

# **AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA AND THE GOVERNMENT OF THE REPUBLIC OF TURKEY ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS**

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

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

Desiring to promote greater economic cooperation among them, particularly with respect to the investments of investors of a contracting party in the territory of the other Contracting Party;

Recognizing that an agreement on the treatment to be granted for 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 a fair and equitable basis, will provide a stable framework for investment and will help to maximize the efficient use of economic resources and improve the economic prosperity of both Parties;

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

Convinced that these objectives can be achieved without relaxing application measures such as health, and the environment, as well as the legal rights of each Contracting Party and labor rights internationally recognized and adopted by each Contracting Party;

Having resolved to conclude an agreement regarding the Promotion and Protection Reciprocal Investment;

Have agreed the following:

## **Article 1. Definitions**

For the purposes of this agreement:

1. The term "investment" means all types of assets, related to activities of business, acquired for the purpose of establishing long-term economic relationships in the territory of a Contracting Party in accordance with its laws and regulations, which has the characteristics of an investment, including characteristics such as the commitment of capital or other resources, the expectation of profit or benefit, the assumption of risks or a certain duration and will include particular, but not exclusively:

(a) movable and immovable property, as well as any other right such as mortgages, liens, garments and any other similar right as set forth in accordance with the laws and regulations of the Contracting Party in whose territory is the property;

(b) Reinvestment of income, claims for money or any other right with financial value related to an investment;

(c) Shares, securities or any other form of participation in the companies;

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

(e) goodwill ;

(f) concessions granted by law or under a contract, including concessions related to natural resources.

But investment does not mean; money claims that arise exclusively from: (i) commercial contracts for the sale of goods or services by a national or company in the territory of one of the Contracting Parties to a company in the territory of the another 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 who have the nationality of one of the Contracting Parties in accordance with their laws;

(b) companies, corporations, firms, incorporated business associations or constituted under the laws of one of the Contracting Parties, and that the address of its offices as well as substantial business activities either in the territory of the said Contracting Party; who have made an investment in the territory of the other Contracting Party.

3. The term "returns" means the amounts produced by an investment and includes in particular, but not exclusively, profits, interests, profits of capital, dividends, royalties and fees.

4. "Territory" means:

(a) in relation to the Republic of Guatemala: the terrestrial, maritime and air, including inland waters, the exclusive economic zone and the continental shelf, over which the Republic of Guatemala exercises rights of sovereignty and jurisdiction, in accordance with its legislation internal and international law;

(b) in relation to the Republic of Turkey: land space, inland waters, maritime and air territory, as well as the maritime areas on which the Republic of Turkey exercises sovereign rights and jurisdiction for the purpose of exploration, exploitation and preservation of resources natural, whether living or non-living, under international law;

## **Article 2. Scope of Application**

This Agreement will apply to investments made in the territory of one of the Contracting Parties, in accordance with their national laws and regulations, by investors or the other contracting party, either before or after the entry into force of this Agreement. However, this Agreement will not apply to controversies that arose before its entry into force.

## **Article 3. Promotion and Protection of Investments**

1. In accordance with its laws and regulations, each Contracting Party shall promote in its territory, as far as possible, investments by investors of the another Contracting Party.

2. Each Contracting Party shall grant to the covered investments treatment according to the customary international law, including fair and equitable treatment; and full protection and security.

3. For greater certainty, paragraph 2 establishes the minimum standard of customary international law of treatment for foreigners, as the minimum standard treatment to be granted to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" require additional or superior treatment to that which is required by that norm and do not create additional substantive rights. The obligation in paragraph 2 grants:

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

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

(4) The determination that there has been a violation of another provision of this Agreement, or of a different international agreement, does not imply a violation of this Article has been produced.

## **Article 4. Treatment of Investments**

1. Each Contracting Party shall admit investments in its territory on a non less favorable basis than that which, in similar circumstances, grants to investments from investors of any third State, within the framework of its laws and regulations.

2. Once established, each Contracting Party shall grant these investments a treatment no less favorable to that granted under the same conditions to the investments of its own investors or investments made by investors of any third State, whichever is more favorable, in terms of management, maintenance, use, operation, enjoyment, extension, sale, liquidation and alienation of the investment.

3. The Contracting Parties shall, within the framework of their national legislation, make their better efforts to give favorable consideration to applications for entry and stay of nationals of either of the Contracting Parties, who wish to enter the territory of the other Contracting Party with respect to the realization and application of an investment.

4.

