

# **AGREEMENT BETWEEN THE PORTUGUESE REPUBLIC AND THE UNITED MEXICAN STATES ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS**

The Portuguese Republic and the United Mexican States, hereinafter referred to as the "Contracting Parties",

Desiring to intensify the economic co-operation between the two States,

Intending to encourage and create favourable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party on the basis of equality and mutual benefit,

Recognising that the mutual promotion and protection of investments on the basis of this Agreement will stimulate business initiative,

Have agreed as follows:

## **CHAPTER ONE: GENERAL PROVISIONS**

### **Article 1. Definitions**

For the purpose of this Agreement,

1. The term "investment" shall mean every kind of asset and rights invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter including, in particular, though not exclusively:

- a) Movable and immovable property, acquired or used for economic purposes, as well as any other rights in rem, such as mortgages, liens, pledges and similar rights; in rem, such as mortgages, liens, pledges and similar rights;
- b) Shares, stocks, debentures, or other forms of interest in the equity of companies or other forms of participation and/or economic interests from the respective activity;
- c) Claims to money, to other assets and to any performance having an economic value, except for:
  - i) Claims to money that arise solely from commercial contracts for the sale of goods or services;
  - ii) The extension of credits in connection with a commercial transaction, such as trade financing;
  - iii) Credits with a maturity of less than three years,

By an investor in the territory of a Contracting Party to an investor in the territory of the other Contracting Party. However, the exception concerning credits with a maturity of less than three years, shall not apply to credits granted by an investor of a Contracting Party to a company of the other Contracting Party owned by the former investor;

- d) Intellectual property rights such as copyrights, patents, utility models, industrial designs, trade marks, trade names, trade and business secrets, technical processes, know-how and good will;
- e) Concessions conferred by law under a contract or administrative act of a competent authority;
- f) Assets that are placed at the disposal of a lessee, in the territory of a Contracting Party, under a leasing agreement and in conformity with its laws and regulations.

Any alteration on the form in which assets are invested does not affect their character as investments, provided that such alteration is included in the aforesaid definition and do not contradict the laws and regulations of the Contracting Party in

which territory the investment was made.

A payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise is not considered an investment.

2. The term "returns" shall mean the amount yielded by investments, over a given period, in particular, though not exclusively, shall include profits, dividends, interests, royalties, technical assistance fees or other forms of income related to the investment.

The returns of investments shall be subject to the same protection given to investment.

In cases where the returns of investments, as defined above, are reinvested, the income resulting from the reinvestment shall also be considered as income related to the first investment.

3. The term "investor" means:

a) Natural persons having the nationality of either Contracting Party, in accordance with its laws and regulations, and

b) Legal persons, including corporations, commercial companies or other companies or associations, which have a main office in the territory of one of the Contracting Parties, and are incorporated or constituted and operate in accordance with the laws and regulations of that Contracting Party.

4. The term "territory" means the territory of either of the Contracting Parties, as defined by their respective laws and regulations, including the territorial sea or any other maritime area adjacent to the coast of the Contracting Party concerned, over which such a Contracting Party exercises, in accordance with international law, sovereignty, sovereign rights or jurisdiction.

## **Article 2. Promotion and Protection of Investments**

1. Each Contracting Party shall promote and encourage, as far as possible, within its territory investments made by investors of the other Contracting Party and shall admit such investments into its territory in accordance with its laws and regulations. It shall in any case accord such investments fair and equitable treatment.

2. Investments made by investors of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations shall enjoy full protection and security in the territory of the latter.

3. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.

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

## **Article 3. National and Most Favoured Nation Treatment**

1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party, as well as the returns therefrom, shall be accorded treatment which is fair and equitable and not less favourable than the one the latter Contracting Party accords to the investments of its own investors or investments of investors of any third State.

2. Both Contracting Parties shall accord to investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments made in their territory, treatment which is fair and equitable and not less favourable than the one the latter Contracting Party accords to its own investors or to investors of any third State.

3. The provisions of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of:

a) Existing or future free trade area, customs union, common market or other similar international agreements including other forms of economic co-operation to which either of the Contracting Parties is or may become a Party, and

b) Bilateral and multilateral agreements, having or not regional nature, relating wholly or mainly to taxation.

## **Article 4. Expropriation and Compensation**

1. Neither Contracting Party shall expropriate or nationalise an investment either directly or indirectly through measures

tantamount to expropriation or nationalisation (hereinafter referred to as "expropriation"), except by virtue of law, for a public purpose, on a non-discriminatory basis and against compensation.

