Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments

The United Mexican States and the Federal Republic of Germany,

Desiring to intensify economic cooperation on the mutual benefit of both Contracting States,

Intending to create favourable conditions for investments by nationals or companies of onte Contracting State in the territory of the other Contracting States,

Recognizing that a bilateral agreement to promote and protect investments will stimulate the flow of investments and invidual business initiative with a view to the economic prosperity of both Contracting States.

Have agreed as follows:

PART I: PROTECTION OF INVESTMENTS

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investments" means every kind of asset acquired or used directly or indirectly in order to achieve an economic objective or other management objectives, in particular:

(a) Movable property, immovable property as well as any other rights in rem such as mortgages and pledge;

(b) Shares, parts and any other kind of interests in companies;

(c) Claims to money, or to any performance having an economic value;

(d) Intellectual property rigts, especially copyrights, patents, utility models, industrial designs and models, marks, trade names, industrial and commercial secrets, technological procedures, know-how, goodwill; and

(e) Rights derived from concessions granted by a public entity.

Any alteration on the form in which assets are invested does not affect its character as an investment, provided that such alterations are included in the aforesaid definition.

However, commercial contracts 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. This shall not apply to a loan provided by a national or enterprise of a Contracting State to an enterprise of the other Contracting State which is owned or controlled by that investor, as well as to loans from third parties to companies not considered State enterprise, which are organised under private law, with mixed private and public ownership, provided the loan i.a.

a) Is for a specific project,

b) Has a duration of more than three years,

c) Serves to finance the project,

d) Assigns to the lender commercial risk and

e) Enables the lender to interfere directly or indirectly in the project, through the national or company of the other

Contracting State.

2. The term "returns" refers to all incomes relevant to an investment and includes profits, interests, capital gains, dividends, royalties or other fees.

3. The term "nationals" means:

a) With respect to the Federal Republic of Germany:

The German people according to the Fundamental Law of the Federal Republic of Germany;

b) With respect to the United Mexican States:

The Mexican people according to the Political Constitution of the United Mexican States.

4. The term "companies" refers to any juridical person, as well as any commercial companies or other companies or associations, constituted or organised under the applicable law of a Contracting State whether or not for profit, whose territorial seat is located in the territory of any of the Contracting States.

5. The term "territory" means the territory of each Contracting State and includes the maritime areas adjacent to the coast of the State concerned, i.e. the exclusive economic zone and the continental shelf, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to International Law.

Article 2. Promotion, Admission and Protection of Investments

1. Each Contracting State shall encourage in its territory, as far as possible, the investments by nationals or companies of the other Contracting State and admit such investments in accordance with its laws and regulations in force.

2. Each Contracting State shall grant to the investments made by nationals or companies of the other Contracting State under its laws and regulations, full protection and security.

3. Each Contracting State shall in any case accord investments of the other Contracting State fair and equitable treatment. Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of such investments.

Article 3. Treatment of Investments

1. Each Contracting State shall ensure to investments in its territory that are owned or controlled by nationals or companies of the other Contracting State, treatment no less favourable than that granted to investments of its own nationals and companies, or to investments of nationals and companies of any third State.

2. Each Contracting State in its territory shall accord to nationals or companies of the other Contracting State, with respect to the activities mentioned in Article 2, paragraph 3 and related to its investments, treatment not less favourable than that accorded to its own nationals and companies or nationals and companies of any third State.

3. The aforesaid treatment does not refers to special advantages that one of the Contracting States grants to nationals or companies of a third State by virtue of an agreement establishing a free trade area, customs unions, a common market or by virtue of its associations with such organizations.

4. The tratment agreed by the present Article does not refer to the advantages that one of the Contracting States grants to the nationals or companies of a third State by virtue of an agreement on the avoidance of double taxation or any other agreement in tax matters.

