Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments

AUSTRALIA AND THE ISLAMIC REPUBLIC OF PAKISTAN ("the 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 investors of one Party in the territory of the other 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 investors of one Party in the territory of the other Party would be made within the framework of the laws of that other Party; and

RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the territories of the 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 investors of one Party and admitted by the other 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,

(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, and

(vi) Activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange;

(b) "return" means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalty payments, management or technical assistance fees, payments in connection with intellectual property rights, and all other lawful income;

(c) "investor" of a Party means:

(i) A company; or

(ii) A natural person who is a citizen or permanent resident of a Party;

(d) "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 Party; or

(ii) Under the law of a third country and is owned or controlled by an entity described in paragraph 1(d)(i) of this Article or by a natural person who is a citizen or permanent resident of a Party;paragraph 1(d)(i) of this Article or by a natural person who is a citizen or permanent resident of a Party;

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

(e) "permanent resident" means a natural person whose residence in a Party is not limited as to time under its law;

(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) "territory" in relation to a Party includes the territorial sea, maritime zone or continental shelf where that 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 of the form in which assets are invested or reinvested shall not affect their character as investments.paragraph 1(a) of this Article, 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.

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 the company or the 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 Parties.

Article 2. Application of Agreement

1 . This Agreement shall apply to investments whenever made.

2 . Where a company of a Party is owned or controlled by a citizen or a company of any third country, the 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 Party shall not be treated as an investor of the other Party, but any investments in that company by investors of that other Party shall be protected by this Agreement.

4 . This Agreement shall not apply to a company organised under the law of a third country within the meaning of paragraph 1(d)(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.paragraph 1(d)(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 natural person who is a permanent resident but not a citizen of a Party where:

(a) The provisions of an investment protection agreement between the other 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 Party.

Article 3. Promotion and Protection of Investments

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

2 . Each Party shall ensure fair and equitable treatment in its own territory to investments.

3 . Each Party shall, subject to its laws, accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments.

4 . This Agreement shall not prevent an investor of one Party from taking advantage of the provisions of any law or policy of the other Party which are more favourable than the provisions of this Agreement.

Article 4. Most Favoured Nation Provision

Each Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country, provided that a Party shall not be obliged to extend to 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 Party belongs; or

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

Article 5. Entry and Sojourn of Personnel

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

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

Article 6. Transparency of Laws

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

Article 7. Expropriation and Nationalisation

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

(a) The expropriation is for a public purpose related to the internal needs of that 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(c) 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, and other relevant factors.paragraph 1(c) 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, 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 parties. The compensation shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in any other freely convertible currency.

Article 8. Compensation for Losses

When a Party adopts any measures relating to losses in respect of 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, civil disturbance or other similar events, the treatment accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Party accords to citizens or companies of any third country.

Article 9. Transfers

1 . Each Party shall, when requested by an investor of the other Party permit all funds of that investor related to an investment in its territory 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) Proceeds from the sale or partial sale or liquidation of the investment;

(d) Payments made pursuant to a loan agreement or for the losses referred to in Article 8; andArticle 8; and

(e) Unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2 . Transfers shall be permitted in freely convertible currency. Unless otherwise agreed by the investor and the Party concerned, transfers shall be made at the exchange rate applying on the date of transfer in accordance with the law of the Party that admitted the investment.

3 . Each 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. Subrogation

1 . If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, the other 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 investor.

2 . Where a Party or an agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.

Article 11. Consultations between the Parties

The 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 the Parties

1 . The 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 months of one Party seeking in writing such negotiations or consultations, it shall be submitted at the request of either 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.Annex A of this Agreement or, by agreement, to any other international tribunal.

Article 13. Settlement of Disputes between a Party and an Investor of the other Party

1 . In the event of a dispute between a Party and an investor of the other Party relating to 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:

(a) In accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies;

(b) If both 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 Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;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 Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;

(c) If both 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, or by agreement, to any other arbitral authority.Annex B of this Agreement, or by agreement, to any other arbitral authority.

3 . Where a dispute is referred to the Centre pursuant to paragraph 2(b) of this Article:paragraph 2(b) of this Article:

(a) Where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor;

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

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

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

5 . In any proceeding involving a dispute relating to an investment, a 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 or guarantee contract, indemnification or other compensation for all or part of any alleged loss.

Article 14. Settlement of Disputes between Investors of the Parties

Each Party shall in accordance with its law:

(a) Provide investors of the other 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 investors;

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

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

Article 15. Entry Into Force, Duration and Termination

1 . This Agreement shall enter into force thirty days after the date on which the Parties 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.paragraph 2 of this Article.

2 . Either 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 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.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.

DONE in duplicate at Islamabad on the seventh day of February, 1998, in the English language.

FOR AUSTRALIA: ALEXANDER DOWNER

[Signed:]

FOR THE ISLAMIC REPUBLIC OF PAKISTAN: GOHAR AYUB KHAN

[Signed:]

1 . The Arbitral Tribunal referred to in paragraph 2 of Article 12 shall consist of three persons appointed as follows:paragraph 2 of Article 12 shall consist of three persons appointed as follows:

(a) Each Party shall appoint one arbitrator;

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

(c) The 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 diplomatic channels by the Party instituting such proceedings to the other 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 Party instituting such proceedings. Within sixty days after the giving of such notice the respondent Party shall notify the Party instituting proceedings of the name of the arbitrator appointed by the respondent Party.

3 . If, within the time limits provided for in paragraph 1(b), 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 Party may request the President of the International Court of Justice to make the necessary appointment. If the President is a citizen or permanent resident of either Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a citizen or permanent resident of either Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a citizen or permanent resident of either Party shall be invited to make the appointment.paragraph 1(b), 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 Party may request the President of the International Court of Justice to make the necessary appointment. If the President is a citizen or permanent resident of either Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a citizen or permanent resident of either Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a citizen or permanent resident of either 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 Parties, determine its own procedure.

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, the international agreements both Parties have concluded and the generally recognised principles of international law.

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

9 . The Arbitral Tribunal shall afford to the Parties a fair hearing. It may render an award on the default of a 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 Party.

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

1 . The Arbitral Tribunal referred to in paragraph 2(c) of Article 13 shall consist of 3 persons appointed as follows:paragraph 2(c) of Article 13 shall consist of 3 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 citizen or permanent resident of a third country which has diplomatic relations with both 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 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 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States.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 Party that admitted the investment.

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

9 . Each party to the dispute shall bear the costs of its appointed arbitrator. The costs 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.