2. Such compensation shall be equivalent to the market value of the expropriated investment immediately before the expropriation took place or before it became publicly known, whichever occurs first. The compensation shall be paid without delay, shall include the usual commercial interest from the date of the expropriation until the date of payment and shall be fully realisable and freely transferable.

Valuation criteria shall include the going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine the market value.

3. The investor whose investment is expropriated, shall have the right under the laws and regulations of the expropriating Contracting Party to the prompt review by a judicial or other competent authority of that Contracting Party of its case and of valuation of its investment in accordance with the principles set out in this Article.

## **Article 5. Compensation for Losses**

Investors of either Contracting Party whose investment suffer losses in the territory of the other Contracting Party owing to war or armed conflict, revolution, a state of national emergency or other events considered as such by international law, shall be accorded treatment no less favourable by the latter Contracting Party than the one that Contracting Party accords to the investments of its own investors, or of any third State, whichever is more favourable, as regards restitution, indemnification or other valuable consideration. Any payment made under this Article shall be freely transferable without delay.

## **Article 6. Transfers**

1. Pursuant to its own laws and regulations, each Contracting Party shall ensure that all sums 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) Capital and additional amounts necessary to maintain or increase the investments;
- b) The returns;
- c) Sums necessary for the service, repayment and amortisation of loans, recognised by both Contracting Parties to be an investment;
- d) The proceeds obtained from the sale or from the total or partial liquidation of the investment;
- e) Any compensation or other payment referred to in Articles 4 and 5;
- f) Any payment made in accordance with Article 7;
- g) Wages earned by foreign workers, duly authorised to work in connection with the investment in the territory of the other Contracting Party;
- h) Payments arising out of the settlement of a dispute.

2. The transfers referred to in this Article shall be made without delay at the exchange rate applicable on the date of the transfer in convertible currency.

3. For the purposes of the present Article, a transfer will be considered as done without delay when such a transfer takes place within the time normally used for the fulfilment of the necessary formalities, which should in any circumstances exceed two months from the date the requirement for transfer was presented.

4. In case of a serious balance of payments difficulties or the threat thereof, each Contracting Party may temporarily restrict transfers, provided that such a Contracting Party implements measures or a programme in accordance with the International Monetary Fund's standards. This restriction would be imposed on an equitable, non-discriminatory and in good faith basis, and may not go beyond what is necessary to remedy the balance of payments situation.

## **Article 7. 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 and 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 4, 5 and 6 of the present Agreement shall apply mutatis mutandis.

However, in case of a dispute, only the designated investor or the 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, Chapter Two.

## Chapter Two: Dispute Settlement

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

#### CHAPTER TWO: DISPUTE SETTLEMENT

#### PART ONE: SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

### **Article 8. 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 investment by an investor of the other Contracting Party may not submit a dispute for resolution under this Agreement.

2. If an investor submits a claim to arbitration under this Part, neither he nor its investment may initiate or continue proceedings before a national tribunal, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. If an investor or its investment initiates proceedings before a national tribunal, the investor may not submit a claim to arbitration under this Part.

### **Article 9. Means of Settlement, Time Periods**

1. An investor may choose to submit a dispute for resolution:

- a) To any 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) By arbitration in accordance with this Article under:
  - i. The Convention on 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 Additional Facility Rules of the Centre for Settlement of Investment Disputes ("ICSID Additional Facility"), if the Contracting Party of the investor or the Contracting Party to the dispute, but not both, is a party to the ICSID Convention; or
  - iii. The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL").

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 for consultation or negotiation 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 its intention to submit a claim to arbitration at least 90 days in advance, but not later than three years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.

4. The notice referred to in paragraph 3, shall specify:

- a) The name and address of both the disputing investor and its investment;

- b) The provisions of this Agreement alleged to have been breached and any other relevant provisions;
- c) The issues and the factual basis for the claim; and
- d) The relief sought and the approximate amount of damages claimed.

## **Article 10. 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 11. 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 the disputing Parties shall agree upon a third member as their chairman who, in any case, shall be a national of a third State with which both Contracting Parties maintain diplomatic relations.
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 failed to agree upon a chairman, the Secretary General of ICSID, on the request of any of the parties to the dispute, shall be 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 12. 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. UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Part.
2. Proceedings will be consolidated:
  - a) When two or more investors in relation with the same investment submit a claim to arbitration under 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 seriously harmed.

