim, right of compensation or any other right, that the disputing investor received or will receive, by virtue of the contract of security or guarantee, indemnification or other compensation for all or part of the alleged damages.

SECTION TWO: DISPUTES BETWEEN THE CONTRACTING PARTIES

Article XIX. Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties regarding the interpretation or application of this Agreement shall be resolved, as far as possible, by friendly agreement.

2. If the dispute cannot be resolved in this way within six months from the start of negotiations, it shall be submitted, at the request of either Contracting Party, to an arbitration tribunal.

3. The arbitration tribunal shall be set up in the following way: each Contracting Party shall appoint an arbitrator and these two arbitrators shall elect a citizen of a third State as president. The arbitrators shall be appointed within three months and the president within five months from the date on which either Contracting Party informed the other Contracting Party of its intention to submit the dispute to an arbitration tribunal.

4. If one of the Contracting Parties does not appoint its arbitrator before the established deadline, the other Contracting Party may request the President of the International Court of Justice to make such appointment. In the event that the two arbitrators do not reach an agreement on the appointment of the third arbitrator before the established deadline, either of the Contracting Parties may call on the President of the International Court of Justice to make the appropriate appointment.

5. If, in the cases described in paragraph 4 above, the President of the International Court of Justice is unable to carry out said function, or is a national of either of the Contracting Parties, the Vice-President shall be requested to make the appropriate appointments. If for the Vice-President is unable to carry out said function or is a national of either of the Contracting Parties, the appointments shall be made by the most senior member of the aforementioned Court who is not a national of either of the Contracting Parties.

6. The arbitration tribunal established pursuant to this Section shall rule on disputes in accordance with this Agreement and with the applicable rules and principles of international law.

7. Unless the Contracting Parties decide otherwise, the tribunal shall lay down its own procedure.

8. The tribunal shall take its decision by majority vote and the decision shall be final and binding for both Contracting Parties.

9. Each Contracting Party shall bear the expenses of the arbitrator appointed by it and those connected with representing it in the arbitration proceedings. The other expenses, including those of the President, shall be borne in equal parts by the Contracting Parties.

CHAPTER IV: FINAL PROVISIONS

Article XX. Other Obligations

In the event that obligations under an international treaty to which both Contracting Parties are party contain rules which require that investors and the investments of investors of the other Contracting Party should be given treatment more favourable than that provided for under this Agreement, such rules shall prevail over this Agreement, to the extent that they are more favourable.

Article XXI. Scope of Application

This Agreement shall also apply to investments made prior to its entry into force by investors of one Contracting Party in accordance with the legal provisions of the other Contracting Party in the territory of the latter.

Article XXII. Entry into Force

1. Each Contracting Party shall notify the other in writing through the diplomatic channel of the completion of its constitutional requirements for the approval and entry into force of this Agreement.

2. This Agreement shall enter into force 30 days after the last of the two notifications referred to in the preceding paragraph.

Article XXIII. Duration and Determination

This Agreement shall remain in force for 10 years. Thereafter, it shall continue to remain in force for 12 months from the date when either of the Contracting Parties has notified the other in writing of its intention to terminate it. The provisions of this Agreement shall remain in force with regard to investments made while it was in force for a pe-

riod of 10 years from the date of termination and without prejudice to the subsequent application of the general rules of international law.

Article XXIV. Abrogation

Upon its entry into force, this Agreement shall replace and abrogate the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the United Mexican States, which entered into force on 18 December 1996. However, a claim to arbitration submitted before the entry into force of this Agreement shall be settled in accordance with the previous Agreement.

DONE at Mexico City on 10 October 2006 in two original copies in the Spanish language, both texts being equally authentic.

For the United Mexican States:

SERGIO ALEJANDRO GARCÍA DE ALBA
Secretary for the Economy

For the Kingdom of Spain:

PEDRO MEJÍA GÓMEZ
Secretary of State for Tourism and Trade