Article 4. Protection In Case of Expropriation

1. Investments of nationals or companies of either Contracting State, shall not be, in the territory of the other Contracting State, expropriated or nationalized, or subject to other measures having the effect, directly or indirectly, equivalent to expropriation or nationalization, unless such measures are taken for a public purpose, on a non-discriminatory basis, in accordance with the principle of legality and shall be subject to compensation.

2. Compensation shall be equivalent to the fair market value of the expropriated investment inmmediately before the date the nationalization, expropriation or measure tantamount too place really and imminently. Compesnation shall be paid without delay, and until the day of payment it shall produce interest calculated at the appropriated market rate of interest; it

shall be effectively realizable and freely transferable according to Article 6. Not later than the date of the expropriation, nationalization or any measure tantamount, provisions adequate shall be taken in order to set and satisfy the compensation. The lawfulness of the expropriation, nationalization or a measure tantamount, and the amount of the compensation could be revised under judicial proceedings.

3. Concerning to the issues regulated in this Article, nationals or companies of either Contracting State shall enjoy the treatment of the most favoured nation in the territory of the other Contracting State.

Article 5. Protection In other Cases

Nationals or companies of one Contracting State who suffer losses in respect of their investments in the territory of the other Contracting State, owing to war or other armed conflict, revolutions, state of a national emergency or revolt, shall be accorded by the latter Contracting State treatment, as regards restituion, indemnification, compensation or other settlement, no less favourable than that which that Contracting State accords to its own nationals or companies, or nationals or companies of any third State. These incomes shall be freely transferable according to article 6.

Article 6. Transfers

1. Each Contracting State shall guarantee that all the payments relating to an investment by nationals or companies of the other Contracting State may be freely transferable, in particular:

a) Profits, and additional sums used for the operation or expansion of the capital investment.

b) Returns;

c) Funds in repayment of loans;

d) The proceeds from the partial or total liquidation or disposition of the capital invesent;

e) Compensations arising under article 4 and 5.

2. Transfers in accordance to Article 4, paragraph 2, as well as Articles 5, 6 or 7 shall be made without delay and at the market rate of exchange prevailing on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Contracting State may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities, reports of transfers of currency or other monetary instruments, the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, an in good faith application of its laws and regulations.

4. 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.

Article 7. Subrogation

If either Contracting State makes a paymen to any of its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall recognize the transmission, whether under a law or pursuant to a legal transaction, of any right or claim of such national or company to the former Contracting State. The latter Contracting State shall recognize the subrogation of the former Contracting State to any such right or claim (assigned claims). However, in a case of a dispute, only a natural person or a privately-owned legal person to which the former Contracting State has assigned the right of action may exercise these rights and assert these claims. As regards the transfer of payments made by virtue of such assigned claims, Article 4 paragraphs 2 and 3 as well as Article 5 and 6 shall apply mutatis mutandis.

Article 8. Other Provisions

1. If legal provisions of either Contracting State or obligations derived from International Law existing at present or established hereinafter between the Contracting States in addition to the present Agreement, contain a regulation, whether general or specific, according to which, a treatment more favourable than the provided for this Agreement shall be granted to investmens by nationals or companies of the other Contracting State, such regulation shall to the extent that is more favourable, prevail over this Agreement.

2. Each Contracting State shall observe any other obligation in writting, it has assumed with regard to investments in its

territory by nationals or companies of the other Contracting State; the disputes arising from such obligations, shall be settled only under the terms and conditions of the respective contract.

Article 9. Scope of Application

The present Agreement shall apply to investments of nationals or companies of one Contracting State, prior its entry into force, in accordance with the laws and regulations of the other Contracting State in its territory. However, it shall not apply to disputes arising before the entry into force of this Agreement.

Article 10. Disputes between Contracting States

1. Disputes between the Contracting States concerning the interpretation or application of the present Agreement shall be settled, if possible, by means of consultations or negotiations by the gobernments of both Contracting States.