(a) The provisions of this Article shall not be construed in order to bind any of the Contracting Parties to extend the benefit of any treatment, preference or privilege to investors of the other Contracting Party, which may be extended by the first Contracting Party under any international agreement or arrangement relative, partial or mainly to taxation;

(b) the provisions of non-discrimination, national treatment and most favored nation of this agreement will not apply to all current or future benefits granted by either of the Contracting Parties by virtue of its membership or association with a customs union, economic or monetary, common market or a free trade zone; to nationals or companies owned by the Member States of that union, common market or area of free trade, or of any other third State;

(c) paragraphs (1) and (2) of this Article shall not apply with respect to provisions of settlement of disputes between an investor and the Contracting Party host, set simultaneously by this Agreement and on the other hand similar international agreement of which either of the Contracting Parties is a party;

(d) the provisions of Article 3 and 4 of this Agreement shall not require Contracting Parties agree to the investments of investors of the other Contracting Party, the same treatment it accords to the investments of its own investors with respect to the acquisition of land, assets real estate and real rights.

## **Article 5. General Exceptions**

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopt, maintain or apply any non-discriminatory legal measure:

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

(b) related to the conservation of living non-renewable natural resources or not alive.

2. Nothing in this Agreement shall be construed as:

(a) require Contracting Parties to provide or allow access to any information whose disclosure is contrary to its essential security interests;

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

(i) relating to the trafficking of arms, ammunition and war material, trafficking and transactions of other goods, materials, services and technology carried out directly or indirectly in order to provide a military establishment or some other security establishment;

(ii) taken in wartime or other emergencies in international relationships; or

(iii) relative to the application of national policies or international agreements on the non-proliferation of nuclear weapons or other explosive nuclear devices.

(c) To prevent any of the Contracting Parties from taking measures in the fulfillment of its obligations under the Charter of the United Nations for the maintenance of international peace and security; or

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

3. Without prejudice to the provisions of Article 6 and the Expropriation Annex, the provisions of this Agreement will not apply to tax matters. But nevertheless, according to its fiscal policies, each Contracting Party shall endeavor to grant justice and equity in the treatment. of the investors of the other Contracting Party.

## **Article 6. Expropriation and Compensation**

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

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

3. The compensation will be equivalent to the market value of the expropriated investment before the expropriation has taken place or that has become public knowledge. Compensation will be paid without delay and freely transferable, as described in section 2 of Article 8.

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

## **Article 7. Compensation for Losses**

Investors of any of the Contracting Parties whose investments suffer losses in the territory of the other Contracting Party due to war, insurrection, civil disturbance or other similar events shall receive from the other Contracting Party a treatment no less favorable than that granted to its own investors or to investors from any third State, whatever the most favorable treatment, regarding the measures that it adopts in relation to such losses.

## **Article 8. Repatriation and Transfer**

1. Each Contracting Party shall guarantee in good faith that all transfers related to an investment are made freely and without delay within and outside its territory. These transfers include:

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

(b) returns;

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

(d) compensation in accordance with Article 6 and 7;

(e) refunds and interest payments derived from loans in relation to the investments;

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

(g) payments derived from an investment dispute.

2. Transfers shall be made in the convertible currency in which it was made the investment or in any convertible currency at the exchange rate in effect, at the date of the transfer, unless otherwise agreed by the investor and the Party Host contracting.

3. When, in exceptional circumstances, payments and movements of capital causing or threatening to cause serious balance of payments difficulties, each of the Contracting Parties may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory basis and in good faith.

4. However, as provided in paragraphs 1 to 3, a Contracting Party may prevent a transfer through the equitable, non-discriminatory application of good faith of its laws regarding:

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

(b) issue, trade or negotiation of securities, futures, options or derivatives;

(c) criminal or criminal infractions;

(d) financial reports or maintenance of transfer records, when necessary to collaborate in compliance with the law or with the regulatory financial authorities; or

(e) guarantee of 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 a scheme of guarantee to protect the investments of its own investors against not commercial activities risks, and if an investor of that Contracting Party adheres to it, any subrogation of the insurance entity under the insurance contract between this investor and the insurer, it shall be recognized by the other Party Contractor.

2. The insurer has the right, by virtue of the subrogation, to exercise the rights and enforce the claims of that investor, and

must assume the obligations related to the investment. The rights or claims subrogated do not exceed the original rights or claims of investors.

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

## **Article 10. Settlement of Disputes between a Contracting Party and the Investors of the other Contracting Party**

1. This article shall apply to disputes between a Contracting Party and an investor of the other Contracting Party, in cases where an alleged breach of an obligation by the first, under this Agreement, causes losses or damages to the investor or his investments.

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

- (a) the name and address of the claimant investor;
- (b) the provisions of the Agreement allegedly unfulfilled;
- (c) the factual and legal basis for the claim;
- (d) the description of the investment made; and
- (e) the repair requested and the approximate amount of the damages claimed.

