

# **Protocol on the Promotion and Protection of Investments from States not Party to the Mercosur**

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

Considering the Treaty of Asuncion signed on March 26, 1991, by which the States Parties decided to create the Southern Common Market (MERCOSUR).

Considering the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR approved by Decision No. 11/93 of the Council of the Common Market, which aims to promote investments of investors of the States Parties of MERCOSUR within the territorial scope of application of the Treaty of Asuncion.

Emphasizing the need to harmonize the general legal principles to be applied by each of the States Parties to investments from States not Parties to MERCOSUR (hereinafter referred to as "Third States"), in order not to create differential conditions that distort the flow of investments.

Recognizing that the promotion and protection of investments on the basis of agreements with Third States will contribute to stimulate individual economic initiative and increase the prosperity of the four States Parties.

Have agreed as follows:

## **Article 1 .**

The States Parties undertake to accord to investments made by investors of Third States treatment no more favorable than that set forth in this Protocol.

## **Article 2.**

For the purposes indicated above, the general treatment to be agreed upon by each State Party with Third States shall not recognize benefits and rights greater than those recognized to the investor in the following normative bases:

### **A) DEFINITIONS**

1. The term "investment" shall mean, in accordance with the laws and regulations of the State Party in whose territory the investment is made, any type of asset invested directly or indirectly by investors of a Third State in the territory of the State Party, in accordance with the laws of that State Party. It shall include in particular, but not exclusively:

- (a) ownership of movable and immovable property, as well as other rights in rem such as mortgages, sureties and pledges;
- b) shares, corporate quotas, and any other type of participation in companies;
- c) debt securities and rights to benefits that have an economic value; loans are included only when they are directly linked to a specific investment;
- d) intellectual or intangible property rights including, in particular, copyrights, patents, industrial designs, trademarks, trade names, technical procedures, know-how and goodwill;
- e) economic concessions conferred by law or contract, including concessions for the prospecting, cultivation, extraction or exploitation of natural resources.

2. The term "investor" shall mean:

- (a) any natural person who is a national of a State Party or of the Third State, in accordance with their respective legislation.

The provisions of the agreements to be concluded shall not apply to investments made in the territory of a State Party by natural persons who are nationals of Third States, if such persons, at the date of the investment, reside or are domiciled, in

accordance with the legislation in force, permanently in such territory, unless it is proved that the resources relating to such investments come from abroad.

(b) any juridical person constituted in accordance with the laws and regulations of a State Party or of the Third State and having its seat in the territory of its incorporation.

(c) any juridical person established under the laws of any country which is effectively controlled by natural or juridical persons as defined in a) and b) of this paragraph.

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

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

## B) PROMOTION OF INVESTMENTS

Each State Party shall promote in its territory the investments of investors of Third States, and shall admit such investments in accordance with its laws and regulations.

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

## C) PROTECTION OF INVESTMENTS

Each State Party shall ensure fair and equitable treatment of investments of investors of Third States, and shall not impair their management, maintenance, use, enjoyment or disposition through unjustified or discriminatory measures.

Each State Party shall accord full protection to such investments and may accord them treatment no less favorable than that accorded to investments of its own domestic investors or to investments made by investors of other states.

States Parties shall not extend to investors of third States the benefits of any treatment, preference or privilege resulting from:

(a) their participation or association in a free trade area, customs union, common market, or similar regional arrangement.

(b) an international agreement relating in whole or in part to tax matters.

## D) EXPROPRIATION AND COMPENSATION

1. No State Party shall take nationalization or expropriation measures or any other measures having the same effect against investments in its territory belonging to investors of Third States, unless such measures are taken for reasons of public utility or social interest, on a non-discriminatory basis and under due process of law. The measures shall be accompanied by provisions for the payment of just, adequate and prompt or timely compensation.

The amount of such compensation shall correspond to the value of the expropriated investment.

