

Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments

AUSTRALIA AND THE REPUBLIC OF POLAND ("the Contracting Parties"),

RECOGNISING the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations and technical co-operation between them, particularly with respect to investment by nationals of one Contracting Party in the territory of the other Contracting Party;

CONSIDERING that investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence;

ACKNOWLEDGING that investments of nationals of one Contracting Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party; and

RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments and associated activities, combined with rules designed to render more effective the application of these principles within the territories of the Contracting Parties,

HAVE AGREED as follows:

Article 1. Definitions

(1) For the purposes of this Agreement:

(a) "investment" means every kind of asset, owned or controlled by nationals of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time and includes:

(i) Tangible and intangible property, including rights such as mortgages, liens and other pledges,

(ii) Shares, stocks, bonds and debentures and any other form of participation in a company,

(iii) A loan or other claim to money or a claim to performance having economic value,

(iv) Intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill, and

(v) Business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to engage in agriculture, forestry, fisheries and animal husbandry, to search for, extract or exploit natural resources and to manufacture, use and sell products;

(b) "activities associated with investments", subject to the law of the Contracting Party which has admitted the investment, includes the organisation, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including industrial and intellectual property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase and sale of foreign exchange;

(c) "return" means an amount derived from or associated with an investment, including profits, dividends, interest, capital gains, royalty payments, management or technical assistance fees, payments in kind and all other lawful income;

(d) "national" of a Contracting Party means a company or a natural person who is a citizen or a permanent resident of a Contracting Party under its law;

(e) "company" means any corporation, association, partnership, trust or other legally recognised entity that is duly

incorporated, constituted, set up, or otherwise duly organised:

(i) Under the law of a Contracting Party; or

(ii) Under the law of a third country and is owned or controlled by an entity described in paragraph (1)(e)(i) of this Article or by a natural person who is a national of a Contracting Party under its law;

Regardless of whether or not the entity is organised for pecuniary gain, privately or otherwise owned, or organised with limited or unlimited liability;

(f) "freely convertible currency" means a convertible currency as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange markets;

(g) "law" includes regulations;

(h) "territory" in relation to a Contracting Party includes the territorial sea, maritime zone or continental shelf where that Contracting Party exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law.

(2) For the purposes of paragraph (1)(a) of this Article, returns that are invested shall be treated as investments and any alteration to the form in which assets are invested or reinvested shall not affect their character as investments.

(3) For the purposes of this Agreement, a natural person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in and the ability to exercise decisive influence over the company or investment. Any question arising out of this Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Contracting Parties by consultation.

Article 2. Application of Agreement

(1) This Agreement shall apply to investments made after 1 January 1972.

(2) Where a company of a Contracting Party is owned or controlled by a citizen or a company of any third country, the Contracting Parties may decide jointly in consultation not to extend the rights and benefits of this Agreement to such company.

(3) A company duly organised under the law of a Contracting Party shall not be treated as a national of the other Contracting Party, but any investments in that company by nationals of that other Contracting Party shall be protected by this Agreement.

(4) This Agreement shall not apply to a company organised law of a third country within the meaning of paragraph (1)(e)(ii) of Article 1 where the provisions of an investment protection agreement with that country have already been invoked in respect of the same matter.

(5) This Agreement shall not apply to a person who is a permanent resident but not a citizen of a Contracting Party where:

(a) The provisions of an investment protection agreement between the other Contracting Party and the country of which the person is a citizen have already been invoked in respect of the same matter; or

(b) The person is a citizen of the other Contracting Party.

Article 3. Promotion and Protection of Investments

(1) Each Contracting Party shall encourage and promote investments in its territory by nationals of the other Contracting Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments.

(2) A Contracting Party shall ensure fair and equitable treatment in its own territory to investments and activities associated with investments.

(3) A Contracting Party shall, subject to its laws, accord within its territory protection and security to investments and activities associated with investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.

(4) This Agreement shall not prevent a national of one Contracting Party from taking advantage of the provisions of any law or policy of the other Contracting Party which are more favourable than the provisions of this Agreement.

