

AGREEMENT BETWEEN THE REPUBLIC OF CHILE AND THE REPUBLIC OF AUSTRIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENT

THE REPUBLIC OF CHILE AND THE REPUBLIC OF AUSTRIA, hereinafter referred to as the "Contracting Parties".

DESIRING to create and maintain favourable conditions for a greater economic cooperation between the Contracting Parties and in particular for investments by investors of either -Contracting Party which implies, inter alia, the transfer of capital into the territory of the other Contracting Party and the stimulation of business activities;

RECOGNIZING that the promotion and protection of investments may strengthen the readiness for such investments, hereby make an important contribution to the development of economic relations and thus favour the economic prosperity of both countries;

HAVE AGREED AS FOLLOWS :

ARTICLE 1 Definitions

For the purpose of this Agreement :

(1) "investment" comprises any kind of assets, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively :

- (a) movable and immovable property and any other property rights such as servitudes, mortgages, pledges, usufructs and similar rights;
- (b) shares, debentures or any other kind of participation in enterprises;
- (c) loans or other claims to money that has been given in order to create an economic value or claims to any performance having an economic value;
- (d) intellectual and industrial property rights, as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organization, insofar as both Contracting Parties have ratified them, including, but not limited to, copyright, trademarks, patents, industrial designs and technical processes, know-how, trade names and goodwill;
- (e) concessions granted in accordance with the laws and regulations of the respective Contracting Party, or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

(2) "investor" means the following subjects who have made an investment in the territory of the other Contracting Party in accordance with its laws and regulations and the present Agreement :

- (a) any natural person having the nationality of either Contracting Party in accordance with its applicable laws;
- (b) any juridical person or partnership, including companies, corporations, business associations and other legally recognized entities, which are constituted or otherwise duly organized under the laws of either Contracting Party and have their seat

together with effective economic activities in the territory of that same Contracting Party.

(3) "territory" means in respect of each Contracting Party the land, maritime and airspace under its sovereignty, including the exclusive economic zone and the continental shelf where that Contracting Party exercises sovereign rights or jurisdiction in conformity with international law.

(4) "returns" means the amounts yielded by an investment and in particular, though not exclusively, profits, interests, capital gains, dividends, royalties, licence and other fees.

ARTICLE 2

Promotion, Admission and Protection of Investments

(1) Each Contracting Party shall, subject to its general policy and its laws and regulations in the field of foreign investments, promote and admit in its territory investments by investors of the other Contracting Party.

(2) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and their returns, and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, operation, sale and liquidation of such investments.

(3) The legal extension, alteration or transformation of an investment has to be made in accordance with the legislation of the Contracting Party in the territory of which the investment is made.

(4) Each Contracting Party shall observe any contractual obligation it may have entered into towards an investor of the other Contracting Party with regard to investments approved by it in its territory.

ARTICLE 3

Treatment of Investments

(1) Each Contracting Party shall accord fair And equitable treatment to investments of investors of the other Contracting Party in its territory and shall ensure that the exercise of the right thus recognised shall not be hindered in practice.

(2) Each Contracting Party shall accord to investments of investors of the other Contracting Party in its territory a treatment which is no less favourable than that accorded to investments made by its own investors or to investments made by investors of any third country, whichever is the most favourable.

(3) Each Contracting Party shall accord to investors of the other Contracting Party a treatment no less favourable than that it accords, in like circumstances, to its own investors or to investors of any third country with respect to the management, maintenance, use, enjoyment, operation, sale and liquidation of investments.

(4) If a Contracting Party accords special advantages to investors of any third country and their investments by virtue of an agreement establishing a free trade area, a customs union, a common market, an economic union or a multilateral agreement on investments to which the Party presently belongs or in the future may belong, or through the provisions of any international agreement, international arrangement or domestic legislation regarding taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party and their investments.

