AGREEMENT between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments

THE UNITED MEXICAN STATES AND THE REPUBLIC OF AUSTRIA, hereinafter referred to as "Contracting Parties";

DESIRING to create favourable conditions for greater economic co-operation between the Contracting Parties;

RECOGNIZING that the promotion and protection of investments may strengthen the readiness for such investments and hereby make an important contribution to the development of economic relations;

CONSIDERING that a bilateral agreement is aimed at granting and assuring equal treatment of investors of both Contracting Parties in accordance with the principles of international reciprocity;

HAVING IN MIND that the entry and the expansion of investments in their territory by investors of the other Contracting Party are subject to relevant instruments of the OECD in the field of international investments;

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

For the purpose of this Agreement

(1) "investor of a Contracting Party" means:

(a) A natural person having the nationality of a Contracting Party in accordance with its applicable law; or

(b) An enterprise constituted or organised under the applicable law of a Contracting Party;

Making or having made an investment in the other Contracting Party's territory.

(2) "investment by an investor of a Contracting Party" means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:

(a) An enterprise constituted or organised under the applicable law of the first Contracting Party;

(b) Shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph (a), and rights derived therefrom;subparagraph (a), and rights derived therefrom;

(c) Bonds, debentures, loans and other forms of debt and rights derived therefrom;

(d) Rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

(e) Claims to money and claims to performance pursuant to a contract having an economic value;

(f) Intellectual and industrial property rights as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organisation, including copyright, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;

(g) Rights conferred by law or contract such as concessions, licenses, authorisations or permits to undertake an economic activity;

(h) Any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.

Commercial transactions designed exclusively for the sale of goods or services and credits to finance commercial transactions with a duration of less than three years, other credits with a duration of less than three years, as well as credits

granted to the State or to a State enterprise are not considered an investment.

However, this shall not apply to credits or loans provided by an investor of a Contracting Party to an enterprise of the other Contracting Party which is owned or controlled by that investor.

(3) "enterprise" means a legal person or any entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, including a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation.

(4) "returns" means the amounts yielded by an investment and, in particular, profits, interests, capital gains, dividends, royalties, license and other fees.

(5) "territory" means with respect to each Contracting Party the land territory, internal waters, maritime and airspace under its sovereignty, including the exclusive economic zone and the continental shelf where the Contracting Party exercises, in conformity with international law, sovereign rights and jurisdiction.

Article 2. Promotion and Admission of Investments

(1) Each Contracting Party shall, according to its laws and regulations, promote and admit investments by investors of the other Contracting Party.

(2) The legal extension, alteration or transformation of an investment is to be considered a new investment.

Article 3. Treatment and Protection of Investments

(1) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments fair and equitable treatment and full and constant protection and security.

(2) A Contracting Party shall not impair by unreasonable or discriminatory measures the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party.

(3) Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor.

(4) No provision of this Agreement shall be construed as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments the present or future benefit of any treatment, preference or privilege resulting from:

(a) Any membership in a free trade area, customs union, common market, economic community or any multilateral agreement on investment;

(b) Any international agreement, international arrangement or domestic legislation regarding taxation.

Article 4. Transparency

(1) Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may have an effect on the operation of the Agreement.

(2) Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to the other Contracting Party on matters referred to in paragraph (1).

(3) No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws and regulations protecting confidentiality.

Article 5. Expropriation and Compensation

(1) A Contracting Party shall not expropriate or nationalise, directly or indirectly, an investment of an investor of the other Contracting Party or take any measures having equivalent effect (hereinafter referred to as "expropriation") except:

(a) For a purpose which is in the public interest,

(b) On a non-discriminatory basis,

(c) In accordance with due process of law, and

(d) Accompanied by payment of compensation in accordance with paragraphs (2) and (3) below

(2) Compensation shall:

(a) Be paid without delay. In the event that the payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position no less favourable than the position in which he would have been had the compensation been paid immediately on the date of expropriation.

(b) 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 value occurring because the expropriation had become publicly known earlier. Valuation criteria shall include, inter alia, the capital invested, replacement value, appreciation, current returns and goodwill. Any other appropriate valuation criteria may be considered to determine the fair market value.

(c) Include interest at a commercial rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.

(d) Be fully realisable and freely transferable.

(3) Without prejudice to Articles 12 and 13, due process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article, by a judicial authority or another competent and independent authority of the latter Contracting Party.