Article 4. Most Favoured Nation Provisions

A Contracting Party shall at all times treat investments and activities associated with investments in its own territory, including compensation under Article 7 and transfers under Article 9, on a basis no less favourable than that accorded to investments and activities associated with investments of nationals of any third country, provided that a Contracting Party shall not be obliged to extend to investments and activities associated with investments any treatment, preference or privilege resulting from:

(a) Any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or

(b) The provisions of a double taxation agreement with a third country.

Article 5. Entry and Sojourn of Personnel

(1) A Contracting Party shall, subject to its laws and policies applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are nationals of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities associated with investments.

(2) A Contracting Party shall, subject to its laws and policies applicable from time to time, permit nationals of the other Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.

Article 6. Transparency of Laws

Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its territory by nationals of the other Contracting Party, make such laws and policies public and readily accessible.

Article 7. Expropriation and Nationalisation

(1) Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") the investments of nationals of the other Contracting Party, unless the following conditions are complied with:

(a) The expropriation is for a public purpose related to the internal needs of that Contracting Party and under due process of law;

(b) The expropriation is non-discriminatory; and

(c) The expropriation is accompanied by the payment of prompt, adequate and effective compensation.

(2) The compensation referred to in paragraph (1) of this Article shall be computed on the basis of the market value of the investment immediately before the expropriation or impending expropriation became public knowledge. Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.

(3) The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate, such as the London Interbank Offered Rate plus an appropriate margin, and shall be freely transferable between the territories of the Contracting Parties. The compensation shall be payable either in the currency in which the investment was originally made or, if requested by the national, in a freely convertible currency.

Article 8. Compensation for Losses

(1) When a Contracting Party adopts any measures relating to losses in respect of investments and activities associated with investments in its territory by citizens or companies of any other country owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, riot or other similar events, the treatment accorded to nationals of the other Contracting Party, as regards restitution, indemnification, compensation or other settlement, shall be no less favourable than that which the first Contracting Party accords to citizens or companies of any third country.

(2) Restitution, indemnification, compensation or other settlement made pursuant to paragraph (1) of this Article shall, where appropriate, be freely transferable between the territories of the Contracting Parties and shall be payable in a freely convertible currency.

Article 9. Transfers

(1) A Contracting Party shall, subject to and to the extent permitted by its laws and policies applicable from time to time, when requested, permit all funds of a national of the other Contracting Party related to an investment and activities associated with an investment in its territory, and earnings of personnel engaged from abroad in connection with an investment, to be transferred freely and without unreasonable delay. Such funds include the following:

- (a) The initial capital plus any additional capital used to maintain or expand the investment;
- (b) Returns;
- (c) Fees, including payments in connection with intellectual and industrial property rights;
- (d) Receipts from the whole or partial sale, divestment or liquidation of the investment;
- (e) Payments made pursuant to a loan agreement; and
- (f) Capital gains.

(2) The transfers abroad of such funds and the earnings of personnel shall be permitted in freely convertible currency and shall be made at the exchange rate applying on the date of transfer in accordance with the law of the Contracting Party which has admitted the investment.

(3) A Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

Article 10. Undertakings Given to Investors

A Contracting Party shall, subject to its law, do all in its power to ensure that a written undertaking given by a competent authority to a national of the other Contracting Party with regard to an investment is respected.

Article 11. Consultations between Contracting Parties

The Contracting Parties shall consult at the request of either of them on matters concerning the interpretation or application of this Agreement.

Article 12. Settlement of Disputes between Contracting Parties

(1) The Contracting Parties shall endeavour to resolve any dispute between them connected with this Agreement by prompt and friendly consultations and negotiations.

(2) If a dispute is not resolved by such means within six (6) months of one Contracting Party seeking in writing such consultations or negotiations, it shall be submitted at the request of either Contracting Party to an Arbitral Tribunal established in accordance with the provisions of Annex A of this Agreement or, by agreement, to any other international tribunal.