ARTICLE 4

Free Transfer

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of funds in connection with an investment without delay any in a freely convertible currency, particularly of :

- (a) interests, dividends, profits and other returns;
- (b) repayments resulting from a loan agreement related to the investment;
- (c) any capital and additional amounts for the maintenance or extension of the investment or proceeds from the total or partial sale or liquidation of the investment;
- (d) compensation for expropriation, damage or loss as referred to in Articles 5 and 6 of this Agreement;
- (e) payments arising out of a settlement of a dispute.

(2) Notwithstanding paragraph 1 the Contracting Parties may require reports and other formalities of transfer in accordance with the law. Such requirements shall not unreasonably derogate from the free and undelayed transfer guaranteed by this Agreement.

(3) Transfers shall be made at the market rate of exchange applying on the date of transfer in the territory of the Contracting Party which has admitted the investment. In the absence of a market for foreign exchange, the rate to be used shall be the most recent rate applied to inward investments.

ARTICLE 5

Expropriation and Compensation

(1) A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of the other Contracting Party or take any measure having equivalent effect (hereinafter referred to as "expropriation"), 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) Compensation shall be equivalent to the market value of the investment affected immediately before the measure was taken or became publicly known, whichever is the earlier. Where that value cannot be readily ascertained, compensation may be determined in accordance with generally recognised equitable principles of valuation taking into account, inter alia, the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. Compensation shall be paid without delay. It shall include interest at the prevailing commercial rate for the currency of payment from the date when expropriation becomes effective until the date of actual payment. It shall be fully realisable and freely transferable.

(3) In case a Contracting Party expropriates the assets of a company which is considered as a company of this Contracting Party pursuant to paragraph (2) of Article 1 of the present Agreement and in which an investor of the other Contracting

Party owns shares, it shall apply the provisions of paragraph (1) so as to ensure due compensation to this investor.

(4) The investor affected shall have a right to access, under the law of the Contracting Party making the expropriation, to the judicial or, if applicable, other independent authority of that Party, in order to review the legality of any such expropriation and the amount of compensation.

ARTICLE 6

Compensation for Damage or Loss

(1) The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency, rebellion or other similar events, which took place in the territory of the other Contracting Party, shall be accorded by the latter Contracting Party as regards restitution, indemnification, compensation or other settlement, a treatment not 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.

(2) Without prejudice to paragraph 1, investors of one Contracting Party who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other Contracting Party resulting from :

(a) requisitioning of their property or part thereof by the forces or authorities of the latter Contracting Party; or

(b) destruction of their property or part thereof by the forces or authorities of the latter Contracting Party, which was not caused in combat action or was not required by the necessity of the situation;

shall be accorded prompt restitution or prompt, adequate and effective compensation.

ARTICLE 7

Subrogation

(1) In case one Contracting Party or an agency authorized by the Contracting Party has granted a contract of insurance or any form of guarantee with regard to an investment by one of its investors in the territory of the other Contracting Party, the latter Contracting Party shall recognize the right of the first Contracting Party, by virtue of the principle of subrogation, to substitute the investor in all its rights and claims when payment has been made under this contract or guarantee by the first Contracting Party.

(2) In case one Contracting Party has made a payment to one of its investors and has taken over the rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Contracting Party making the payment, pursue those rights and claims against the other Contracting Party.

ARTICLE 8

Principle of More Favourable Treatment

If the provisions of law of either Contracting Party or international obligations existing at present or established thereafter between the Contracting Parties in addition to the present Agreement contain a rule, whether general or specific, entitling investments

by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rule shall to the extent that it is more favourable, prevail over the present Agreement.

ARTICLE 9

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, which arise out of an investment covered by this Agreement, consultations will 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 of the International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States and opened for signature in Washington on March 18, 1965; or

(c) to arbitration by three arbitrators in accordance with the UNCITRAL arbitration rules, as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure.

(3) In the cases referred to in subparagraphs (b) and (c) above, each Contracting Party by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to the corresponding arbitral tribunal. None of the Contracting Parties shall request the exhaustion of internal administrative or juridical remedies as a condition for reverting to international arbitration.

