

AGREEMENT BETWEEN THE REPUBLIC OF TURKEY AND AUSTRALIA ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Republic

Australia and the Republic of Turkey ("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;

AGREEING that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilisation of economic resources;

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 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 invested 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: tangible and intangible property, including rights such as mortgages, liens and other pledges, any form of participation in a legal person such as, but not limited to, shares and stocks, a claim to money or a claim to performance having economic value, intellectual property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill, 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 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;(i) Tangible and intangible property, including rights such as mortgages, liens and other pledges,

(ii) Any form of participation in a legal person such as, but not limited to, shares and stocks,

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

(iv) Intellectual 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" means: a legal person; or a natural person who is a citizen of the Republic of Turkey; or a natural person who is a citizen or permanent resident of Australia;(i) A legal person; or

(ii) A natural person who is a citizen of the Republic of Turkey; or

(iii) A natural person who is a citizen or permanent resident of Australia;

(d) "legal person" means any corporation, association, partnership, or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised: under the law of a Party; or 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 described in paragraph 1(c)(ii) or 1(c)(iii);(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 described in paragraph 1(c)(ii) or 1(c)(iii);

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 Australia is not limited as to time under Australian law;

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

(g) "territory" means land territory, territorial sea, as well as the maritime areas over which each Party has jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to 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.

3. The question of ownership or control with respect to paragraph 1(d)(ii) shall depend on the factual circumstances of the particular case. The following facts, inter alia, shall be accepted as evidence of such ownership or control:

(a) A substantial direct or indirect participation in the capital of the legal person 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: the exercise of a decisive power over management and operations; or the exercise of a decisive power over the composition of the board of directors or of any other managing body.(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.

Article 2. Application of Agreement

1. This Agreement shall apply to investments whenever made. It shall not apply to disputes which arose prior to its entry into force.

2. Where a legal person of a Party is owned or controlled by a citizen or a legal person of any third country, the Parties may decide jointly in consultation, subject to their national law, not to extend the rights and benefits of this Agreement to such legal person.

3. This Agreement shall not apply to a legal person 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.

4. This Agreement shall not apply to a natural person who is a permanent resident but not a citizen of Australia where:

(a) The provisions of an investment protection agreement between the Republic of Turkey 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 Republic of Turkey.

Article 3. Promotion and Protection of Investments

1. Each Party shall in its territory promote as far as possible investments by investors of the other Party and shall, in accordance with its laws and investment policies applicable from time to time, admit investments.
2. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. Neither Party shall, subject to its laws, in any way impair by arbitrary or unjustifiable measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.
3. 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. Treatment of Investments

1. Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country, subject to its laws and regulations and investment policies.
2. Each Party shall accord these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors, subject to its laws, regulations and investment policies, or to investments of investors of any third country, whichever is the most favourable.
3. Each Party, in accordance with its domestic law, shall 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 assert claims and enforce rights in respect of disputes with its own investors, shall permit its investors to choose how to settle disputes relating to investments with the investors of the other Party (including arbitration conducted in a third country), and shall provide for the recognition and enforcement of any resulting judgments or awards.
4. The provisions of this Article shall not require a Party to extend to investments of the other Party any treatment, preference or privilege resulting from the following agreements entered into by either of the Parties:
 - (a) Any existing or future customs unions, free trade agreements, regional economic integration organisations or similar international agreement,
 - (b) Any existing or future agreement relating wholly or mainly to taxation.

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 legal persons 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, regulations and investment policies, if any, that pertain to or affect investments in its territory by investors of the other Party, make such laws, regulations and investment policies, if any, 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 currency exchange rate movements and other relevant factors.

3. The compensation shall be paid without undue delay, shall include interest at the relevant prevailing 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 its investors or investors of any third country.

Article 9. Transfers

1. Each Party shall permit in good faith all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) The initial capital plus any additional capital used to maintain or expand the investment;

(b) Returns;

(c) Proceeds from the sale or liquidation of all or any part of an investment;

(d) Compensation pursuant to Article 8;

(e) Reimbursements and interest payments deriving from loans in connection with investments;

(f) Salaries, wages, unspent earnings and other remunerations of personnel engaged from abroad in connection with that investment;

(g) Payments arising from an investment dispute pursuant to Article 13.

2. Transfers shall be made in the freely convertible currency in which the investment has been made or in any freely convertible currency at the rate of exchange in force at the date of transfer, unless otherwise agreed by the investor and the hosting Party.

