

# **AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF CHILE ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS**

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF CHILE, hereinafter the "Contracting Parties";

DESIRING to intensify economic cooperation to the mutual benefit of both countries;

WITH THE INTENTION to create and maintain favourable conditions for investments by investors of one Contracting Party which implies the transfer of capital in the territory of the other Contracting Party;

RECOGNIZING that the reciprocal promotion and protection of such foreign investments favour the economic prosperity of both countries;

HAVE AGREED as follows:

## **Article 1. Definitions**

For the purpose of this Agreement:

1 . "investment" means any kind of asset admitted by one or the other Contracting Party, in accordance with its respective laws, regulations and investment policies, and includes in particular, though not exclusively:

- (a) Movable and immovable property and any other property rights such as mortgages, liens and pledges;
- (b) Shares, debentures or any other kinds of participation in companies;
- (c) A loan or other claim to money or to any performance having an economic value;
- (d) Intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, technical processes, know-how and goodwill;
- (e) Business concessions and any other rights directly required to conduct an economic activity conferred by law or under contract, including concessions to search for, extract, exploit or cultivate natural resources and to manufacture, use and sell products.

2 . "investor" means:

- (a) A natural person from one Contracting Party which owns or effectively controls an investment in the territory of the other Contracting Party where that natural person is a citizen or permanent resident, according to the law of that Contracting Party;
- (b) A legal entity from one Contracting Party which owns or effectively controls an investment in the territory of the other Contracting Party, if that legal entity, including companies, corporations, business associations and other legally recognized entities, regardless of whether or not the entity is organised for pecuniary gain, is legally constituted or otherwise duly organised under the law of that Contracting Party and carries on business in the territory of that same Contracting Party;
- (c) A legal entity which owns or effectively controls an investment in the territory of one Contracting Party where that legal entity, including companies, corporations, business associations and other legally recognised entities, regardless of whether or not the entity is organised for pecuniary gain, is constituted in accordance with the law of a third country but is owned or effectively controlled by an investor as defined in subparagraph (a) and (b) of this paragraph. subparagraph (a) and (b) of this paragraph.

3. "permanent resident" means a natural person whose residence in a Contracting Party is not limited as to time under its law.
4. "return" means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, management or technical assistance fees, payments in connection with intellectual property rights, and all other such income.
5. Net returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.
6. "territory" includes the areas of the exclusive economic zone and the continental shelf where a Contracting Party exercises its sovereignty, sovereign rights or jurisdiction in accordance with international law.

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

1. This Agreement shall apply to investments whenever made. Article 11 of this Agreement, however, shall not apply to disputes which arose prior to its entry into force or disputes directly related to events which occurred prior to its entry into force. Article 11 of this Agreement, however, shall not apply to disputes which arose prior to its entry into force or disputes directly related to events which occurred prior to its entry into force.
2. Where a legal entity of a Contracting Party is owned or effectively controlled by an investor of any third country, the Contracting Parties may decide jointly in consultation and in accordance with international law, not to extend the rights and benefits of this Agreement to such a legal entity.
3. This Agreement shall not apply to a legal entity organised under the law of a third country within the meaning of paragraph (2)(c) of Article 1 where the provisions of an investment protection agreement with that country have already been invoked or that third country invokes diplomatic protection by a formal request in respect of the same matter. paragraph (2)(c) of Article 1 where the provisions of an investment protection agreement with that country have already been invoked or that third country invokes diplomatic protection by a formal request in respect of the same matter.
4. This Agreement shall not apply to a permanent resident of one Contracting Party:
  - (a) Where the provisions of an investment protection agreement between the other Contracting Party and the country of which that person is a citizen have already been invoked or that third country invokes diplomatic protection by a formal request in respect of the same matter; or
  - (b) The permanent resident is a citizen of the other Contracting Party.

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

1. Each Contracting Party shall, subject to its general policy in the field of foreign investments, promote and admit, in accordance with its laws, regulations and investment policies, investments by investors of the other Contracting Party.
2. Each Contracting Party shall, subject to its laws, regulations and investment policies, protect within its territory investments by investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments.
3. Subject to the laws and regulations relating to the entry and sojourn of non-citizens, individuals working for an investor of one Contracting Party, shall be permitted to enter, remain in and leave the territory of the other Contracting Party for the purpose of carrying out activities associated with investments in the territory of the latter Contracting Party. This provision also applies to members of those individual's households. For the purposes of this Agreement "activities associated with investments" shall include activities such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights and the purchase and sale of foreign exchange.
4. An investor of one Contracting Party may take advantage of the provisions of any law or policy of the other Contracting Party which is more favourable than the provisions of this Agreement.