(4) Article 3, paragraph (4) does not apply to this Article.

Article 6. Compensation for Losses

An investor of a Contracting Party which has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.

Article 7. Transfers

(1) Each Contracting Party shall ensure that all payments relating to an investment by an investor of the other Contracting Party may be freely transferred into and out of its territory without delay. Such transfers shall include, in particular:

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

b) Returns;

c) Payments made under a contract including a loan agreement;

d) Proceeds from the sale or liquidation of all or any part of an investment;

e) Payments of compensation under Articles 5 and 6;

f) Payments arising out of the settlement of a dispute.

(2) Each Contracting Party shall further ensure that such transfer may be made in a freely convertible currency at the market rate of exchange prevailing on the date of transfer in the territory of the Contracting Party from which the transfer is made.

(3) In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights.

(4) Notwithstanding paragraph (1) b), a Contracting Party may restrict the transfer of a return in kind in circumstances where the Contracting Party is permitted under the GATT 1994 to restrict or prohibit the exportation or the sale for export of the

product constituting the return in kind. Nevertheless, a Contracting Party shall ensure that transfers of returns in kind may be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and an investor or investment of the other Contracting Party.

(5) Notwithstanding paragraphs (1) to (3), a Contracting Party may prevent a transfer through the equitable, non-discriminatory and in good faith application of measures relating to bankruptcy or insolvency or to protect the rights of creditors, relating to or ensuring compliance with laws and regulations on the issuing, trading and dealing in securities, futures and derivatives, reports or records of transfer, or in connection with criminal offenses and orders or judgments in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under this Agreement.

(6) In case of serious balance of payments difficulties or the threat thereof, each Contracting Party may temporarily, but only for a period not exceeding twelve months, restrict transfers of proceeds from the sale or liquidation of all or any part of an investment. These restrictions would be imposed on an equitable, non-discriminatory and in good faith basis.

Article 8. Subrogation

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance against non-commercial risks given in respect of an investment by an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right or claim to the same extent as its predecessor in title. As regards the transfer of payments to the Contracting Party concerned by virtue of such assignment, Articles (5), (6) and (7) of the present Agreement shall apply mutatis mutandis.

However, in case of a dispute, only the investor or a designated agency organised under private law may initiate, or participate in, proceedings before a national tribunal or submit the case to international arbitration in accordance with the provisions of Part one of Chapter two of this Agreement.

Article 9. Other Obligations

Each Contracting Party shall observe any other obligation it has assumed in writing, with regard to investments in its territory by investors of the other Contracting Party. Disputes arising from such obligations shall be settled under the terms of the contracts underlying the obligations.

Chapter Two: Dispute Settlement

Part One: Settlement of Disputes between an Investor and a Contracting Party

Article 10. Scope and Standing

(1) This Part applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment. An enterprise that is an investment by an investor of the other Contracting Party may not submit a claim to arbitration under this Part.

(2) If an investor of a Contracting Party or his investment that is an enterprise initiates proceedings before a national tribunal with respect to a measure that is alleged to be a breach of this Agreement, the dispute may only be submitted to arbitration under this Part if the competent national tribunal has not rendered judgment in the first instance on the merits of the case. The foregoing does not apply to administrative proceedings before the administrative authorities executing the measure that is alleged to be a breach.

(3) Without prejudice to Article (18), paragraphs (5) and (6), in case an investor of a Contracting Party submits a claim to arbitration, neither the investor, nor his enterprise, may initiate or continue proceedings before a national tribunal.

Article 11. Means of Settlement, Time Periods

(1) Such a dispute should, if possible, be settled by negotiation or consultation. If it is not so settled, the investor may choose to submit it for resolution:

a) To the competent courts or administrative tribunals of the Contracting Party to the dispute;

b) In accordance with any applicable previously agreed dispute settlement procedure, or

c) In accordance with this Article to:

i) The Convention of the Settlement of Investment Disputes between States and nationals of other States ("the ICSID Convention"), if the Contracting Party of the investor and the Contracting Party to the dispute are both parties to the ICSID Convention;

ii) The Centre under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, if the Contracting Party of the investor or the Contracting Party to the dispute, but not both, is a party to the ICSID Convention;

iii) A sole arbitrator or an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL");

iv) The International Chamber of Commerce, by a sole arbitrator or an ad hoc tribunal under its rules of arbitration.