3. Paragraph 1 is without prejudice to the equitable and non-discriminatory application of a Party's laws relating to bankruptcy and insolvency and to ensure the execution and satisfaction of judgements in adjudicatory proceedings.

Article 10. Subrogation

1. If the investment of an investor of one Party is insured against non-commercial risks under a system established by law, any subrogation of the insurer which stems from the terms of the insurance agreement shall be recognised by the other Party.

2. The insurer shall not be entitled to exercise any rights other than the rights which the investor would have been entitled to exercise.

3. Where the insurer 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 insurer making the payment, pursue those rights and claims against the other Party.

4. Disputes between a Party and an insurer shall be settled in accordance with the provisions of Article 13 of this Agreement.

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 seek, in good faith and a spirit of cooperation, rapid and equitable solution to any dispute between them concerning the interpretation or application of this Agreement. In this regard, the Parties agree to engage in direct and meaningful negotiations to arrive at such solutions. If the Parties cannot reach an agreement within six months after the beginning of a dispute between themselves through the foregoing procedure, the dispute may be submitted, upon the request of either Party, to an arbitral tribunal of three members, or any other dispute settlement procedure agreed between them.

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 and the nature of the relief sought.

3. Within sixty days of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators, within thirty days of the appointment of the second of them, shall select a third arbitrator as Chairperson, who shall be a national of a third State which has diplomatic relations with both Parties. The Parties shall, within thirty days of the selection of the third arbitrator, approve the selection of that arbitrator who shall act as Chairperson of the Tribunal.

4. In the event either Party fails, within the specified time, to appoint an arbitrator to approve the selection of the third arbitrator, the other Party may request the President of the International Court of Justice to make the appointment.

5. If both arbitrators cannot reach an agreement about the choice of the Chairperson within two months after their appointment, the Chairperson shall be appointed upon the request of either Party by the President of the International Court of Justice.

6. If, in the cases specified under paragraphs 4 and 5 of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Party, the appointment shall be made by the Vice-President, and if the Vice-President is prevented from carrying out the said function or if he is a national of either Party, the appointment shall be made by the most senior member of the Court who is not a national of either Party.

7. In case any arbitrator appointed as provided for in this Article 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.

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

9. The Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chairperson of the Tribunal. Thereafter, the Arbitral Tribunal shall determine where and when it shall sit.

10. 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.

11. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within eight months of the date of the selection of the Chairperson, and the tribunal shall render its decision within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

12. 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 taking into account the provisions of this Agreement, the international agreements both Parties have concluded and the generally recognised principles of international law.

13. Each Party shall bear the costs of its appointed arbitrator. The costs of the Chairperson 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.

14. The arbitral tribunal shall reach its decisions, which shall be final and binding, by a majority of votes.

15. A dispute shall not be submitted to an international arbitration tribunal under the provisions of this Article, if the same dispute has been brought before another international arbitration court under the provisions of Article 13 and is still before that tribunal. This shall not impair the engagement in direct and meaningful negotiations between the Parties.

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 within a period of six months, the investor may, subject to paragraph 4, elect to do one of the following:

(a) 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 either conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;

(b) Refer the dispute to an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (1976) subject to the following provisions: The arbitral tribunal shall consist of three arbitrators. Each Party shall select an arbitrator, and those two arbitrators shall then appoint by mutual agreement a third arbitrator, the Chairperson, who shall be a national of a third State. All arbitrators shall be appointed within two months from the date when the investor informs the other Party of its intention to submit the dispute to arbitration under this subparagraph. If the necessary appointments are not made within the period specified above, either Party to the dispute may, in the absence of any other agreement, request the Secretary-General of the Permanent Court of Arbitration to make the necessary appointments. The arbitral award shall be made in accordance with this Agreement. The arbitral tribunal shall reach its decision by a majority of votes. The decision of the arbitral tribunal shall be final and binding and the Parties to the dispute shall abide by and comply with the terms of its award. The arbitral tribunal shall state the basis of its decision and give the reasons for its decision. Each Party to the dispute shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairperson in discharging his or her duties in relation to the arbitration and the remaining costs of the arbitration shall be borne equally by the Parties to the dispute. The arbitral tribunal may, however, direct in its decision that a higher proportion of costs shall be borne by one or other of the Parties to the dispute, and this award shall be binding on the Parties to the dispute. (i) The arbitral tribunal shall consist of three arbitrators. Each Party shall select an arbitrator, and those two arbitrators shall then appoint by mutual agreement a third arbitrator, the Chairperson, who shall be a national of a third State. All arbitrators shall be appointed within two months from the date when the investor informs the other Party of its intention to submit the dispute to arbitration under this subparagraph.