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

1. Each Contracting Party shall extend fair and equitable treatment to investments made by investors of the other Contracting Party on its territory and activities associated with investments and shall ensure that the exercise of the right thus recognized shall not be hindered.

2 . A Contracting Party shall at all times treat investments of the investors of one Contracting Party and activities associated with investments in its territory on a basis no less favourable than that accorded to investments of investors of any third country.

3 . If a Contracting Party accords special advantages to investors of any third country by virtue of an agreement establishing a free trade area, a customs union, an economic union or any other form of regional economic organization to which the Contracting Party belongs or through the provisions of an agreement relating wholly or mainly to taxation with a third country, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

## **Article 5. Free Transfer**

1 . Each Contracting Party shall allow without unreasonable delay the investors of the other Contracting Party to transfer funds in connection with an investment in a freely convertible currency. Such funds include:

(a) Returns;

(b) Repayments of a loan agreement related to the investment;

(c) Any capital or the proceeds from the sale or partial sale or liquidation of the investment;

(d) Compensation for expropriation or loss described in Article 6 and 7 of this Agreement; and Article 6 and 7 of this Agreement; and

(e) Earnings and other remuneration of personnel working in connection with that investment who are not citizens of the Contracting Party in whose territory the investment is made.

2 . Transfers shall be made at the exchange rate applying on date of transfer in accordance with the law of the Contracting Party which has admitted the investment, unless otherwise agreed by the investor and the Contracting Party concerned.

3 . A Contracting Party may protect the rights of creditors, or ensure satisfaction of judgments in adjudicatory proceedings in accordance with its laws.

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

1 . Neither Contracting Party shall take any measures, such as expropriation, depriving directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:

(a) The measures are taken in the public or national interest and in accordance with the law;

(b) The measures are not discriminatory;

(c) The measures are accompanied by provisions for the payment of prompt, adequate and effective compensation.

2 . The compensation shall be based on the market value of the investments affected immediately before the measure became public knowledge. Where that value cannot be readily ascertained, the compensation may 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. This compensation shall carry interest at the appropriate market rate of interest from the date of expropriation until the date of payment.

3 . The investor affected shall have a right of access, under the law of the Contracting Party making the expropriation, to the judicial authority of that Contracting Party, in order to review the amount of compensation and the legality of any such expropriation or comparable measure.

## **Article 7. Indemnification for Losses**

The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place in the territory of the other Contracting Party shall be accorded by the latter Contracting Party treatment as regards restitution, indemnification, compensation or other valuable consideration, no less favourable than that which that Contracting Party accords to its domestic investors or to investors of any third country, whichever is more favourable to the investors concerned.

## **Article 8. Subrogation**

1 . Where one Contracting Party or an agency authorized by the Contracting Party has granted a contract of insurance, any form of financial guarantee or other form of indemnity with regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this contract, financial guarantee or other form of indemnity by the first Contracting Party.

2 . Where a Contracting Party has made a payment to its investor and has taken over rights and claims of the investor, that investor 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. The subrogated right or claim shall not be greater than the original right or claim of the investor.

## **Article 9. 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 10. Settlement of Disputes between Contracting Parties**

1 . The Contracting Parties shall endeavour to resolve any difference between them regarding the interpretation or application of the provisions of this Agreement by friendly negotiations.

2 . If both Contracting Parties cannot reach an agreement within six months after the beginning of the dispute between themselves, it shall, upon request of either Contracting Party, be submitted to an Arbitral Tribunal of three persons. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall, within thirty days of the appointment of the second of them, by agreement, select a third arbitrator who shall be a citizen of a third State which has diplomatic relations with both Contracting Parties. 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.

3 . 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 of the giving of such notice the respondent Contracting Party shall notify the Contracting Party instituting proceedings of the name of the arbitrator appointed by respondent Contracting Party.

4 . If, within the time limits provided for in paragraph (2) and (3) of this Article, 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 of the International Court of Justice is prevented from carrying out the said function or if that person is a citizen or permanent resident of either Contracting Party, the appointment shall be made by the Vice-President, and if that person is prevented from carrying out the said function or if that person is a citizen or permanent resident of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a citizen or permanent resident of either Contracting Party. paragraph (2) and (3) of this Article, 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 of the International Court of Justice is prevented from carrying out the said function or if that person is a citizen or permanent resident of either Contracting Party, the appointment shall be made by the Vice-President, and if that person is prevented from carrying out the said function or if that person is a citizen or permanent resident of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a citizen or permanent resident of either Contracting Party.

5 . In case any arbitrator appointed as provided 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.

6 . 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.

7 . 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.