(2) The applicable arbitration rules shall govern the arbitration except to the extent modified by this Part.

(3) A dispute may be submitted for resolution pursuant to paragraph (1) c), provided that six months have elapsed since the events giving rise to the claim occurred and provided that the investor has delivered to the Contracting Party, party to the dispute, written notice of his intention to submit a claim to arbitration at least 60 days in advance, but not later than 4 years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.

Article 12. Contracting Party Consent

Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Part.

Article 13. Formation of the Arbitral Tribunal

(1) Unless the parties to the dispute agree otherwise, the arbitral tribunal shall comprise three members. Each party to the dispute shall appoint one member and these two members shall agree upon a third member as their chairman.

(2) Members of arbitral tribunals shall have experience in international law and investment matters.

(3) If an arbitral tribunal has not been constituted within 90 days from the date the claim was submitted to arbitration, either because a party to the dispute failed to appoint a member or the elected members failed to agree upon a chairman, the Secretary General of ICSID, on the request of any of the parties to the dispute, shall be kindly asked to appoint, in his discretion, the member or members not yet appointed. Nevertheless, the Secretary General of ICSID, when appointing a chairman, shall assure that the chairman is a national of neither of the Contracting Parties.

Article 14. Consolidation

(1) A tribunal of consolidation established under this Article shall be installed under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Part.

(2) Proceedings will be consolidated in the following cases:

a) When an investor submits a claim on behalf of an enterprise that he owns or controls and, simultaneously, another investor or other investors participating in the same enterprise, but not controlling it, submit claims on their own behalf as a consequence of the same breaches of this Agreement; or

b) When two or more claims are submitted to arbitration arising from common legal and factual issues.

(3) The tribunal of consolidation will decide the jurisdiction of the claims and will jointly review such claims, unless it determines that the interests of any party to the dispute are harmed.

Article 15. Place of Arbitration

Any arbitration under this Part shall, at the request of any party to the dispute, be held in a state that is party of the New York Convention. Claims submitted to arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purpose of Article 1 of the New York Convention.

Article 16. Indemnification

A Contracting party shall not assert as a defense, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged losses or damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

Article 17. Applicable Law

A tribunal established under this Part shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law.

Article 18. Awards and Enforcement

(1) Arbitration awards may provide the following forms of relief:

a) A declaration that the Contracting Party has failed to comply with its obligations under this Agreement;

b) Pecuniary compensation, which shall include interest from the time the loss or damage was incurred until the time of payment;

c) Restitution in kind in appropriate cases, provided that the Contracting Party may pay pecuniary compensation in lieu thereof where restitution is not practicable; and

d) With the agreement of the parties to the dispute, any other form of relief.

(2) Arbitration awards shall be final and binding only upon the parties to the dispute and only with respect to the particular case.

(3) The final award will only be published if there is written agreement by both parties to the dispute.

(4) An arbitral tribunal shall not order a Contracting Party to pay punitive damages.

(5) Each Contracting Party shall, in its territory, make provision for the effective enforcement of awards made pursuant to this Article and shall carry out without delay any such award issued in a proceeding to which it is party.

(6) An investor may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention.

Article 19. Exclusions

The disputes settlement provisions of this Part shall not apply to the resolutions adopted by a Contracting Party which, for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by investors of the other Contracting Party, according to the legislation of each Contracting Party.

Part Two: Settlement of Disputes between the Contracting Parties

Article 20. Scope, Consultations, Mediation and Conciliation

Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably or through consultations, mediation or conciliation. Should the Contracting Parties agree on a controversial issue, a written understanding shall be drafted and approved by the Contracting Parties.

Article 21. Initiation of Proceedings

(1) At the request of either Contracting Party a dispute concerning the interpretation or application of this Agreement may be submitted to an arbitral tribunal for decision not earlier than four months after such request has been notified to the other Contracting Party.

(2) A Contracting Party shall not initiate proceedings under this Part for a dispute regarding the infringement of rights of an investor which that investor has submitted to proceedings under Part 1 of this Chapter, unless the other Contracting Party has failed to abide by or comply with the award rendered in that dispute. In this case, the arbitral tribunal established under this Part, on delivery of a request by a Contracting Party whose investor was a party to the dispute, may award:

(a) A declaration that the failure to abide by or comply with the final award is in contravention of the obligations of the other Contracting Party under this Agreement; and

(b) A recommendation that the other Contracting Party abide by or comply with the final award.

