

# **AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA AND THE GOVERNMENT OF FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS**

The Government of the Republic of Guatemala and the Government of the Republic of hereinafter referred to as the "Contracting Parties",

Desiring to intensify economic relations for the mutual benefit of both countries; Convinced of the need to promote and protect reciprocal foreign investments, with the objective of stimulating the flow of productive capital, technological development and economic prosperity of both Contracting Parties;

Convinced of the need to reciprocally promote and protect foreign investments, with the objective of stimulating the flow of productive capital, technological development and economic prosperity of both Contracting Parties;

Recognizing that investments by investors of one Contracting Party in the territory of the other Contracting Party shall be made in accordance with the laws of that other Contracting Party;

Convinced that these objectives must be achieved in a manner consistent with the protection of the health, safety, environment and labor rights of each Contracting Party;

They have agreed as follows:

## **Article 1. Definitions**

For purposes of this Agreement:

1. "investment" means assets established or acquired by an investor that involve the contribution of capital, the expectation of gain or the assumption of risk, including:

- a) ownership of real and personal property, as well as other rights in rem;
- b) leases;
- c) shares, stocks, securities or any other form of participation in the capital of a company;
- d) credit rights or any other contractual benefit that has economic value, directly related to an investment.
- e) debt instruments of an enterprise, where the enterprise is an affiliate of the investor; or where the original maturity of the debt instrument is at least three years, but does not include a debt instrument of a Contracting Party regardless of maturity.
- f) intellectual property rights;
- g) concessions granted by law or by virtue of a contract, including concessions to explore, develop, cultivate, extract or exploit natural resources.

But investment does not mean:

Pecuniary claims arising exclusively from: (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of one Contracting Party to an enterprise in the territory of the other Contracting Party; (ii) the extension of credit in connection with a commercial transaction.

Any modification in the form of investment of the assets shall not affect its character as an investment, provided that such modification is consistent with the legislation of the Contracting Party in whose territory the investment was made.

2. "investor" of a Contracting Party means any natural or juridical person of a Contracting Party investing in the territory of

the other Contracting Party. For this purpose:

- a) "natural person" means a natural person having the nationality of a Contracting Party, in accordance with its legislation;
  - b) "legal person" means any enterprise which is incorporated or constituted under the laws of one of the Contracting Parties and which has substantive business operations in the territory of that Contracting Party.
3. "enterprise" means any entity incorporated or organized under the applicable law of a Contracting Party, whether or not for profit and whether privately or governmentally owned, including any partnership, joint venture, sole proprietorship, joint venture or other association.
4. "returns" means amounts produced by an investment and in particular, but not limited to, includes profits, interest, dividends, royalties and fees.
5. "territory" means the land, sea and air space, including internal waters, the exclusive economic zone and continental shelf, over which each Contracting Party exercises sovereign rights and jurisdiction, in accordance with its internal legislation and international law.

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

This Agreement shall apply to investments existing at the time of its entry into force, as well as to investments made thereafter. The Agreement shall not apply to any dispute concerning an investment that has arisen, or to any claim concerning an investment that has arisen, prior to its entry into force.

Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any measure to regulate investments of an investor of one Contracting Party in the territory of the other Contracting Party in the framework of measures aimed at preserving and promoting cultural diversity and safeguarding the environment.

Nothing in this Agreement shall apply to taxation measures.

## **Article 3. Admission**

Each Contracting Party shall admit investments of investors of the other Contracting Party to the extent permitted by its legislation.

## **Article 4. National Treatment and Most-Favored-Nation Treatment**

Each Contracting Party shall accord to investors and their investments treatment no less favorable than that it accords, in like circumstances, to its own investors or their investments with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

Each Contracting Party shall accord to investors and their investments treatment no less favorable than that it accords, in like circumstances, to investors or their investments of any third State with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

The provisions of this Article shall not be construed to require a Contracting Party to extend to investors of the other Contracting Party and their investments the benefit of any treatment, preference or privilege resulting from:

- a) a free trade area, customs union, common market or any similar existing or future international agreement to which any of the Contracting Parties is or becomes a party; as well as under those investment agreements to which the Contracting Party is a party and which were signed or are in force prior to the entry into force of this Agreement; or
- b) any international agreement or arrangement or any national legislation relating wholly or mainly to tax matters.

## **Article 5. Minimum Standard of Treatment**

Each Contracting Party shall at all times accord fair and equitable treatment and full protection and security in its territory to investments of investors of the other Contracting Party.

The concepts of "fair and equitable treatment" and "full protection and security" do not require additional treatment beyond that provided by customary international law, nor do they create additional substantive rights.