(ii) If the necessary appointments are not made within the period specified above, either Party to the dispute may, in the absence of any other agreement, request the Secretary-General of the Permanent Court of Arbitration to make the necessary appointments.

(iii) The arbitral award shall be made in accordance with this Agreement.

(iv) The arbitral tribunal shall reach its decision by a majority of votes.

(v) The decision of the arbitral tribunal shall be final and binding and the Parties to the dispute shall abide by and comply with the terms of its award.

(vi) The arbitral tribunal shall state the basis of its decision and give the reasons for its decision.

(vii) Each Party to the dispute shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairperson in discharging his or her duties in relation to the arbitration and the remaining costs of the arbitration shall be borne equally by the Parties to the dispute. The arbitral tribunal may, however, direct in its decision that a higher proportion of costs shall be borne by one or other of the Parties to the dispute, and this award shall be binding on the Parties to the dispute.

(c) By agreement with the other Party to the dispute, refer the dispute to any other arbitral authority.

3. Either Party to the dispute may, in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies.

4. As a precondition to electing arbitration under paragraph 13(2), the investor must waive any right it may have to initiate or continue proceedings on the same matter before judicial or administrative bodies of either Party.

5. Where a dispute is referred to the Centre by an investor pursuant to paragraph 2(a) of this Article:

(a) The other Party shall, for the purposes of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, be deemed to have given its consent to the submission of the dispute to the Centre;

(b) A legal person 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 legal person of the other Party.

6. Once an action referred to in paragraphs 2 and 3 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.

7. 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.

8. If a Party so elects, Article 13 shall not apply in relation to a dispute between that Party and an investor of the other Party relating to an investment where that investment consists solely of the acquisition of publicly listed shares in a company made through a domestic stock exchange and where the investor of the other Party owns less than 10 percent of the shares or voting power in that company.

Article 14. Entry Into Force, Duration and Termination

1. This Agreement shall enter into force on the date on which both Parties have notified each other in writing of the completion of the constitutional formalities required in their respective territories for the entry into force of this Agreement. It shall remain in force for a period of fifteen years and shall continue in force unless terminated in accordance with paragraph 2 of this Article.

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

3. This Agreement may be amended by written agreement between the Parties. Any amendment shall enter into force when each Party has notified the other that it has completed all internal requirements for entry into force of such amendment.

4. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of fifteen years from such date of termination.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Agreement.

DONE in duplicate at Canberra on the sixteenth day of June two thousand and five, in the English and Turkish languages, both texts being equally authoritative.

FOR THE GOVERNMENT OF AUSTRALIA FOR THE GOVERNMENT OF THE REPUBLIC OF TURKEY

Mark Vaile

Minister for Trade Kürsad Tüzmen

Minister for State

PROTOCOL TO THE AGREEMENT BETWEEN AUSTRALIA AND THE REPUBLIC OF TURKEY ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

On signing the Agreement between the Government of Australia and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, (the Agreement), the Parties to the Agreement:

(a) Agreed that for the purposes of the Agreement, "investment policies" in relation to Australia means those policies published by the Foreign Investment Review Board;

(b) Agreed to reaffirm, for the purposes of the Agreement, the commitments they have made under the OECD Code of Liberalisation of Capital Movements, particularly in relation to the formation and application of Australia's foreign investment policies;

(c) Noted that, for the purposes of Article 2(4) of the Agreement, Australia recognises that a Turkish citizen who is a permanent resident of Australia enjoys identical rights to an Australian citizen in relation to investments made within Australia; and

(d) Agreed that this Protocol shall form an integral part of the Agreement and shall enter into force on the same date as the Agreement.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Protocol

DONE in duplicate at Canberra on the sixteenth day of June 2005, in the English and Turkish languages, both texts being equally authoritative.

FOR THE GOVERNMENT OF AUSTRALIA FOR THE GOVERNMENT OF THE REPUBLIC OF TURKEY

Mark Vaile

Minister for Trade Kürsad Tüzmen

Minister for State