AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF TURKEY AND THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA CONCERNING THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Republic of Turkey and the Government of the Republic of Guatemala, hereinafter referred to as "the Contracting Parties";

Desiring to intensify the economic relations for mutual benefit of both countries;

Desiring to promote greater economic cooperation between them, particularly with respect to investments by investors of one Contracting Party in the territory of the other Contracting Party;

Recognizing that an agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties;

Considering that the protection of investments on fair and equitable basis shall provide a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve economic prosperity of both parties;

Convinced that these objectives should be achieved in a manner consistent with the protection of health, security, environment and labor rights of each Contracting Party; and

Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as labor rights of each Contracting Party and internationally recognized labor rights adopted by each Contracting Party;

Having resolved to conclude an agreement concerning the reciprocal promotion and protection of investments;

Have agreed as follows:

ARTICLE I
Definitions

For the purposes of this Agreement:

1. The term "investment" means every kind of asset, connected with business activities, acquired for the purpose of establishing lasting economic relations in the territory of a Contracting Party in conformity with its laws and regulations, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk or a certain duration, and shall include in particular, but not exclusively:

(a) movable and immovable property, as well as any other rights as mortgages, liens, pledges, and any other similar rights as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated;

(b) reinvested returns, claims to money or any other rights having financial value related to an investment;

(c) shares, stocks, or any other form of participation in companies;

(d) intellectual property rights, such as patents, industrial designs, technical processes, trademarks, and know-how;

(e) goodwill;

(f) concessions conferred by law or by contract, including concessions related to natural resources.

But investment does not mean; claims to money that arise exclusively from: (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, (ii) the granting of credit in connection with a commercial transaction, unless it is a loan that has the characteristics of an investment.

2. The term "investor" means:

(a) natural persons having the nationality of a Contracting Party according to its laws;

(b) companies, corporations, firms, business partnerships incorporated or constituted under the law of a Contracting Party and having their registered offices together with substantial business activities in the territory of that Contracting Party; who have made an investment in the territory of the other Contracting Party.

3. The term "returns" means the amounts yielded by an investment and includes in particular, though not exclusively, profit, interest, capital gains, royalties, fees and dividends.

4. The "territory" means;

(a) in respect of the Republic of Turkey; the land territory, internal waters, the territorial sea and the airspace above them, as well as the maritime areas over which the Republic of Turkey has sovereign rights or jurisdiction for the purpose of exploration, exploitation and preservation of natural resources whether living or non-living, pursuant to international law.

(b) in respect of the Republic of Guatemala; the land territory, maritime and air space including inland waters, the exclusive economic zone and the continental shelf over which it exercises sovereign rights and jurisdiction in accordance with its domestic legislation and international law;

ARTICLE 2
Scope of Application

This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.

ARTICLE 3
Promotion and Protection of Investments

1. Subject to its laws and regulations, each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party.

2. Each Contracting Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

3. For greater certainty, paragraph 2 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 2 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Contracting Party to provide the level of police protection required under customary international law.

4. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

ARTICLE 4
Treatment of Investments

1. Each Contracting Party shall admit in its territory investments on a basis no less favourable than that accorded in like circumstances to investments of investors of any third State, within the framework of its laws and regulations.

2. Each Contracting Party shall accord to these investments, once established, treatment no less favourable than that accorded in like circumstances to investments of its investors or to investments of investors of any third State, whichever is the most favourable, as regards the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of the investment.

3. The Contracting Parties shall within the framework of their national legislation make their best efforts to give favorable consideration to applications for the entry and sojourn of nationals of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with the making and carrying through of an investment.

