

Agreement between the Government of Australia and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA
(hereinafter referred to as the Contracting Parties),

RECOGNISING the importance of measures to strengthen their relationship in accordance with the Joint Declaration of Principles Guiding Relations between Papua New Guinea and Australia, including the principle that co-operation and exchange between the two countries shall be mutually beneficial and based on full participation by both countries, with due regard to the capacity, resources and development needs of both countries, and on mutual respect;

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

CONSIDERING that investment relations should be promoted and protected 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 or companies 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 activities associated with investments combined with measures 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) "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.

(b) "Company" of a Contracting Party 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)(b)(i) of this Article or by a national of a Contracting Party;

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

(c) "Freely convertible currency" means convertible currencies as classified by the International Monetary Fund or any currency that is widely traded in international foreign exchange markets.

(d) "Investment" means every kind of asset admitted by the Contracting Party subject to its law and investment policies from

time to time and in particular, though not exclusively, including:

- (i) Movable and immovable property and other property rights such as mortgages, liens or pledges;
 - (ii) Shares, stock and debentures of Companies or interests in the property of such Companies;
 - (iii) A loan or other claim to money or a claim to any performance having a financial value;
 - (iv) Intellectual and industrial property rights and goodwill;
 - (v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;
 - (vi) Returns which are reinvested.
- (e) "Law" includes regulations.
- (f) "National" of a Contracting Party means a natural person who is a citizen of a Contracting Party or a person whose continued stay in its territory is not subject to any limitations as to time under its law.
- (g) "Returns" means an amount derived from an investment or activities associated with an investment including profits, dividends, interest, capital gains, royalty payments, management or consultancy fees, payments in kind and all other lawful income.
- (h) "Territory" in relation to a Contracting Party includes the territorial sea, maritime zone or continental shelf where, in accordance with international law, that Contracting Party exercises its sovereignty, sovereign rights or jurisdiction.
- (2) For the purposes of paragraph (1)(d) of this Article, any alteration of the form in which the assets are invested shall not affect their classification as investment, provided that such alteration is not contrary to the approval, if any, granted in respect of the assets originally invested.

Article 2. Application of Agreement

- (1) This Agreement shall apply to investments made in the territory of either Contracting Party in accordance with its law and investment policies by nationals or companies of the other Contracting Party prior to as well as after the entry into force of this Agreement.
- (2) A company duly organised under the law of a Contracting Party shall not be treated as a company of the other Contracting Party, but any investments in that company by nationals or companies of that other Contracting Party shall be protected by this Agreement.
- (3) Each Contracting Party reserves the right to refuse to extend the rights and benefits of this Agreement to any of its own companies if nationals or companies of any third country own or control any such company.
- (4) This Agreement shall not apply to a company organised under the law of a third country within the meaning of paragraph (1)(b)(ii) of this Article 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 national of a Contracting Party who is not a citizen of that 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) Consistent with Papua New Guinea Free Trade Agreement (PATCRA), each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, including in joint ventures, and subject to its right to exercise powers conferred by its laws and investment policies applicable from time to time, shall admit such capital.
- (2) Each Contracting Party reserves the right to refuse to admit the investments of any company of the other Contracting Party if nationals or companies of any third country control any such company.

(3) Investments by nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

(4) Each Contracting Party shall ensure subject to its law that the management, maintenance, use, enjoyment, acquisition or disposal of investments, rights related to investments and activities associated with investments in the territory of the other Contracting Party shall not in any way be subjected to or impaired by arbitrary, unreasonable or discriminatory measures.

(5) Where a Contracting Party requires its nationals or companies to hold an equity in investments or activities associated with investments in its territory, it shall ensure that nationals or companies of the other Contracting Party are required to provide for that equity on normal commercial terms and in accordance with generally recognised principles of valuation.

Article 4. Most Favoured Nation Provisions

(1) Each Contracting Party shall treat investments and activities associated with investments in its own territory by companies and nationals of the other Contracting Party, 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 by nationals or companies of any third country.

(2) Special incentives granted by one Contracting Party only to its nationals or companies in order to stimulate the creation of local industries are considered compatible with this Article.

