Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kosovo

The GOVERNMENT OF THE REPUBLIC OF AUSTRIA and the GOVERNMENT OF THE REPUBLIC OF KOSOVO, hereinafter referred to as "Contracting Parties",

RECALLING that foreign direct investments are vital complements to national and international development efforts, as expressed at the United Nations International Conference on the Financing of Development held in Monterrey, Mexico, in March 2002 (the "Monterrey Consensus");

RECOGNISING that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;

EMPHASISING that fair, transparent and predictable investment regimes based on the rule of law both complement and benefit the world trading system;

DESIRING to strengthen their ties of friendship and to promote greater economic co-operation between them with respect to investment by nationals and enterprises of one Contracting Party in the territory of the other;

REAFFIRMING the commitments under the 2006 Ministerial declaration of the UN Economic and Social Council on Full Employment and Decent Work,

REFERING to the international obligations and commitments concerning respect for human rights;

RECOGNISING that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable;

COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards;

EXPRESSING their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries;

EMPHASISING the necessity for all governments and civil actors alike to adhere to UN and OECD anticorruption efforts, most notably the UN Convention against Corruption (2003);

TAKING NOTE OF the principles of the UN Global Compact;

ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection;

HAVE AGREED AS FOLLOWS:

Chapter One. General Provisions

Article 1. Definitions

For the purpose of this Agreement

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

(a) A natural person having the dominant and effective 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,

Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk, and include:

(a) An enterprise as defined in paragraph (3);

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

(c) Bonds, debentures, loans and other forms of debt instruments and rights derived there from;

(d) Any right or claim to money or performance whether conferred by law or contract, including turnkey construction, management or revenue-sharing contracts, and concessions, licences, authorisations or permits to undertake an economic activity;

(e) Intellectual property rights and intangible assets having an economic value, including industrial property rights, copyright, trademarks, trade dresses; patents, geographical indications, industrial designs and technical processes, trade secrets, trade names, know-how and goodwill;

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

(3) "enterprise" means any entity possessing at least partial legal personality, constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, e.g. a corporation, partnership, joint venture or any other association, as well as a trust, a sole proprietorship, or a branch located in the territory of a Contracting party and carrying out substantive business there.

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

(5) "without delay" means such period as is normally required for the completion of necessary formalities for the payments of compensation or for the transfer of payments. This period shall commence for payments of compensation on the day of expropriation and for transfers of payments on the day on which the request for transfer has been submitted. It shall in no case exceed one month.

(6) "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 jurisdiction, in conformity with international law.

(7) "measure" means a regulatory action and includes any law, regulation, decision, procedure, requirement, or practice.

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) Any alteration of the form in which assets are invested or reinvested shall not affect their character as an investment provided that such alteration is in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made.

Article 3. Treatment of Investments

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

(2) A Contracting Party shall not unduly or discriminatory impair 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 or returns treatment no less favourable than that it accords to its own investors and their investments or to investors of any third State and their investments or returns with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns, whichever is more favourable to the investor.

(4) No provision of this Agreement shall be construed

(a) As to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security; or

(b) As to prevent a Contracting Party from fulfilling its obligations as a member of an economic integration agreement such as a free trade area, customs union, common market, economic community, monetary union, e.g. the European Union, or as to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments or returns the present or future benefit of any treatment, preference or privilege by virtue of its membership in such an agreement or any multilateral agreement on investment; or

(c) As to oblige a Contracting Party to extend to the investors of the other Contracting Party and to their investments or returns the present or future benefit of any treatment, preference or privilege resulting from obligations of a Contracting Party under an international agreement, international arrangement or domestic legislation regarding taxation.

Article 4. Investment and Environment

The Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic environmental laws.

Article 5. Investment and Labour

(1) The Contracting Parties recognise that it is inappropriate to encourage an investment by weakening domestic labour laws.

(2) For the purposes of this Article, "labour laws" means each Contracting Party's statutes or regulations, that are directly related to the following internationally recognised labour rights:

(a) The right of association;

(b) The right to organise and to bargain collectively;

(c) A prohibition on the use of any form of forced or compulsory labour;

(d) Labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour;

(e) Acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

(f) Elimination of discrimination in employment and occupation.

Article 6. Transparency

(1) Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures, as well as international agreements which may affect 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 any measures and 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 7. 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,

(d) Accompanied by payment of prompt, adequate and effective compensation in accordance with paragraphs (2) and (3) below.

(2) Compensation shall:

(a) Be paid without delay. In case of delay any exchange rate loss arising from this delay shall be borne by the host State.

(b) Be equivalent to the fair market value of the expropriated investment before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

(c) Be paid and made freely transferable to the State designated by the claimants concerned and in the currency of the State of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

(d) 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.

(3) An investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party shall have the right 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) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

Article 8. Compensation for Losses

(1) An investor of a Contracting Party who 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.