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

(5) Notwithstanding paragraph 4 the investor may have recourse to international arbitration in case the competent tribunal has not issued a sentence within a period of thirty six months.

(6) The award of the competent local or international arbitration tribunal shall be final and binding on both parties to the dispute; it shall be executed according to national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

(7) Once a dispute has been submitted to the competent local or international arbitration tribunal in accordance with this Article, neither Contracting Party shall pursue the dispute through diplomatic channels, unless the other Contracting Party has failed to abide by or comply with any judgment, award, order or other decision made by the competent local or international arbitration tribunal in question.

(8) A Contracting Party which is a party to a dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise the objection that the investor who is the other party to the dispute has received by virtue of a guarantee issued by a third party indemnity in respect of all or some of its losses.

ARTICLE 10

Settlement of Disputes between the Contracting Parties

(1) The Contracting Parties shall endeavour to resolve any dispute between them regarding the interpretation or application of the provisions of this Agreement through friendly negotiations.

(2) If the dispute cannot thus be settled within six months following the date of notification of the dispute, it shall, upon the request of either Contracting Party, be submitted to an *Ád-hoc* Arbitral Tribunal in accordance with this Article.

(3) The Arbitral Tribunal shall be formed by three members and shall be constituted as follows : within two months of the notification by a Contracting Party of its wish to settle the dispute by arbitration, each Contracting Party shall appoint one arbitrator. These two members shall then, within one month of the appointment of the last one, agree upon a third member who shall be a national of a third country and who shall act as the Chairman. The appointment of the Chairman shall be approved by the Contracting Parties within one month of that person's nomination.

(4) If, within the time limits provided for in paragraphs (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 appointments. If the President of the International Court of Justice is prevented from carrying out the said function or if that person is a national of either Contracting Party, the appointments shall be made by the Vice-President, and if the latter is prevented or if that person is a national of either Contracting Party, the appointments shall be made by the senior Judge of the Court who is not a national of either Contracting Party.

(5) The Chairman of the Tribunal shall be a national of a third country which has diplomatic relations with both Contracting Parties.

(6) The Arbitral Tribunal shall reach its decisions by virtue of the provisions of this Agreement, the generally recognized principles of international law on this subject and the general principles of laws as recognized by both Contracting Parties. The Tribunal shall reach its decisions by a majority vote and shall determine its procedure.

(7) 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 agreed otherwise. The Tribunal may, however, in its award determine another distribution of cost.

(8) The award of the Arbitral Tribunal shall be final and binding on both Parties.

ARTICLE 11

Scope of application

This Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its legislation, prior to or after the entry into force of the Agreement, by investors of the other Contracting Party. It shall however not be applicable to disputes which arose prior to its entry into force.

ARTICLE 12

Consultations between the Contracting Parties

The Contracting Parties shall consult with each other, at the request of either of them, on matters concerning the interpretation or application of this Agreement.

ARTICLE 13

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 sixty days after the date of the latter notification.

(2) This Agreement shall remain in force for a period of ten years. Thereafter it shall remain in force indefinitely, unless one of the Contracting Parties gives one year's written notice of termination to the other Contracting Party through diplomatic channels.

(3) In respect of investments made prior to the date of receipt of the notice of termination of this Agreement, the provisions of Articles 1 to 12 of this Agreement shall remain in force for a further period of ten years from that date on.

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

Done at Santiago, this eighth day of september in duplicate in the Spanish, German and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

PROTOCOL

On signing the Agreement between the Republic of Chile and the Republic of Austria on the Promotion and Reciprocal Protection of Investments the Contracting Parties have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement.

Ad Article 4

(1) Capital 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.

(2) A transfer shall be deemed to have been made without delay if carried out within such period as is normally required for the completion of transfer formalities. The said period shall start on the day on which the relevant request has been submitted in due form and may in no case exceed thirty days.

DONE at Santiago, this eighth day of september in duplicate in the Spanish, German and English languages, all texts being equally authentic. In case of any divergence of interpretation, the English text shall prevail.