3. If these disputes can not be resolved in this manner within six (6) months following the date of the written notification referred to in paragraph 2, the Contracting Parties agree to submit the dispute to international arbitration. Disputes may be submitted, at the option of the investor, to:

- (a) the competent court of the Contracting Party in whose territory the investment was made, or
- (b) To
  - (i) the International Center for Settlement of Differences Concernin Investments (ICSID), created by the "Convention on the Settlement of Differences in Investment between States and Nationals of others States ", except as provided in paragraph 6 of this article;
  - (ii) arbitration as provided in the Rules of the ISCID Additional Facility, provided that the complaining Party or the Non-complaining party, but not both, is a party to the Convention of ICSID.
  - (iii) an ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission for the International Commercial Law (UNCITRAL); or
  - (iv) any other arbitration rule, if the disputing parties so declare agree

4. Once the investor has submitted the dispute to one or other of the dispute resolution forums mentioned in paragraph 3 of this article, the election of one of these forums will be final and will exclude any other.

5. A disputing investor may submit a claim to arbitration only if it waives his right to initiate or continue any proceedings before an administrative or judicial court, in accordance with the laws of the Contracting Party, other dispute resolution procedures or any procedure with respect to the measure of the complaining Contracting Party alleging breach of the Agreement, with the exception of suspensives, declaratives or extraordinaries precautionary measures, that do not imply the payment of damages before the administrative or judicial court, according to the legislation of the Claimant contracting Party. The consent and waiver referred to in this article will be delivered in writing in the request for arbitration.

6. Notwithstanding the provisions of paragraph 3 of this article to decide whether an Investment dispute is within the jurisdiction of the ICSID and the jurisdiction of the court set forth in paragraphs 3 (b) (i), that court shall comply with the notification submitted by the Republic of Turkey on March 3, 1989 and for the Republic of Guatemala on January 16, 2003 to the ICSID, in accordance with Article 25 (4) of the ICSID Convention concerning types of differences considered adequate or inadequate for submission to the jurisdiction of ICSID, as an integral part of this Agreement.

7. The arbitral tribunal established pursuant to this Agreement shall decide the issues in dispute in accordance with the provisions of this Agreement and the International Law applicable rules. The arbitral tribunal established pursuant to this

Agreement may take into account the national legislation of the complaining Party, as relevant to the factual basis of the claim.

8. The arbitral awards will be final and binding for all parties in dispute. Each Contracting Party shall execute the award in accordance with its national legislation.

## **Article 11. Constitution of the Tribunal**

1. The Tribunal shall be constituted by three arbitrators. Each disputing party appoint an 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 arbitral tribunal shall not, under any circumstances, be a national of any of the Parties Contracting.

2. When a court established under this article has not been constituted within ninety (90) days from the date on which the arbitration claim was submitted, the arbitrator or arbitrators who have not yet been appointed shall be designated in accordance with the provisions applicable under the procedural rules of the chosen forum. In any case, the appointing authority before the appointment of the arbitrator or arbitrators who have not yet been appointed, should consult with the disputing party.

3. The disputing parties may agree on the legal place of any arbitration under the arbitration rules applicable under paragraph 3 (b) of this article. If the disputing parties do not reach an agreement, the court will determine the place in accordance with the applicable arbitration rules, provided that the place is found in the territory of a State that is a party to the Convention on United Nations on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York on June 10, 1958.

4. When a tribunal makes a final award unfavorable to the defendant, the Court may grant, separately or jointly, only:

(a) pecuniary damages and interest as appropriate; and

(b) restitution of property, in which case the award shall provide that the defendant may pay pecuniary damages, plus any interest that may arise instead of restitution.

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

## **Article 12. Provisional Measures**

An arbitral tribunal may order an interim measure of protection for preserve the rights of the disputing party or to ensure that the jurisdiction of the arbitral tribunal will be fully effective, including an order to preserve the evidence in possession or control of the disputing party or orders to protect the jurisdiction of the arbitral tribunal. An arbitral tribunal may not order the foreclosure or the suspension of the application of the measure allegedly in violation of 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 that other Contracting Party and the investments of the said investor, if the company does not have substantial commercial activities in the territory of the Contracting Party under whose law is constituted or organized, and the investors of a non-Contracting Party or investors who own or control a company of the Contracting Party that denies.

2. The refusing Contracting Party shall, to the extent possible, 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 in a spirit of cooperation a rapid and equitable solution to any dispute in relation to the interpretation or application of this Agreement. In this regard, the Contracting Parties agree to enter into direct and meaningful negotiations to reach this type of solutions. If the Contracting Parties can not reach an agreement within six (6) months after the start of the disputes between them through the above process, disputes may be submitted at the request of either Contracting Party, to an arbitral tribunal of three members.

