Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in MERCOSUR

The Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay, hereinafter referred to as the "Contracting Parties";

Taking into account the Treaty signed in Asunción on 26 March 1991 by which the Contracting Parties decide to create a Southern Common Market (MERCOSUR);

Considering the results of the work carried out by the Technical Commission for the Promotion and Protection of Investments created within Subgroup IV by Resolution 20/92 of the Common Market Group.

Convinced that the creation of favourable conditions for investments by investors of one Contracting Party in the territory of another Contracting Party will intensify economic cooperation and accelerate the process of integration between the four countries;

Recognizing that the promotion and protection of such investments on the basis of an agreement will contribute to stimulating individual economic initiative and increase prosperity in the four States.

They have agreed as follows:

Article 1. Definitions

For the purposes of this Protocol:

1. The term "investment" means any type of asset invested directly or indirectly by investors of one Contracting Party in the territory of another Contracting Party, in accordance with the laws and regulations of the latter.

It includes in particular, but not exclusively:

(a) The ownership of movable and immovable property, as well as other rights in rem such as mortgages, sureties and pledges;

(b) Shares, quotas and any other type of participation in companies;

(c) Debt securities and rights to benefits having an economic value; loans are included only where they are directly linked to a specific investment;

(d) Intellectual or immaterial property rights, including copyrights and industrial property rights, such as patents, industrial designs, trademarks, trade names, technical processes, know-how and key value;

(e) Economic concessions under public law conferred in accordance with the law, including concessions for the search for, cultivation, extraction or exploitation of natural resources.

2. The term "investor" means:

(a) Any natural person who is a national of one of the Contracting Parties or who is permanently resident or domiciled in the territory of that Contracting Party in accordance with its legislation. The provisions of this Protocol shall not apply to investments made by natural persons who are nationals of one of the Contracting Parties in the territory of another Contracting Party, if such persons, at the date of the investment, are permanently resident or domiciled in the latter.

(b) Any legal person constituted in accordance with the laws and regulations of a Contracting Party and having its headquarters in the territory of the Contracting Party.

(c) Legal persons incorporated in the territory where the investment is made, effectively controlled, directly or indirectly, by

natural or legal persons defined in (a) and (b).

3. The term "profits" means all sums produced by an investment, such as profits, rents, dividends, interest, royalties and other current income.

4. The term "territory" means the national territory of each Contracting Party, including those maritime zones adjacent to the outer limit of the national territorial sea, over which the Contracting Party concerned may, in accordance with international law, exercise sovereign rights or jurisdiction.

Article 2. Promotion and Admission

1. Each Contracting Party shall promote investments by investors of the other Contracting Parties and admit them to its territory no less favourably than investments by its own investors or investments made by investors of third States, without prejudice to the right of each Party to maintain temporarily limited exceptions corresponding to one of the sectors listed in the Annex to this Protocol.

2. When one of the Contracting Parties has admitted an investment in its territory, it shall grant the necessary authorizations for its better development, including the execution of contracts on licenses, commercial or administrative assistance and the entry of the necessary personnel.

Article 3. Treatment

1. Each Contracting Party shall at all times ensure fair and equitable treatment of investments of investors of another Contracting Party and shall not prejudice their management, maintenance, use, enjoyment or disposition through unjustified or discriminatory measures.

2. Each Contracting Party shall accord full legal protection to such investments and accord them treatment no less favourable than that accorded to investments of its own domestic investors or of investors from third States.

3. The provisions of Paragraph 2 of this Article shall not be construed to oblige a Contracting Party to extend to investors of another Contracting Party the benefits of any treatment, preference or privilege resulting from an international agreement relating wholly or partly to tax matters.

4. No Party shall establish performance requirements as a condition for the establishment, expansion or maintenance of investments that require or require commitments to export goods, or specify that certain goods or services are procured locally, or impose any other similar requirements.

Article 4. Expropriations and Compensation

1. No Contracting Party shall take measures of nationalization or expropriation, or any other measure having the same effect, against investments in its territory belonging to investors of another Contracting Party, unless such measures are taken for reasons of public utility, on a non-discriminatory basis and under due process of law.