Article 13. Settlement of Disputes between a Contracting Party and a National of the other Contracting Party

(1) In the event of a dispute between a Contracting Party and a national of the other Contracting Party relating to an investment or an activity associated with an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

(2) If the dispute in question cannot be resolved through consultations and negotiations either party to the dispute may, in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before that Contracting Party's competent judicial or administrative bodies.

(3) Where the dispute arises under Article 7 of this Agreement, either party to the dispute may take the following action

irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted:

(a) If both Contracting Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention"), refer the dispute to the International Centre for the Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention. Where this action is taken by a national of one Contracting Party, the other Contracting Party shall consent in writing to the submission of the dispute to the Centre within 30 days of receiving such a request from the national of the first Contracting Party;

(b) If both Contracting Parties are not at that time party to the Convention, refer the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement.

(4) Where the dispute arises otherwise than under Article 7 of this Agreement, action pursuant to paragraph (3) of this Article may be taken where local remedies available pursuant to paragraph (2) of this Article have been exhausted. Where action in accordance with this paragraph is taken by a national of one Contracting Party the other Contracting Party shall consent in writing to the submission of the dispute to the Centre within 30 days of receiving such a request from the national.

(5) Where a dispute is referred to the Centre in accordance with paragraph (3) or paragraph (4) of this Article:

(a) If the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the national affected shall have the right to choose;

(b) A company which is constituted or incorporated under the law in force in the territory of one Contracting Party and in which before the dispute arises the majority of the shares are owned by nationals of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention, be treated as a company of the other Contracting Party.

(6) Once an action referred to in paragraph (2), paragraph (3) or paragraph (4) of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:

(a) The relevant judicial or administrative body, the Secretary-General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or

(b) The other Contracting Party has failed to abide by or comply with any judgment, award, order or other determination made by the body in question.

(7) In any proceeding involving a dispute relating to an investment or an activity associated with an investment, a Contracting Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the national concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss. Nevertheless, a national of a Contracting Party involved in such a dispute shall not be entitled to compensation for more than the value, as determined in accordance with paragraph (2) of Article 7, of the investment which is the subject of the dispute, taking into account all sources of compensation within the territory of the Contracting Party liable to pay compensation.

Article 14. Settlement of Disputes between Nationals of the Contracting Parties

A Contracting Party shall in accordance with its laws:

(a) Provide nationals of the other Contracting Party who have made investments within its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own nationals;

(b) Permit its nationals to select means of their choice to settle disputes relating to investments and activities associated with investments with the nationals of the other Contracting Party, including arbitration conducted in a third country; and

(c) Provide for the recognition and enforcement of any resulting judgments or awards.

Article 15. Subrogation

(1) If a Contracting Party or an agency of a Contracting Party makes a payment to a national of that Contracting Party under a guarantee, contract of insurance or other form of indemnity it has granted in respect of an investment, the other Contracting Party shall recognise the transfer of any right or title in respect of such investment. The subrogated right or

claim shall not be greater than the original right or claim of the national.

(2) Where a Contracting Party has made a payment to its national and has taken over rights and claims of the national, that national shall not, unless authorised to act on behalf of the Contracting Party making the payment, pursue those rights and claims against the other Contracting Party.

Article 16. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force thirty days after the date on which the Contracting Parties shall have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled. It shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph (2) of this Article.

(2) Either Contracting Party may terminate this Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Contracting Party.

(3) Notwithstanding termination of this Agreement pursuant to paragraph (2) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

DONE in duplicate at Canberra on this seventh day of May, one thousand nine hundred and ninety-one, in the English and Polish languages, both texts being equally authentic.

FOR AUSTRALIA: GARETH EVANS [Signed]

FOR THE REPUBLIC OF POLAND: KRZYSZTOK SKUBISZEWSKI [Signed]

(1) The Arbitral Tribunal referred to in Article 12 shall consist of three persons appointed as follows:

(a) Each Contracting Party shall appoint one arbitrator;

(b) The arbitrators appointed by the Contracting Parties shall, within thirty days of the appointment of the second of them, by agreement, select a third arbitrator who shall be a national of a third country which has diplomatic relations with both Contracting Parties;

(c) The Contracting Parties shall, within thirty days of the selection of the third arbitrator, approve the selection of that arbitrator who shall act as Chairman of the Tribunal.