2. Within two (2) months following receipt of an application, each Contracting Party will appoint an arbitrator. The two arbitrators will choose a third arbitrator as President, who is a national of a third State. In the case that any of the Contracting Party does not appoint an arbitrator within the prescribed period, the other Contracting Party may request the

President of the International Court of Justice to make the designation, within four months, from the date on which either Contracting Party has notified the other Contracting Party of its intention to submit the dispute to an arbitral tribunal.

3. In the event that a Contracting Party does not appoint an arbitrator or if the two arbitrators can not reach an agreement on the election of the President within the two (2) months after their appointment, the President shall be appointed at the request of any of the Contracting Parties by the President of the International Court of Justice.

4. If, in the cases provided in paragraphs (2) and (3) of this article, the President of the International Court of Justice is prevented from performing said function or if it is a national of one of the Contracting Parties, the designation shall be made by the Vice President, and if the Vice President is prevented from performing said function, or if it is a national of either of the Contracting Parties, the appointment shall be made by the oldest member of the Court who is not national of any of the Contracting Parties.

5. The court shall have three (3) months from the date of the election of the President to agree on the procedural rules consistent with the other provisions of the present Agreement. In the absence of such an agreement, the court shall request the President of the International Court of Justice to establish a regulation, taking into Consideration of the generally recognized rules of procedural international arbitration.

6. Unless otherwise agreed, all presentations and all the hearings shall be completed within eight (8) months of the date of the election of the President and the court shall render its decision within two (2) months after the date of closing arguments or closing date of hearings, whichever is later. The arbitral tribunal will make its decisions, which will be definitive and binding, by majority vote. The Arbitral Tribunal will make its decision on the basis of this Agreement and in conformity with the applicable International Law between the Contracting Parties.

7. Expenses incurred by the President, other arbitrators, and other expenses of the procedure shall be paid in equal parts by the Contracting Parties. The court may, however, at its discretion, decide that a greater proportion of the costs shall be paid by one of the Contracting Parties.

8. A dispute will not be submitted to an international arbitral tribunal under the provisions of this article, if a dispute over the same matter has been brought before another international arbitral tribunal pursuant to the provisions of Article 10 and is still before the court. This will not affect the participation in direct and meaningful negotiations between the two Contracting Parties.

9. The Arbitral Tribunal will adopt its own procedural rules.

## **Article 15. Entry Into Force**

1. This Agreement shall enter into force on the day following the date of receipt of the last notification by the Contracting Parties, in writing and through diplomatic channels, of compliance with the respective internal legal procedures necessary for the effect.

2. This Agreement shall remain in force for a period of ten (10) years and will continue in force indefinitely unless it is resolved in accordance with the paragraph 4 of this article.

3. This Agreement may be modified by mutual written consent of the Contracting Parties at any time. The amendments will enter into force in accordance with the same legal procedure provided in the first paragraph of present article.

4. Each Contracting Party may, by prior written notification of one year to the other Contracting Party, terminate this Agreement at the end of the ten years initial period or at any later time.

5. With respect to investments made or acquired prior to the termination date of this Agreement and to which it is applied otherwise Agreement, the provisions of all other articles of this Agreement will continue effective thereafter for an additional period of ten (10) years from the finish date.

IN FAITH WHEREOF, the undersigned, duly authorized representatives for this purpose, by their respective governments, they have signed this Agreement.

DONE in duplicate in Ankara, on December 21, 2015, in the Spanish, Turkish and English languages, all texts being equally authentic. In case of divergence in interpretation, the English text will prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA

Rodrigo José Vielmann de León

Vice Minister

Ministry of Foreign Affairs

FOR THE GOVERNMENT OF THE REPUBLIC OF TURKEY

Ibrahim Senel

Undersecretary

Ministry of Economy

The Contracting Parties confirm their common understanding that:

1. An action or series of actions of a Contracting Party cannot constitute an expropriation unless it interferes with tangible or intangible property rights or a property interest on 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 the formal transfer of title or direct confiscation;

(b) the second situation is indirect expropriation, when an act or series of acts of a Contracting Party have an effect equivalent to the direct expropriation without formal transfer of title or direct confiscation.

3. The determination of whether an act or series of acts of a Contracting Party, in a specific fact situation, constitute an indirect expropriation requires an examen of every case, taking in consideration, between other factors:

(a) the economic impact of the governmental action, although the fact of an action or series of actions of one contracting party has an adverse effect over the economic value of an investment, by itself, does not mean an indirect expropriation has been produced;

(b) the degree in which the governmental action intervenes with unequivocal and reasonable investment expectations ; and

(c) the character of the governmental action.