2. If consultations and negotiations fail to resolve the dispute within a period of four months from the date of the notification of such consultations or negotiations, the dispute shall be submitted on the request of either party, to an arbitral tribunal.

3. The arbitral tribunal shall be constituted ad hoc; each Contracting State shall appoint one arbitrator, and the two arbitrators thus appointed shall together appoint the third arbitrator who shall be the Chairman of the arbitral tribunal and must be a national of a third State designated by the goverments of both Contracting States. The arbitrators shall be appointed within a period of two months, and the Chairman within a period of three months; such terms shall begin from the date on wjich either Contracting State has notified the other its intention to submit the dispute to arbitration.

4. In the event that in the lapses of time according to paragraph 3, the arbitral tribunal has not been constituted, either Contracting State may request the President of the International Court of Justice to do the corresponding appointments. If the latter is prevented from discharging the said function or is a national of either Contracting States, the Vice-President shall be invited to do the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Contracting State, the most senior member of the Court available who is not a national of either Contracting State, shall, be invited to do the necessary appointments.

5. The arbitral tribunal shall reach its decisions by a majority or votes. Such decisions shall be binding. Each Contracting State shall assume the fees of its arbitrator and agents in the arbitral proceeding; the Chairman's fees and any other expenses shall be shared equally between the two Contracting States. The arbitral tribunal may adopt a different regulation in what respects to fees. Concerning to all other issues, the arbitral tribuanl shall determine its own procedure.

Article 11. Scope and Standing

This Section applies to disputes between a Contracting State and a national or company of the other Contracting State, arising from the date the Agreement enters into force, concerning an alleged breach of an obligation of the former Contracting State under this Agreement, which causes loss or damage to the national or company of the other Contracting State, may not submit a claim to arbitration under this Section.

Article 12. Means of Settlement, Time Periods

1. Such a dispute should, if possible, be settled by negotiations or consultations. If it is not so settled, the national or company of a Contracting State may choose to submit it for resolution:

a) To the judicial or administrative tribunals of the Contracting State to the dispute;

b) In accordance with any dispute settlement procedure previously agreed, 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 ("the ICSID Convention"), if the Contracting State of the national or company and the Contracting State 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 State of the national or company or the Contracting State to the dispute, but not both, is a party to the ICSID Convention;

iii) A sole arbitrator or an ad hoc arbitral 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 arbitral tribunal under its rules of arbitration.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

3. A dispute may be submitted for resolution pursuant to paragraph 1 (c) this Article, provided that six months have elapsed since the events giving rise to the claim ocurred and provided that the national or company of a Contracting State has delivered to the Contracting State 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 four years from the date the national or company first acquired or should have acquired knowledge of the events which gave rise to the dispute.

4. In case the national or company of a Contracting State or its investment has initiated proceedings before a national tribunal of the United Mexican States, the dispute may only be submitted to arbitration if the competent Mexican tribunal has not rendered a judgement in the first instance on the merits of the case.

5. If a national or company of a Contracting State submits a dispute to arbitration, neither he nor his investment that is an enterprise may initiate or continue proceedings before a national tribunal.

Article 13. Contracting State Consent

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

Article 14. 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 ellected 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 this discretion, the member or members not yet appointed. Nevertheless, the Secretary General of ICSID, when appointing a Chairman, shall assure that the Chairman is not a national of either of the Contracting States.

Article 15. 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 Section.

2. Proceedings will be consolidated in the following cases:

a) When a national or company of a Contracting State submits a claim on behalf of an enterprise that he owns or controls and, simultaneously, another national or company, or other nationals or companies of that Contracting State 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 common legal and factual issues.

3. The tribunal of consolidation will decide the jurisdiction of the claims and will jointly review such claims, unless a national or company asserts that its interests are seriously harmed.

Article 16. Place of Arbitration

Any arbitration under this Section shall, at the request of any party to the dispute, be held in a State that is party of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Claims submitted to arbitration under this Section 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 State 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

A tribunal established under this Section shall decide the dispute in accordance with this Agreement, the applicable rules and the principles International Law.