The measures shall be accompanied by provisions for the payment of prior, adequate and effective compensation.

The amount of such compensation shall correspond to the actual value of the expropriated investment immediately prior to the time when the decision to nationalize or expropriate has been legally announced or made public by the competent authority and shall bear interest or be discounted to its value until the date of payment.

2. Investors of a Contracting Party who suffer losses in their investments in the territory of another Contracting Party due to war or other armed conflict, state of national emergency, revolt, insurrection or mutiny shall, in respect of restitution, indemnification, compensation or other redress, receive treatment no less favourable than that accorded to their own investors or to investors of a third State.

Article 5. Transfers

1. Each Contracting Party shall grant to investors of another Contracting Party the free transfer of investments and profits, and in particular, but not exclusively:

(a) The capital and additional sums necessary for the maintenance and development of the investments;

(b) Profits, profits, income, interest, dividends and other current income;

(c) Funds for the repayment of loans as defined in Article 1, paragraph 1(c);

(d) Royalties and fees and any other relative payment of the rights provided for in Article 1, Paragraph 1, d) and e);

(e) Proceeds from the sale or total or partial liquidation of an investment;

(f) Compensation, indemnities or other payments provided for in Article 4;

(g) The remuneration of nationals of a Contracting Party who have obtained authorization to work in connection with an investment.

2. Transfers shall be effected without delay, in freely convertible currency, at the exchange rate prevailing in the market on the date of the transfer, in accordance with the procedures established by the Contracting Party in whose territory the investment was made, which may not affect the substance of the rights provided for in this Article.

Article 6. Subrogation

1. If a Contracting Party or one of its agencies makes a payment to an investor under a guarantee or insurance to cover non-commercial risks which it has contracted in relation to an investment, the Contracting Party in whose territory the investment was made shall recognise the validity of the subrogation in favour of the first Contracting Party or one of its agencies in respect of any right or title of the investor for the purpose of obtaining the corresponding pecuniary damages. This Contracting Party or one of its agencies shall be entitled, within the limits of subrogation, to exercise the same rights as the investor would have been entitled to exercise.

2. In the case of a subrogation as defined in Paragraph 1 of this Article, the investor shall not make any claim unless authorized to do so by the Contracting Party or its agency.

Article 7. Application of other Standards

Where the provisions of the law of a Contracting Party or existing or future international law obligations or an agreement between an investor of a Contracting Party and the Contracting Party in whose territory the investment was made, contain rules that give investments more favourable treatment than that set out in this Protocol, these rules shall prevail over this Protocol to the extent that they are more favourable.

Article 8. Settlement of Disputes between Contracting Parties

Disputes arising between Contracting Parties concerning the interpretation or application of this Protocol shall be submitted to the dispute settlement procedures established by the Protocol of Brasilia for the Settlement of Disputes of December 17, 1991, hereinafter referred to as the Brasilia Protocol, or to the System that may be established to replace it within the framework of the Treaty of Asunción.

Article 9. Settlement of Disputes between an Investor and the Contracting Party Receiving the Investment

1. Any dispute concerning the provisions of this Protocol between an investor of a Contracting Party and the Contracting Party in whose territory the investment was made shall, as far as possible, be settled by friendly consultations.

2. If the dispute cannot be settled within six months from the time it was raised by one or other of the parties, it shall, at the request of the investor, be submitted to one of the following procedures:

(i) To the competent courts of the Contracting Party in whose territory the investment was made; or

(ii) International arbitration in accordance with Paragraph 4 of this Article;

(iii) The permanent system for the settlement of disputes with private persons which may be established within the framework of the Treaty of Asunción.

3. Where an investor has opted to submit the dispute to one of the procedures set forth in Paragraph 2 of this Article, the choice shall be final.