4. (a) 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 any international agreement or arrangement relating wholly or mainly to taxation;

(b) the non-discrimination, national treatment and most—favored nation treatment provisions of this Agreement shall not apply to all actual or future advantages accorded by either Contracting Party by virtue of its membership of, or association with a customs, economic or monetary union, common market or a free trade area; to nationals or companies of its own, of Member States of such union, common market or free trade area, or of any other third State;

(c) paragraphs (1) and (2) of this Article shall not apply in respect of dispute settlement provisions between an investor and the hosting Contracting Party laid down simultaneously by this Agreement and by another similar international agreement to which one of the Contracting Parties is a party;

(d) the provisions of Article 3 and 4 of this Agreement shall not oblige the Contracting Parties to accord investments of investors of the other Contracting Party the same treatment that it accords to investments of its own investors with regard to acquisition of land, real estates, and real rights thereof.

ARTICLE 5
General Exceptions

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:

(a) designed and applied for the protection of human, animal or plant life or health, or the environment;

(b) related to the conservation of living or non-living exhaustible natural resources.

2. Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any actions that it considers necessary for the protection of its essential security interests;

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment;

(ii) taken in time of war or other emergency in international relations; or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices.

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

(d) to prevent the Republic of Guatemala from taking any measure to preserve and promote cultural diversity in accordance with the Articles 66-69 of the Politic Constitution of the Republic of Guatemala.

3. Without prejudice to the provisions of Article 6 and Annex on Expropriation, the provisions of this Agreement shall not apply to tax matters. However, in accordance with its tax policies, each Contracting Party shall strive to accord fairness and equity in the treatment of investors of the other Contracting Party.

ARTICLE 6
Expropriation and Compensation

1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects (hereinafter referred as expropriation) except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement.

2. Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.

3. Compensation shall be equivalent to the market value of the expropriated investment before the expropriation was taken or became public knowledge. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 of Article 8.

4. Compensation shall be payable in a freely convertible currency and in the event that payment of compensation is delayed, it shall include an applicable interest rate from the date of expropriation until the date of payment.

ARTICLE 7
Compensation for Losses

Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment no less favourable than that accorded to its own investors or to investors of any third State, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

ARTICLE 8
Repatriation and Transfer

1. Each Contracting Party shall guarantee in good faith all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) the initial capital and additional amounts to maintain or increase investment;

(b) returns;

(c) proceeds from the sale or liquidation of all or any part of an investment;

(d) compensation pursuant to Article 6 and 7;

(e) reimbursements and interest payments deriving from loans in connection with investments;

(f) salaries, wages and other remunerations received by the nationals of one Contracting Party who have obtained in the territory of the other Contracting Party the corresponding work permits related to an investment;

(g) payments arising from an investment dispute.

2. Transfers shall be made in the convertible currency in which the investment has been made or in any convertible currency at the rate of exchange in force at the date of transfer, unless otherwise agreed by the investor and the hosting Contracting Party.

3. Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a nondiscriminatory and in good faith basis.

4. Notwithstanding paragraphs 1 through 3, a Contracting Party may prevent a transfer through the equitable, nondiscriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

ARTICLE 9
Subrogation

1. If one of the Contracting Parties has a public insurance or guarantee scheme to protect investments of its own investors against non-commercial risks, and if an investor of this Contracting Party has subscribed to it, any subrogation of the insurer under the insurance contract between this investor and the insurer shall be recognized by the other Contracting Party.

2. The insurer is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and shall assume the obligations related to the investment. The subrogated rights or claims shall not exceed the original rights or claims of the investor.

3. Disputes between a Contracting Party and an insurer shall be settled in accordance with the provisions of Article 10 of this Agreement.

ARTICLE 10
Settlement of Disputes between One Contracting Party and Investors of the Other Contracting Party

1. This Article shall apply to disputes between one 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 investments.

2. In order to resolve the dispute amicably, the investor shall notify the Contracting Party in writing and in detail, the intention to submit a claim to arbitration under the provisions of this Agreement. The notification shall contain at least the following information:

(a) the name and the address of the disputing investor;

(b) the provisions of the Agreement alleged to have been breached;

(c) the factual and legal basis for the claim;

(d) the description of the investment involved; and

(e) the relief sought and the approximate amount of damages claimed.