## **Article 6. Expropriation**

1. Neither Contracting Party shall expropriate or nationalize an investment, either directly or indirectly through measures tantamount to expropriation or nationalization, unless the following conditions are met:

- a) that the measures are taken for reasons of public purpose;
- b) that the measures are taken in accordance with the principle of legality;
- c) that the measures are taken on a non-discriminatory basis; and
- d) that the measures be accompanied by provisions for the payment of compensation without undue delay, which shall be liquidable and freely transferable.

2. Such compensation shall represent the fair market value of the expropriated investment immediately prior to the expropriation or when the impending expropriation becomes known, whichever is earlier. The fair market value shall not reflect any change in value due to the expropriation having become publicly known in advance.

The fair market value, at the request of the investor, will be expressed in freely convertible currency, based on the market exchange rate for that currency existing on the valuation date. Compensation will also include interest at a commercial market rate from the date of expropriation to the date of payment.

## **Article 7. Compensation for Losses**

Investors of either Contracting Party who suffer losses on their investments in the territory of the other Contracting Party due to armed conflict or civil disturbance shall be accorded treatment no less favorable than that accorded to their own investors or to investors of any third State as regards restitution, indemnification or other form of compensation.

## **Article 8. Free Transfer**

1. Each Contracting Party shall permit without undue delay, the transfer in freely convertible currency, of payments related to an investment and shall include in particular, but not exclusively:

- a) returns;
- b) the proceeds of a total or partial sale or liquidation of any investment of an investor of the other Contracting Party;
- c) payments derived from loans or other contractual obligations;
- d) compensation in accordance with Articles 6 and 7; and
- e) salaries and other remuneration of personnel hired abroad in connection with an investment.

2. Any transfer in connection with this Agreement shall be made at the market exchange rate in effect on the day of transfer.

3. Notwithstanding the provisions of paragraphs 1 and 2 above, a Contracting Party may prevent the implementation of a transfer through the non-discriminatory and good faith application of its legislation in the following cases:

- a) bankruptcy, insolvency or protection of creditors' rights;
- b) issuance, trading or operations of securities;
- c) criminal offenses;
- d) financial reporting or record keeping of transfers, when necessary, to assist law enforcement or financial regulatory authorities; or
- e) guaranteeing compliance with orders or rulings in judicial or administrative proceedings.

In the event of a fundamental disequilibrium in the balance of payments, a Contracting Party may temporarily restrict transfers, provided that such Contracting Party implements measures or a program in accordance with international standards. Such restrictions would have to be imposed on a non-discriminatory basis and in good faith.

## **Article 9. Subrogation**

Where a Contracting Party has provided a guarantee against non-commercial risks and has made a payment to an investor

under that guarantee, in connection with the investment of one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the former Contracting Party under the principle of subrogation to the rights of the investor, where the payment has been made in accordance with the guarantee provided by the former Contracting Party.

## **Article 10. Disputes between an Investor and a Contracting Party**

Any dispute concerning an investment between an investor of a Contracting Party and the other Contracting Party arising out of an alleged breach of the provisions of this Agreement and the investor has incurred loss or damage by reason of or arising out of such breach shall, to the extent possible, be settled amicably.

In order to resolve the dispute amicably, the investor shall notify the Contracting Party, in writing and in detail, of the intention to submit the claim to arbitration in accordance with the provisions of this Agreement. The notice shall document the status of the investor and the investment and shall contain at least the following information:

- a) name and address of the investor that is a party to the dispute;
- b) legal and factual basis for the investor's claim; and
- c) the investor's claims.

If any dispute cannot be settled within six months from the date on which the investor has submitted to the Contracting Party its intention to arbitrate as provided in the preceding paragraph, the Contracting Parties consent to the submission of the dispute to international arbitration. The dispute shall be submitted, at the option of the investor, pursuant to:

- a) the International Centre for Settlement of Investment Disputes (ICSID);
- b) the ICSID Additional Facility Rules; or
- c) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The appointing authority provided for in Article 6, first paragraph of the said Rules shall be the Secretary-General of ICSID.
- d) any other arbitration rules, if so agreed by the disputing parties.

The choice of one dispute settlement mechanism shall be exclusive of any other. However, an investor may only submit a claim to arbitration if it waives its right to initiate or continue any proceedings before an administrative tribunal or court under the national law of a Contracting Party, or other dispute settlement procedures, with respect to the measure of the disputing Contracting Party alleged to be in breach of the Agreement, except for proceedings for injunctive, declaratory or extraordinary relief, not involving the payment of damages, before an administrative tribunal or court, in accordance with the national law of the disputing Contracting Party.

The consent and waiver provided for in this article shall be expressed in writing in the request for arbitration.