Article 5. Exceptions to Mfn Provisions

The provisions in this Agreement relating to the grant of treatment no less favourable than that accorded to the nationals or companies of either Contracting Party or of any third country shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege which may be extended by the Contracting Party by virtue of:

- (a) Any existing or future customs union or free trade area or a common external tariff area or a monetary union or similar international agreement to which a Contracting Party is or may become a party;
- (b) The adoption of an agreement designed to lead to the formation or extension of such a union or area; or
- (c) Any international agreement or arrangement relating wholly or mainly to taxation.

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 or companies of the other Contracting Party:

- (a) Make such laws and policies public and readily accessible;
- (b) If requested, provide copies of specified laws and policies to the other Contracting Party; and
- (c) If requested, consult with the other Contracting Party with a view to explaining specified laws and policies.

Article 7. Expropriation and Nationalisation

(1) Neither Contracting Party shall take any measures of expropriation, nationalisation or any other dispossession having effect equivalent to nationalisation or expropriation against the investments of nationals or companies of the other Contracting Party, except under the following conditions:

- (a) The measures are taken for a public purpose and under due process of law;
- (b) The measures are non-discriminatory; and
- (c) The measures are accompanied by provisions for 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 as a going concern immediately before the measures become 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 and other relevant factors.

(3) The compensation shall be paid without undue delay, shall include interest at a commercially reasonable rate from the date the measures were taken to the date of payment 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 or investments were originally made or, if requested by the national or company, in a freely convertible currency.

Article 8. Compensation for Losses

When a Contracting Party adopts any measures relating to losses in respect of investments and activities associated with investments in its territory by nationals 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 or companies 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 nationals or companies of any third country.

Article 9. Transfers

(1) A Contracting Party shall subject to its law and policies applicable from time to time, when requested, permit all funds of a national or company of the other Contracting Party related to an investment or activities associated with an investment in its territory, and earnings and other assets 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;
- (f) Capital accretions; and
- (g) Payments in respect of losses referred to in Article 8.

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

(3) Either 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.

(4) The Contracting Parties shall guarantee to nationals and companies the transfers referred to in this Article, subject to the right of a Contracting Party in exceptional financial or economic circumstances to exercise equitably and in good faith powers conferred by its law for the time being in force.

Article 10. Entry and Sojourn of Personnel

(1) A Contracting Party shall, subject to its law and policies applicable from time to time relating to the entry and sojourn of non-citizens, permit 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 and companies 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 11. Undertakings Given to Investors

A Contracting Party shall, subject to its law, adhere to any written undertakings given to a national or company of the other Contracting Party concerning an investment, provided that the undertaking is given by a person lawfully entitled to give it.

Article 12. Consultations between Contracting Parties

The Contracting Parties shall consult when necessary on matters concerning the application and operation of this Agreement in the spirit of the Joint Declaration of Principles Guiding Relations between Papua New Guinea and Australia.

Article 13. 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 negotiations and consultations in accordance with Article 12.

(2) If a dispute is not resolved by such means within sixty (60) days of one Contracting Party seeking in writing such negotiations or consultations, 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 14. Settlement of Disputes between a Contracting Party and a National or Company of the other Contracting Party

(1) In the event of a dispute between a Contracting Party and a national or company 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 in the spirit of the Joint Declaration of Principles Guiding Relations between Papua New Guinea and Australia.

(2) If the dispute in question cannot be resolved through consultations and negotiations in accordance with paragraph (1) of this Article, either party to the dispute may:

(a) In accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before its competent judicial or administrative bodies;

(b) If both Papua New Guinea and Australia 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;

(c) If both Papua New Guinea and Australia are not at that time party to the Convention, submit the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement. Annex B of this Agreement.

(3) Where a dispute is referred to the International Centre for the Settlement of Investment Disputes pursuant to subparagraph (2)(b) of this Article:

(a) Each Contracting Party shall consent to the submission of that dispute to the Centre;

(b) If the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the opinion of the national or company shall prevail; and

(c) If a company which is a party to the dispute is incorporated or constituted under the law in force in the territory of a Contracting Party and, before such a dispute arises the majority of that company's shares are owned by nationals or companies of the other Contracting Party, the first named company shall, in accordance with Article 25(2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Contracting Party.