3. If these disputes, cannot be settled in this way within six (6) months following the date of the written notification mentioned in paragraph 2, the Contracting Parties consent to submit the dispute to international arbitration. The disputes can be submitted, as the investor may choose, to:

(a) the competent court of the Contracting Party in whose territory the investment has been made, or

(b) to:

(i) the international Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States", except as provided under paragraph 6 of this Article;

(ii) arbitration under ICSID Additional Facility Rules, provided that either the disputing Party or the non-disputing Party, but not both, is a party to the ICSID Convention;

(iii) an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission for international Trade Law (UNCITRAL); or

(iv) any other arbitration rules, if the disputing parties so agree.

4. Once the investor has submitted the dispute to one or the other of the dispute settlement forums mentioned in paragraph 3 of this Article, the choice of one of these forums shall be final and exclude any other.

5. A disputing investor may submit a claim to arbitration only if he waives his right to initiate or continue any proceeding before an administrative tribunal or court under the laws of the Contracting Party, other dispute settlement procedures, or any proceedings with respect to the measure of the disputing Contracting Party that is alleged to be a breach of Agreement, except for the procedures for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of disputing Contracting Party.

The consent and waiver under this Article shall be given in writing in the request for arbitration.

6. Notwithstanding the provisions of paragraph 3 of this Article in deciding whether an investment dispute is within the jurisdiction of ICSID and competence of the tribunal established under subparagraphs 3 (b) (i) that tribunal shall comply with the notification submitted by the Republic of Turkey on March 3, 1989, and by the Republic of Guatemala on January 16, 2003 to ICSID, in accordance with Article 25 (4) of ICSID Convention concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of ICSID, as an integral part of this Agreement.

7. The arbitral tribunal established under this Agreement shall decide the issues in dispute in accordance with the provisions of this Agreement, and applicable rules of international laws.

The arbitral tribunal established under this Agreement may take into account domestic law of the disputing Party where it is relevant to the factual basis of the claim.

8. The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party shall execute the award according to its national law.

ARTICLE 11
Constitution of Tribunal

1. The tribunal shall be constituted of three arbitrators. Each disputing party shall appoint one arbitrator, the third arbitrator who shall be the president of the arbitral tribunal, shall be appointed by the disputing parties by mutual agreement. The president of the arbitral tribunal shall not be in any case a national of either Contracting Party.

2. Where a tribunal established under this Article has not been constituted within ninety (90) days from the date on which the claim is submitted to arbitration, the arbitrator or arbitrators not yet appointed shall be designated in accordance with the provisions applicable under the procedural rules of the chosen forum. In any case, the appointing authority prior to the appointment of the arbitrator or arbitrators not yet appointed shall consult with the disputing party.

3. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under subparagraph 3 (b) of this Article. If the disputing parties fail to reach an agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958.

4. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damage and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damage and any applicable interest in lieu of restitution.

5. The disputing Contracting Party may decide the publication of the award, in accordance with its practice or its national legislation.

ARTICLE 12
Provisional Measures

An arbitral tribunal may order a provisional measure of protection to preserve the rights of a disputing party or to ensure that the jurisdiction of the arbitral tribunal shall be fully effective, including an order to preserve evidence in possession or control of a disputing party or orders to protect the jurisdiction of the arbitral tribunal. An arbitral tribunal may not order attachment or suspension of the application of the measure alleged to constitute a breach, referred to in Article 10.

ARTICLE 13
Denial of Benefits

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a company of such other Contracting Party and to investments of such investor if the company has no substantial business activities in the territory of the Contracting Party under whose law it is constituted or organized, and investors of a non-Contracting Party or investors of the denying Contracting Party, own or control the company.

2. The denying Contracting Party shall, to the extent practicable, notify the other Contracting Party before denying the benefits.