Investors of a Third State, who suffer losses on their investments in the territory of the State Party, due to war or other armed conflict, state of national emergency, revolt, insurrection or riot, shall receive, in respect of restitution, indemnification, compensation or other relief, treatment no less favorable than that accorded to their own investors or to investors of other states.

## (E) TRANSFERS

Each State Party shall grant to investors of the Third State the free transfer of investments and returns, and in particular, but not exclusively, of:

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

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

(c) funds for the repayment of loans as defined in Article 2, subparagraph A), Paragraph (1), (c);

(d) royalties and fees and any other payments related to the rights provided for in Article 2, subparagraph A), paragraph (1),

d) and e);

e) the proceeds from a sale or total or partial liquidation of an investment;

(f) compensation, indemnities or other payments provided for in Article 2(D);

(g) the remuneration of nationals of a Third State who have obtained authorization to work in connection with an investment;

Transfers shall be made without delay, in freely convertible currency.

#### F) SUBROGATION

If a Third State or an agency designated by it makes a payment to an investor under a guarantee or insurance to cover non-commercial risks that it has contracted in connection with an investment, the State Party in whose territory the investment was made shall recognize the validity of the subrogation in favor of the Third State or one of its agencies, with respect to any right or title of the investor for the purpose of obtaining the corresponding pecuniary compensation.

#### G) SETTLEMENT OF DISPUTES BETWEEN A STATE PARTY AND A THIRD STATE

Disputes arising between a State Party and a Third State concerning the interpretation or application of the agreement concluded between them shall, as far as possible, be settled through diplomatic channels.

If such dispute cannot be settled in this way within a reasonable period of time to be determined, it shall be submitted to international arbitration.

#### H) SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR FROM A THIRD STATE AND A STATE PARTY RECEIVING THE INVESTMENT

Any dispute concerning the interpretation or application of a treaty for the promotion and reciprocal protection of investments arising between an investor of a third State and a State Party shall, to the extent possible, be settled by friendly consultations.

If the dispute cannot be settled within a reasonable time after it has been raised by one or other of the parties, it may, at the request of the investor, be submitted either to the competent courts of the State Party in whose territory the investment was made or to international arbitration under the conditions described in paragraph 3.

Once an investor has submitted the dispute to the jurisdiction of the State Party concerned or to international arbitration, the choice of one or the other of these procedures shall be final.

In the event of recourse to international arbitration, the dispute may be submitted, at the option of the investor, to an ad hoc arbitral tribunal or to an international arbitration institution.

The arbitration body shall decide on the basis of the provisions of the agreement concluded, the law of the State Party involved in the dispute, including the rules relating to conflicts of laws, the terms of any special agreements concluded in connection with the investment, as well as the principles of international law on the subject.

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

#### (I) INVESTMENTS AND DISPUTES COVERED BY THE AGREEMENT

The provisions of the agreements to be entered into may be applied to all investments made before or after the date of their entry into force, but shall not apply to any controversy, claim or dispute arising prior to their entry into force.

#### J) DURATION AND TERMINATION

The minimum period of validity of the agreements shall be ten years. With respect to investments made prior to the date of termination of the agreement, the State Party may agree that the provisions of the agreement shall continue in force for a maximum period of fifteen years from that date.

### **Article 3.**

The States Parties undertake to exchange information on future and ongoing negotiations on agreements for the promotion and reciprocal protection of investments with Third States and shall consult each other prior to any substantial modification

to the general treatment agreed upon in Article 2 of this Protocol. For such purposes, the executive body of MERCOSUR shall be in charge of the consultations and information on the subject.

#### **Article 4.**

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

Accession by a State to the Treaty of Asunción shall imply "ipso jure" accession to this Protocol.

This Protocol shall enter into force 30 days after the date of deposit of the fourth instrument of ratification.

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

Done at the city of Buenos Aires on the fifth day of the month of August 1994, in an original copy, in the Spanish and Portuguese languages, both texts being equally authentic.

For the Government of the Argentine Republic

For the Government of the Federative Republic of Brazil

For the Government of the Republic of Paraguay

For the Government of the Oriental Republic of Uruguay