Article 22. Formation of the Tribunal

(1) Such arbitral tribunal shall be constituted ad hoc as follows: Each Contracting Party shall appoint one member and these two members shall agree upon a national of a third State as their chairman. Such members shall be appointed within two months from the date one Contracting Party has informed the other Contracting Party, that it intends to submit the dispute to an arbitral tribunal, the chairman of which shall be appointed within two further months.

(2) If the periods specified in paragraph (1) are not observed, either Contracting Party may, in the absence of any other relevant arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either of the Contracting Parties or if he is otherwise prevented from discharging the said function, the Vice-President or, in case of his inability, the member of the International Court of Justice next in seniority should be invited under the same conditions to make the necessary appointments.

(3) Members of an arbitral tribunal shall be independent and impartial.

Article 23. Applicable Law, Default Rules

(1) The arbitral tribunal will decide disputes in accordance with this Agreement and the applicable rules and principles of international law.

(2) The arbitral tribunal shall determine its own procedures, including recourse to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes, unless the Contracting Parties agree otherwise. The arbitral tribunal shall reach its decision by a majority of votes.

Article 24. Awards

(1) The arbitral tribunal, in its award, shall set out its findings of law and fact, together with the reasons therefore, and may, at the request of a Contracting Party, award the following forms of relief:

a) A declaration that an action of a Contracting Party is in contravention of its obligations under this Agreement;

b) A recommendation that a Contracting Party brings its actions into conformity with its obligations under this Agreement; or

c) Any other form of relief to which the Contracting Party against whom the award is made consents.

(2) The arbitration award shall be final and binding upon the parties to the dispute.

Article 25. Costs

Each Contracting Party shall pay the cost of its representation in the proceedings. The cost of the arbitral tribunal shall be paid for equally by the Contracting Parties, unless the tribunal directs that they be shared differently.

Chapter Three: Final Provisions

Article 26. Protocol

The annexed Protocol is an integral part of this Agreement.

Article 27. Application of the Agreement

(1) This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its legislation by investors of the other Contracting Party prior to as well as after the entry into force of this Agreement.

(2) This Agreement applies in the territory of the Contracting Parties and at all levels of government.

(3) This Agreement shall not apply to claims which have been settled or procedures which have been initiated prior to its

entry into force.

Article 28. Consultations

Each Contracting Party may propose to the other Contracting Party consultations on any matter relating to this Agreement. These consultations shall be held at a place and at a time agreed upon through diplomatic channels.

Article 29. Entry Into Force

(1) The Contracting Parties shall notify each other in writing on the compliance with their constitutional requirements in relation to the approval and entry into force of this Agreement.

(2) This Agreement shall enter into force 60 days after the date on which the last notification referred to in paragraph (1) above has been received by the Contracting Party in question.

Article 30. Duration and Termination

(1) This Agreement shall be in force for an initial period of ten years and shall remain in force thereafter for an indefinite period of time, unless terminated in accordance with paragraph (2).paragraph (2).

(2) Either Contracting Party may terminate this Agreement at the end of the initial ten years period or at any time thereafter, by given a twelve months written notice to the other through diplomatic channels.

(3) With respect to investments made before termination of this Agreement, its provisions shall continue to be effective with respect to such investments for a period of ten years after the date of termination

DONE at ___, in___, in duplicate, in the German, Spanish and English languages, each text being equally authentic. In case of divergence of interpretation the English text shall prevail.

For the United Mexican States:

For the Republic of Austria:

On signing the Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments, the undersigned plenipotentiaries have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Agreement:

Ad Article (1)

(a) For greater clarity, the Contracting Parties agree to cover under Article (1), paragraph (2) and under Article (7) only those investments which are created for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.

(b) The term "indirectly" shall cover only those situations where both the subsidiary and its investment are located in the territory of the same Contracting Party.

Ad Article (10)

Pursuant to Article (10), an alleged breach of this Agreement must be causally linked to loss or damage to the investor or its investment for the investor to have standing to bring the claim against the host State. Notwithstanding, if a damage were imminent, it would not need to have been incurred before the dispute is submitted to arbitration but, in any case, the damage must have had occurred in order for the arbitral tribunal to decide accordingly, except in the case of Article (18), paragraph (1) a) and d).