Article 19. Awards and Enforcement

1. Arbitration awards may provide the following forms of relief:

a) Declaration that the Contracting State 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 State may poay pecuniary compensation in lieu thereof when 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. An arbitral tribunal shall not order a Contracting State to pay punitive damages.

4. Each Contracting State shall, in its territory, take measures 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 to the dispute.

5. A national or company may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention.

Article 20. Exclusions

The dispute settlement provisions of this Section shall not apply to the resolutions adopted by a Contracting State, which for national security reasons, prohibit or restrict the acquisition of an investment in its territory, owned or controlled by its nationals, by nationals or companies of the other Contracting State, according to the legislation of the relevant Contracting State.

Article 21. Protocol

The annexed Protocol is an integral part of this Agreement.

Article 22. Entry Into Force, Duration and Expiration

1. This agreement shall be subject to ratification. Such instruments shall be exchanged as soon as possible.

2. This Agreement shall enter into force one month after the date in which the instruments of ratification have been exchanged. It shall remain in force for a period of ten years and shall be binding in force unless terminated by any of the Contracting States by giving a written notice twelve months before the expiration date. If the period of ten years has elapsed, the Agreement may be terminated at any time, by giving a written notice twelve months before the expiration date. If the period of ten years has elapsed, the Agreement may be terminated at any time, by giving a written notice twelve months in advance.

3. With respect to investments made whilst this Agreement is in force, its provisions shall be binding with respect to such investments for a period of 15 years after the date of termination.

Done in duplicate, _____on,_____, in Spanish and German languages, each text being equally autentic.

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

1. Ad article 1

(a) For greater clarity, the Contracting States agree to cover under Article 1, paragraph 1 and under article 6, 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 "indirect" investment shall cover only those situations where both the subsidiary and its investment are located in the territory of the same Contracting State.

(c) In case of re-investment of returns from capital investment, such returns will enjoy the same protection given to the investment.

2. Ad article 2

Article 2, paragraph 3, shall be applicable to the access to and the use of systems for the physical distribution in connection with an investment, in accordance with the international agreements signed by the Contracting States.

3. Ad article 3

(a) The measures taken by reason of national security, public interest, public health or morality shall not be considered as a "less favourable treatment", according to Article 3.

(b) The provisions in Article 3 are not binding for a Contracting State to extend to the natural persons and companies resident in the other Contracting State's territory; the tax benefits, exemptions and reductions which according to tax laws are applicable only to natural persons and residents in the Contracting State's territory.

(c) Each Contracting State, in accordance with its laws, shall proceed in a benevolent manner with regard to migration, residence, and working permit applications of the key personnel of one Contracting State, which, in relation to an investment, intend to enter in the territory of the other Contracting State.

(d) Each Contracting State may require in its territory to the nationals or companies from the other Contracting State, to provide routine information related to their investment for statistical purposes.

4. Ad article 4

To determine the fair market value any appropriate valuation criteria may be considered.

5. Ad article 6

(a) A transfer shall be considered made "without delay" according to Article 6, paragraph 2, when it has been made in the normal time necessary to fulfill the transfer formalities. These period of time, that in any case shall exceed from two months, shall begin from the date of the delivery of the concerning request.

(b) In case of a serious balance of payments difficulties or the threat thereof, the United Mexican States may temporarily limit and for a maximum period of twelve months, the free transfer of capital pursuant to paragraph 1 (d). These restrictions shall be imposed on an equitable, non-discriminatory and in good faith basis.

6. Ad article 11

Pursuant to Article 11 an alleged breach of this Agreement must be causally linked to loss or damage to the national, company or its investment for the national or company to have standing to bring a 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 ocurred in order for the arbitral tribunal to reach a decision accordingly, except in the case of article 19, paragraph 1, subparagraph (a) and (d).