A dispute may be submitted to arbitration if the investor has delivered to the disputing Contracting Party the notice of its intention to submit its claim to arbitration referred to in the second paragraph of this Article and provided that no more than three years have elapsed from the date on which the investor first obtained or should have first obtained knowledge of the facts giving rise to the dispute.

## **Article 11. Constitution of the Court**

The tribunal shall be composed of three arbitrators. Each of the disputing parties shall appoint one arbitrator; the third arbitrator, who shall be the chairman of the arbitral tribunal, shall be appointed by the disputing parties by mutual agreement. The chairman of the tribunal shall in no case be a national of any of the Contracting Parties.

Where a tribunal established under this Article is not constituted within 90 days from the date on which the claim is submitted to arbitration, the Secretary-General of ICSID shall, at the request of either disputing party, appoint, at his discretion, the arbitrator or arbitrators not yet appointed. In any event, the Secretary-General of ICSID shall, prior to the appointment of the arbitrator or arbitrators not yet appointed, consult with the disputing parties.

Any arbitration under the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules, at the request of any of the parties, shall be conducted in consultation with the parties. of the disputing parties, shall be conducted in a State that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958 (the New York Convention).

Unless the disputing parties agree otherwise, an arbitral award finding that the Contracting Party has failed to comply with its obligations under this Agreement may order only one or both of the following measures:

(a) the payment of monetary damages; or

(b) restitution in kind, unless the Contracting Party elects to pay monetary compensation instead.

The award shall be made in public unless the disputing parties agree otherwise.

Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Contracting Party shall promptly comply with the provisions of any award and shall secure in its territory the enforcement of such award in accordance with its national law.

## **Article 12. Applicable Law**

The arbitral tribunal shall decide the dispute in accordance with this Agreement and the applicable principles and rules of international law.

## **Article 13. Provisional Measures**

An arbitral tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the arbitral tribunal's jurisdiction is given full effect, including an order to preserve evidence in the possession or control of a disputing party or orders to protect the arbitral tribunal's jurisdiction. An arbitral tribunal may not order attachment or a stay of enforcement of the allegedly violative measure referred to in Article 10.

## **Article 14. Disputes between Contracting Parties**

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled through negotiations between the Governments of both Contracting Parties.

2. If the dispute cannot be settled within six months from the date on which such negotiations were requested by any Contracting Party, it shall, at the request of any Contracting Party, be submitted to an arbitral tribunal.

3. The arbitral tribunal shall be constituted for each case, and each Contracting Party shall appoint one member. These two members shall select a national of a third State as its chairman, with the approval of the Contracting Parties. The members shall be appointed within two months and the chairman within four months of the date on which either Contracting Party notifies the other Contracting Party of its intention to submit the dispute to an arbitral tribunal.

4. If within the time limits referred to in Paragraph (3) of this Article the necessary appointments have not been made, any Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments.

5. If the President of the International Court of Justice is unable to perform the function designated in Paragraph (4) of this Article or is a national of any Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is unable to perform such function or is a national of any Contracting Party, the most senior member of the Court who is not a national of any Contracting Party shall be invited to make the necessary appointments.

6. The arbitral tribunal shall reach its decision by majority vote, such decision shall be final and binding on the Contracting Parties.

7. Each Contracting Party shall pay the costs of the member appointed by that Contracting Party, as well as the costs of his representation in the arbitration proceedings; the costs of the Chairman and any other costs shall be divided equally between the two Contracting Parties. However, the arbitral tribunal may order in its decision that a higher proportion of such costs be charged to one of the Contracting Parties. The tribunal shall determine its own procedure.

## **Article 15. Effective Date, Duration and Termination**

1. The Contracting Parties shall notify each other when the internal legal requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the day following receipt of the last notification.

2. This Agreement shall remain in force for a period of ten (10) years. Thereafter, the Agreement shall remain in force indefinitely, unless either Contracting Party notifies the other Contracting Party in writing of its decision to terminate the

Agreement. Termination of the Agreement shall become effective one year after the notice of termination has been received by the other Contracting Party.

3. With respect to investments made prior to the date on which the termination of this Agreement becomes effective, the provisions of Articles 1 through 15 shall remain in force for a period of ten (10) years from such date.

4. This Agreement may be amended, in writing, by mutual consent of the Contracting Parties. Any amendment shall enter into force on the date on which the Contracting Parties have notified each other in writing of the completion of their respective internal procedures for the entry into force of the amendment.

IN WITNESS WHEREOF, the undersigned, duly authorized to this effect, have signed this Agreement.

Done in duplicate in the city of on the days of the month of 200\_, in the Spanish and English languages, and English, all texts being equally authentic. In case of divergence in interpretation, the English text shall prevail.

For the Government of the Republic of Guatemala

For the Government of .....