(4) The action referred to in paragraph (2) of this Article should be without prejudice to the right of the parties to seek assistance with regard to the dispute from any competent government agency of the Contracting Party which has admitted the investment.

(5) Subject to paragraph (4) of this Article, once an action referred to in paragraph (2) of this Article has been instituted, 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.

(6) 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 or company

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 or company 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 Article 7, of the investment which is the subject of the dispute, taking into account all sources of compensation within the territory of a Contracting Party liable to pay compensation.

Article 15. Settlement of Disputes between Nationals and Companies of the Contracting Parties

A Contracting Party shall in accordance with its law:

- (a) Provide nationals and companies 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 and companies;
- (b) Permit its nationals and companies 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 16. Subrogation

If a Contracting Party or an agency of a Contracting Party makes a payment to any of its nationals or companies under a guarantee or other form of indemnity it has granted in respect of an investment, the other Contracting Party shall, without prejudice to the rights of the first Contracting Party or its nationals or companies under Article 9 of this Agreement, 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 or company.

Article 17. Limitations on Immunity

Any question arising in relation to an investment or activity associated with an investment of a company of either Contracting Party concerning immunity from the jurisdiction of the Courts in any proceeding, the procedure for service of initiating process or immunity from execution shall be resolved in accordance with the law of the Contracting Party which has admitted the investment.

Article 18. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force thirty (30) 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 (15) years and thereafter shall remain in force indefinitely, unless terminated in accordance with paragraph (2) of this Article.

(2) Either Contracting Party may by giving one (1) year's written notice to the other Contracting Party, terminate this Agreement at the end of the initial fifteen (15) year period or any time thereafter.

(3) In respect of investments made or acquired before the date of termination of this Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen (15) years from the date of termination and without prejudice to the Law of Application and thereafter, of the general rules of International Law.

DONE in duplicate at Port Moresby on the third day of September, 1990.

FOR THE GOVERNMENT OF FOR THE GOVERNMENT OF AUSTRALIA:

A R TAYLOR

[Signed:]

THE INDEPENDENT STATE OF PAPUA NEW GUINEA:

J GIHENO

[Signed:]

1. The Arbitral Tribunal referred to in Article 13 shall consist of three persons appointed as follows: each Contracting Party shall appoint one arbitrator, and a third arbitrator, who shall be a national of a country with which both Contracting Parties maintain diplomatic relations, shall be appointed by the agreement of the Contracting Parties. This third arbitrator shall also 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 (60) 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 sixty (60) days after the giving of notice instituting the arbitration proceedings the Contracting Parties shall not be agreed upon a Chairman of the Tribunal, either Contracting Party may request the President of the International Court of Justice to make the 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 in this Annex shall resign, die or otherwise become unable to act, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and his 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 and other expenses associated with the conduct of the arbitration shall be borne in equal parts by both 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 (2)(c) of Article 14 shall consist of 3 persons appointed as follows: each party to the dispute shall appoint one arbitrator; the arbitrators appointed by the parties to the dispute shall, within thirty (30) days of the appointment of the last of their number, by agreement, select an arbitrator as Chairman who is a national of a third country which has diplomatic relations with both Contracting Parties.
2. If, within sixty (60) days after a party has given notice in writing instituting the arbitration proceedings, agreement has not been reached on a Chairman of the Arbitral Tribunal, either party to the dispute may request the President of the International Bank for Reconstruction and Development to make the appointment.
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 (30) days of receiving notice from the other party, such arbitrator shall be appointed by the Chairman of the Arbitral Tribunal after the Chairman is appointed.

4. In case any arbitrator appointed as provided in this Annex shall resign, die or otherwise become unable to perform his functions as an arbitrator, a successor arbitrator shall be appointed in the same manner as prescribed for the appointment of the original arbitrator and his 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 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

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 and other expenses associated with the conduct of the arbitration shall be borne equally by the parties.