## **Article 13. 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 14. 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 losses or damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

## **Article 15. Applicable Law**

1. A tribunal established under this Dispute Settlement Mechanism shall decide the submitted issues in dispute in accordance with this Agreement, the applicable rules of law and principles of International Law.
2. An interpretation jointly formulated and agreed by the Contracting Parties of a provision of this Agreement shall be binding on any tribunal established under this Dispute Settlement Mechanism. If the Contracting Parties fail to submit an interpretation within 60 days from the date of the request of either Contracting Party, the tribunal shall decide the issue.

## **Article 16. 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 any applicable interests;
- 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, if both Contracting Parties are parties to such instruments.

### **PART TWO: SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES**

## **Article 17. Scope, Means of Settlement and Time Periods**

1. 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.

2. If the Contracting Parties fail to reach such settlement within six (6) months after the beginning of negotiations, the dispute shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal, in accordance with the provisions of this article.

3. A Contracting Party shall not initiate proceedings under this Dispute Settlement Mechanism for a dispute regarding the infringement of rights of an investor which that investor has submitted to proceedings under the provisions of Part One, 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.

4. The Arbitral Tribunal shall be constituted ad hoc, as follows: each of the Contracting Parties shall appoint one member and these two members shall propose a national of a third State with which both Contracting Parties maintain diplomatic relations, as chairman to be appointed by the two Contracting Parties. The members shall be appointed within two months and the chairman shall be appointed within three months from the date on which either Contracting Party notifies the other that it wishes to submit the dispute to an arbitral tribunal.

5. If the deadlines specified in paragraph 4 of this Article are not complied with, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is prevented from doing so, or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is also a national of either Contracting Party or if he is prevented from making the appointments for any other reason, the appointments shall be made by the member of the Court who is next in seniority and who is not a national of either Contracting Party.

6. The arbitral tribunal will decide disputes in accordance with this Agreement and the applicable rules and principles of International Law.

7. The Arbitral Tribunal shall rule according to majority vote. The decisions of the Arbitral Tribunal shall be final and binding on both Contracting Parties. Each Contracting Party shall be responsible for the costs of its own arbitrator and of its representatives at the arbitral proceedings. Both Contracting Parties shall assume an equal share of the expenses incurred by the chairman, as well as any other expenses. The Arbitral Tribunal may make a different decision regarding costs.

In all other respects, the Arbitral Tribunal shall define its own rules of procedure.

8. 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.

#### CHAPTER THREE: FINAL PROVISIONS

### **Article 18. Application of other Rules**

1. If the provisions of laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments made by investors of the other Contracting Party to a treatment more favourable than the one provided for by this Agreement, such provisions shall, to the extent that they are more favourable than the one that is provided, prevail over this Agreement.

2. Each Contracting Party shall observe any other obligations 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 only under the terms of the specific agreement underlying the obligations.

### **Article 19. Application of the Agreement**

This Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the legal provisions of the latter, prior to as well as after its entry into force, but shall not apply to any dispute concerning investments which have arisen before its entry into force.

### **Article 20. Consultations**

Representatives of the Contracting Parties shall, whenever necessary, hold consultations on any matter related to the interpretation and application of this Agreement. These consultations shall be held on the proposal of one of the Contracting Parties, which shall, if necessary, propose meetings at a place and a time to be agreed upon through diplomatic channels.

### **Article 21. Entry Into Force and Duration**

1. This Agreement shall enter into force 30 days after the Contracting Parties notify each other in writing that their respective internal constitutional or legal procedures have been fulfilled.

2. This Agreement shall remain in force for a period of 10 years, which shall be extended for equal periods, unless, 12 months before the expiration of the period, either Contracting Party notifies the other in writing of its intention to terminate this Agreement.

3. In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 20 shall remain in force for a further period of 10 years from the date of termination of this Agreement.

Done in duplicate at this day of 199 in the Portuguese, Spanish and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Portuguese Republic

For the United Mexican States

On the occasion of the signing of the Agreement between the Portuguese Republic and the United Mexican States on the Reciprocal Promotion and Protection of Investments, the undersigned duly authorised to this effect, have agreed also on the following provision, which constitute an integral part of the said Agreement:

With reference to Article 3 of this Agreement:

The Contracting Parties consider that provisions of Article 3 of this Agreement shall be without prejudice to the right of either Contracting Party to apply the relevant provisions of their tax law which distinguish between tax-payers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

Done in duplicate at this day of 199 in the Portuguese, Spanish and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Portuguese Republic

For the United Mexican States