ARTICLE 14
Settlement of Disputes between the Contracting Parties

1. The Contracting Parties shall seek in good faith and a spirit of cooperation a rapid and equitable solution to any dispute between them concerning the interpretation or application of this Agreement. In this regard, the Contracting Parties agree to engage in direct and meaningful negotiations to arrive at such solutions. If the Contracting Parties cannot reach an agreement within six (6) months after the beginning of disputes between themselves through the foregoing procedure, the disputes may be submitted, upon the request of either Contracting Party, to an arbitral tribunal of three members.

2. Within two (2) months of receipt of a request, each Contracting Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. In the event either Contracting Party fails to appoint an arbitrator within the specified time, the other Contracting Party may request the President of the international Court of Justice to make the appointment, within a period of four months, from the date on which any Contracting Party has notified the other Contracting Party its intention to submit the dispute to an arbitral tribunal.

3. In the case that a Contracting Party does not designate an arbitrator or if both arbitrators cannot reach an agreement about the choice of the Chairman within two (2) months after their appointment, the Chairman shall be appointed upon the request of either Contracting Party by the President of the international Court of Justice.

4. If, in the cases specified under paragraphs (2) and (3) of this Article, the President of the lnternational Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the Vice-President is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the most senior member of the Court who is not a national of either Contracting Party.

5. The tribunal shall have three (3) months from the date of the selection of the Chairman to agree upon rules of procedure consistent with the other provisions of this Agreement. In the absence of such agreement, the tribunal shall request the President of the International Court of Justice to designate rules of procedure, taking into account generally recognized rules of international arbitral procedure.

6. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within eight (8) months of the date of selection of the Chairman, and the tribunal shall render its decision within two (2) months after the date of the final submissions or the date of the closing of the hearings, whichever is later. The arbitral tribunal shall reach its decisions, which shall be final and binding, by a majority of votes.

Arbitral Tribunal shall reach its decision on the basis of this Agreement and in accordance with international law applicable between the Contracting Parties.

7. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be "paid for equally by the Contracting Parties. The tribunal may, however, at its discretion, decide that a higher proportion of the costs be paid by one of the Contracting Parties.

8. A dispute shall not be submitted to an international arbitral tribunal under the provisions of this Article, if a dispute on the same matter has been brought before another international arbitral tribunal under the provisions of Article 10 and is still before the tribunal. This will not impair the engagement in direct and meaningful negotiations between both Contracting Parties.

9. The Arbitral Tribunal shall determine its rules of procedures.

ARTICLE 15
Entry into Force

1. This Agreement shall enter into force the next day of the date of the receipt of the last notification by the Contracting Parties, in writing and through diplomatic channels, of the completion of the respective internal legal procedures necessary to that effect.

2. This Agreement shall remain in force for a period of ten (10) years and shall continue in force indefinitely unless terminated in accordance with paragraph 4 of this Article.

3. This Agreement may be amended by mutual written consent of the Contracting Parties at any time. The amendments shall enter into force in accordance with the same legal procedure prescribed under the first paragraph of the present Article.

4. Either Contracting Party may, by giving one year's prior written notice to the other Contracting Party, terminate this Agreement at the end of the initial ten-year period or at any time thereafter.

5. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of ten (10) years from such date of termination.

IN WITNESS WHEREOF, the undersigned representatives, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Ankara on 21/ 12/2015 in the Turkish, Spanish and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF TURKEY

İbrahim Şenel
Undersecretary

FOR THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA

José Rodrigo Vielmann de Leon
Vice Minister of Foreign Affairs

ANNEX
Expropriation

The Contracting Parties confirm their shared understanding that:

1. An action or a series of actions by a Contracting Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

2. Article 6 paragraph 1 addresses two situations:

(a) the first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure;

(b) the second situation is indirect expropriation, where an action or series of actions by a Contracting Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

3. The determination of whether an action or series of actions by a Contracting Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the government action, although the fact that an action or series of actions by a Contracting Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(c) the character of the government action.