(2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from:

(a) Requisitioning of its investment or part thereof by the authorities or forces acting on the territory of the other Contracting Party, or

(b) Destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 7 (2) and (3).

Article 9. Transfers

(1) Each Contracting Party shall guarantee 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 7 and 8;

(f) Payments arising out of the settlement of a dispute;

(g) Earnings and other remuneration of personnel engaged from abroad in connection with an investment.

(2) Each Contracting Party shall further guarantee that such transfers 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. The bank charges shall be fair and equitable.

(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 paragraphs (1) to (3) and without prejudice to measures adopted by a Contracting Party in pursuance of its international obligations as mentioned in Article 3 (4), a Contracting Party may also prevent a transfer through the equitable, non-discriminatory and good faith application of laws and regulations on bankruptcy, insolvency or the protection of rights of creditors, on the issuing, trading and dealing in securities, futures, options and derivatives, on reports or records of transfer, on the prevention of money laundering or terrorist financing, or in connection with criminal offences and orders or judgements 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.

Article 10. Subrogations

If a Contracting Party or its designated agency makes a payment under an indemnity, guarantee or contract of insurance given in respect of an investment by an investor in the territory of the other Contracting Party, the latter Contracting Party shall recognise without prejudice to the rights of the investor under Chapter Two Part One 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 and claim to the same extent as its predecessor in title.

Article 11. Other Obligations

(1) Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party. This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.

(2) If the laws of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by nationals or enterprises of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

Article 12. Denial of Benefits

A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organised.

Chapter Two. Dispute Settlement

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

Article 13. Scope and Standing

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 his investment.

Article 14. Means of Settlement, Time Periods

(1) A dispute between a Contracting Party and an investor of the other Contracting Party shall, 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, 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 International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention of the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington on 18 March 1965 ("the ICSID Convention"), if the Contracting Party of the investor and the Contracting Party, 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, 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) A dispute may be submitted for resolution pursuant to paragraph (1) (c) of this Article after 60 days from the date notice of intent to do so was provided to the Contracting Party, party to the dispute, but not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.

Article 15. Contracting Party Consent

(1) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Part. However, a dispute may not be submitted to international arbitration if a court in the first instance in either Contracting Party has rendered its final decision on the merits.

(2) The consent referred to in paragraph (1) implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted.

Article 16. 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 to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958. Claims submitted to arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention.

Article 17. Indemnification

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

Article 18. Applicable Law

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

(2) Issues in dispute under Article 11 shall be decided, absent other agreement, in accordance with the law of the Contracting Party, party to the dispute, the law governing the authorisation or agreement and such rules of international law as may be applicable.

Article 19. Awards and Enforcement

(1) Arbitration awards, which may include an award of interest, shall be final and binding upon the parties to the dispute and 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 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) Each Contracting Party shall 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.

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.

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 60 days after such request has been notified to the other Contracting Party.

(2) A Contracting Party may not initiate proceedings under this Part for a dispute regarding the infringement of rights of an investor which that investor has submitted to arbitration under Part One of Chapter Two of this Agreement, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute or those proceedings have terminated without resolution by an arbitral tribunal of the investor's claim.

Article 22. Formation of the Tribunal

(1) The 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 of its intention 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) of this Article are not observed, either Contracting Party may, in the absence of any 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/she is otherwise prevented from discharging the said function, the Vice-President or in case of his/her 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) Unless the parties to the dispute decide otherwise, the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes shall apply to matters not governed by other provisions of this Part.

Article 24. Awards

(1) The 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:

(2) 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;

(c) Pecuniary compensation for any loss or damage to the requesting Contracting Party's investor or its investment; or

(d) Any other form of relief to which the Contracting Party against whom the award is made consents, including restitution in kind to an investor.

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

Article 25. Costs

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

Article 26. Enforcement

Pecuniary awards which have not been complied with within one year from the date of the award may be enforced in the courts of either Contracting Party with jurisdiction over assets of the defaulting Party.

Chapter Three. Final Provisions

Article 27. Scope and 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 shall not apply to claims which have been settled or procedures in accordance with Article 14 (1) (c) 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 and Duration

(1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month during which the instruments of ratification have been exchanged.

(2) This Agreement shall remain in force for a period of ten years; it shall be extended thereafter for an indefinite period and may be denounced in writing through diplomatic channels by either Contracting Party giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of the present Agreement the provisions of Articles 1 to 29 of the present Agreement shall continue to be effective for a further period of ten years from the date of termination of the present Agreement.

DONE in duplicate at Pristina, on 22 January 2010, in the German, Albanian, Serbian and English languages, all texts being equally authentic. In case of difference of interpretation the English text shall prevail.

For the Government of the Republic of Austria

Reinhold Lopatka

For the Government of the Republic of Kosovo

Ahmet Shala