(2) Arbitration proceedings shall be instituted upon notice being given through the diplomatic channel by the Contracting Party instituting such proceedings to the other Contracting Party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the Contracting Party instituting such proceedings. Within sixty days after the giving of such notice the respondent Contracting Party shall notify the Contracting Party instituting proceedings of the name of the arbitrator appointed by the respondent Contracting Party.

(3) If, within the time limits provided for in paragraph (1)(c) and paragraph (2) of this Annex, the required appointment has not been made or the required approval has not been given, either Contracting Party may request the President of the International Court of Justice to make the necessary appointment. If the President is a national of either Contracting Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a national of either Contracting Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointment.

(4) In case any arbitrator appointed as provided for in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

(5) The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chairman of the Tribunal. Thereafter,

the Arbitral Tribunal shall determine where and when it shall sit.

(6) The Arbitral Tribunal shall decide all questions relating to its competence and shall, subject to any agreement between the Contracting Parties, determine its own procedure.

(7) Before the Arbitral Tribunal makes a decision, it may at any stage of the proceedings propose to the Contracting Parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, the international agreements both Contracting Parties have concluded and the generally recognised principles of international law.

(8) Each Contracting Party shall bear the costs of its appointed arbitrator. The cost of the Chairman of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne in equal parts by both Contracting Parties. The Arbitral Tribunal may decide, however, that a higher proportion of costs shall be borne by one of the Contracting Parties.

(9) The Arbitral Tribunal shall afford to the Contracting Parties a fair hearing. It may render an award on the default of a Contracting Party. Any award shall be rendered in writing and shall state its legal basis. A signed counterpart of the award shall be transmitted to each Contracting Party.

(10) An award shall be final and binding on the Contracting Parties.

(1) The Arbitral Tribunal referred to in paragraph (3)(b) of Article 13 shall consist of three persons appointed as follows:

(a) Each party to the dispute shall appoint one arbitrator;

(b) The arbitrators appointed by the parties to the dispute shall, within thirty days of the appointment of the second of them, by agreement, select an arbitrator as Chairman of the Tribunal who shall be a national of a third country which has diplomatic relations with both Contracting Parties.

(2) Arbitration proceedings shall be instituted by written notice setting forth the grounds of the claim, the nature of the relief sought and the name of the arbitrator appointed by the party instituting such proceedings.

(3) If a party to the dispute, receiving notice in writing from the other party of the institution of arbitration proceedings and the appointment of an arbitrator, shall fail to appoint its arbitrator within thirty days of receiving notice from the other party, or if, within sixty days after a party has given notice in writing instituting the arbitration proceedings, agreement has not been reached on a Chairman of the Tribunal, either party to the dispute may request the Secretary-General of the International Centre for the Settlement of Investment Disputes to make the necessary appointment.

(4) In case any arbitrator appointed as provided in this Annex shall resign or become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and the successor shall have all the powers and duties of the original arbitrator.

(5) The Arbitral Tribunal shall, subject to the provisions of any agreement between the parties to the dispute, determine its procedure by reference to the rules of procedure contained in the Convention.

(6) The Arbitral Tribunal shall decide all questions relating to its competence.

(7) Before the Arbitral Tribunal makes a decision it may at any stage of the proceedings propose to the parties that the dispute be settled amicably. The Arbitral Tribunal shall reach its award by majority vote taking into account the provisions of this Agreement, any agreement between the parties to the dispute and the relevant domestic law of the Contracting Party which has admitted the investment.

(8) An award shall be final and binding and shall be enforced in the territory of each Contracting Party in accordance with its law.

(9) Each party to the dispute shall bear the costs of its appointed arbitrator. The cost of the Chairman of the Tribunal and other expenses associated with the conduct of the arbitration shall be borne equally by the parties. The Arbitral Tribunal may, however, decide that a higher proportion of the costs shall be borne by one of the parties.