8 . The Arbitral Tribunal shall reach its decisions by majority vote, taking into account the provisions of this Agreement, the

laws of the Contracting Party where the investment in dispute is situated including the rules on conflicts of laws, the international agreements both Contracting Parties have concluded and the generally recognised principles of international law. Furthermore each Contracting Party shall bear the cost of the arbitrator it has appointed and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties unless otherwise agreed.

9 . The Arbitral Tribunal may render a decision on the default of a Contracting Party. Any such decision 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 . The decisions of the Tribunal are final and binding for Contracting Parties.

## **Article 11. Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party**

1 . With a view to an amicable solution of disputes between a Contracting Party and an investor of the other Contracting Party consultations shall take place between the parties concerned.

2 . If these consultations do not result in a solution within three months from the date of request for settlement, the investor may submit the dispute either:

(a) To the competent tribunal of the Contracting Party in whose territory the investment was made; or

(b) To international arbitration.

In the latter event the investor has the choice between:

(i) The International Centre for the Settlement of Investment Disputes (ICSID), created by the Convention for the Settlement of Disputes in respect of Investments occurring between States and Nationals of other States, signed in Washington on 18 March 1965 — in this event each Contracting Party hereby gives its prior consent to submission of the dispute to ICSID; Convention for the Settlement of Disputes in respect of Investments occurring between States and Nationals of other States, signed in Washington on 18 March 1965 — in this event each Contracting Party hereby gives its prior consent to submission of the dispute to ICSID;

(ii) An ad hoc arbitral tribunal which unless otherwise agreed by the parties to the dispute shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

3 . Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, that election shall be final.

4 . For the purpose of this Article, any legal person which is constituted in accordance with the legislation of one Contracting Party, and in which, before a dispute arises, the majority of shares are owned by investors of the other Contracting Party, shall be treated, in accordance with Article 25(2)(b) of the said Washington Convention, as a legal person of the other Contracting Party. Article 25(2)(b) of the said Washington Convention, as a legal person of the other Contracting Party.

5 . Once an action referred to in paragraph 2 of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless: paragraph 2 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 or comply with any judgment, award, order or other determination made by the body in question.

6 . In any proceedings involving a dispute relating to an investment, a Contracting Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance contract, compensation for all or part of any alleged loss.

7 . The arbitration shall be final and binding on both parties.

## **Article 12. Final Provisions**

1 . The Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force thirty days after the date of the latter notification.

2 . This Agreement shall remain in force for a period of fifteen years. Thereafter it shall remain in force indefinitely unless one of the Contracting Parties gives one year's written notice of termination through diplomatic channels.

3 . In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force a further period of fifteen years from that date.

4 . This Agreement shall be applicable irrespective of whether diplomatic or consular relations exist between the Contracting Parties.

DONE at Canberra, this ninth day of July, one thousand nine hundred and ninety-six, in duplicate in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF AUSTRALIA: THE REPUBLIC OF CHILE:

[Signed:] [Signed:]

T FISCHER ALVARO GARCÍA

PROTOCOL On signing "the Agreement between the Government of Australia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments, the undersigned plenipotentiaries have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement.

(1) With reference to the whole Agreement: In the original text of the English language. the word "citizen" corresponds to the word "national" in the original text of the Spanish language.

(2) With reference to the whole Agreement: The Contracting Parties acknowledge that the question of effective control with respect to an investor will depend on the factual circumstances of the particular case. The following facts, inter alia, shall be accepted as evidence of such control:

(a) a substantial direct or indirect participation in the capital of the legal entity which allows for effective control, such as, in particular, a direct or indirect participation of more than 50% of the capital or a majority shareholding; or

(b) direct or indirect control of voting rights allowing for:

(i) the exercise of a decisive power over management and operations; or

(ii) the exercise of a decisive power over the composition of the board of directors or of any other managing body. Where there is doubt as to whether an investor exercises effective control, the investor shall be responsible for demonstrating that such control exists.

(3) In relation to Article 5:

Transfers of funds referred to in Article 5(1)(a), (b), (c) and Cd) and invested under the Special Program of Foreign Debt Equity Swaps of the Republic of Chile are subject to special regulations.

Transfers of funds referred to in Article 5(1)(c) can only be transferred one year after it has entered the territory of the Contracting Party unless its legislation provides for a more favourable treatment. In no case shall Australian investors in transfer matters be treated less favourably than investors of any third state.

DONE at Canberra, this ninth day of July, one thousand nine hundred and ninety-six, in duplicate in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF AUSTRALIA [Signed:] T FISCHER

FOR THE GOVERNMENT OF THE REPUBLIC OF CHILE [Signed:] ALVARO GARCIA