4. In the event of recourse to international arbitration, the dispute may be brought, at the choice of the investor:

(a) the International Centre for Settlement of Investment Disputes (ICSID), established by the "Convention on the Settlement

of Investment Disputes between States and Nationals of Other States", opened for signature in Washington on March 18, 1965, when each State Party to this Protocol has acceded to it. As long as this condition is not met, each Contracting Party gives its consent for the dispute to be submitted to arbitration in accordance with the rules of the ICSID Additional Facility for the Administration of Conciliation, Arbitration or Investigation Proceedings;

(b) An "ad-hoc" arbitration tribunal established in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

5. The arbitral body shall decide disputes on the basis of the provisions of this Protocol, the law of the Contracting Party that is a party to the dispute, including rules relating to conflicts of laws, the terms of any particular agreements concluded in relation to investment, as well as the principles of international investment law.

6. Arbitral awards shall be final and binding on the parties to the dispute. Each Contracting Party shall enforce them in accordance with its law.

Article 10. Investments and Disputes Covered by the Protocol

This Protocol shall apply to all investments made before or after the date of its entry into force, but the provisions of this Protocol shall not apply to any dispute, claim or dispute arising prior to its entry into force.

Article 11. Entry Into Force, Duration and Termination

1. This Protocol shall enter into force 30 days after the date of deposit of the fourth instrument of ratification. It shall remain in force indefinitely until twelve months have elapsed after either Contracting Party notifies the other Contracting Parties in writing of its decision to terminate this Protocol.

2. For investments made prior to the date on which the notice of termination of this Protocol becomes effective, the provisions of Articles 1 to 11 shall continue in force for a period of 15 years from that date.

Article 12. Final Provisions

This Protocol is an integral part of the Treaty of Asuncion.

Accession by a State to the Treaty of Asunción shall entail 'ipso jure' accession to this Protocol. Done at Colonia del Sacramento, 17 January 1994, in an original in the Spanish and Portuguese languages, both texts being equally authentic.

The Government of the Republic of Paraguay shall be the depositary of this Protocol and of the instruments of ratification and shall send a duly authenticated copy thereof to the Governments of the other States Parties.

For the Government of the Republic of Argentina

For the Government of the Federative Republic of Brazil

For the Government of the Republic of Paraguay

For the Government of the Oriental Republic of Uruguay

At the time of signing the Protocol on the Reciprocal Promotion and Protection of Investments among the States Parties to the Treaty of Asunción, the undersigned have further agreed to the following provisions, which constitute an integral part of this Protocol.

1. Ad. Article 2, Paragraph 1

In accordance with the provisions of Article 2 of this Protocol, the Contracting Parties reserve the right to maintain temporarily limited exceptions to the national treatment of investments of investors of the other Contracting Parties in the following sectors:

Argentina: immovable property in border areas; air transport; naval industry; nuclear plants; uranium mining; insurance and

fishing.

Brazil: exploration and exploitation of minerals; use of hydropower; health care; sound, sound and image broadcasting services and other telecommunications services; acquisition of rural property; participation in the system of financial intermediation, insurance, security and capitalization; construction, ownership and navigation of coastal and inland navigation.

Paraguay: immovable property in border areas; media: written, radio and television; air, sea and land transportation; electricity, water and telephone; exploitation of hydrocarbons and strategic minerals; import and refining of petroleum products and postal service.

Uruguay: electricity; hydrocarbons; basic petrochemicals; atomic energy; exploitation of strategic minerals; financial intermediation; railways; telecommunications, broadcasting; press and audiovisual media.

2. Ad. Article 3, Paragraph 2

The Federative Republic of Brazil reserves the right to maintain the exception provided for in Article 171, paragraph 2, of its Federal Constitution with respect to government purchases.

3. Ad. Article 3, Paragraph 4

Notwithstanding the provisions of Article 3, Paragraph 4, the Argentine Republic and the Federative Republic of Brazil reserve the right to temporarily maintain performance requirements in the automotive sector.

The Contracting Parties shall make all possible efforts to eliminate the exceptions referred to in Paragraphs 1, 2 and 3 of this Annex, as soon as possible, in order to allow the full conformation of the Southern Common Market, in accordance with the provisions of Article 1 of the Treaty of Asuncion.

The Contracting Parties shall hold six-monthly meetings in order to follow up the process of eliminating such exceptions.