

**Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol
(Canberra, 23 August 1995)**

**Entry into force: 11 January 1997
AUSTRALIAN TREATY SERIES**

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**AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE
GOVERNMENT OF THE ARGENTINE REPUBLIC ON THE PROMOTION AND
PROTECTION OF INVESTMENTS**

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE ARGENTINE REPUBLIC, hereinafter referred to as "the Contracting Parties",

DESIRING to intensify economic cooperation between both countries;

CONSIDERING that investment relations should be promoted and economic cooperation 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 Contracting Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party; and

RECOGNISING that the promotion and protection of such investments on the basis of a bilateral agreement will be conducive to the stimulation of individual business initiative to the benefit of both countries,

HAVE AGREED as follows:

Article 1

Definitions

1. For the purposes of this Agreement:

(a) "investment" means, in conformity with the laws, regulations and investment policies of the Contracting Party in whose territory the investment is made, every kind

of asset owned or controlled, and invested by an investor of one Contracting Party in the territory of the other Contracting Party, in accordance with the latter's laws, regulations and investment policies. It includes in particular, though not exclusively:

(i) movable and immovable 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 or legal person;

(iii) a loan or other claim to money which is directly related to a specific investment 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; and

(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.

(b) "returns" means amounts 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 Contracting Party means:

(i) in respect of Australia:

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

(B) a company; and

(ii) in respect of the Argentine Republic:

(A) a natural person who is a national of the Argentine Republic in accordance with its laws on nationality; or

(B) a legal person;

(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 Australia; or

(ii) under the law of a third country and is owned or controlled, directly or indirectly, 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 Australia;

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

(e) "legal person" means any entity constituted according to the laws and regulations of the Argentine Republic or having its seat in the territory of the Argentine Republic;

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

(h) "territory" in relation to a Contracting Party means the national territory of either Contracting Party and includes the territorial sea, maritime zone, Exclusive Economic Zone or continental shelf where that Contracting Party exercises or may exercise 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.

3. This Agreement shall apply to 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, in the same way that it applies to investments.

4. For the purposes of this Agreement, a natural person, company or legal person shall be regarded as controlling a company, legal person or an investment if the natural person, company or legal person has a substantial interest in the company, legal person or the investment. The Contracting Party in the territory of which the investment is made may require proof, to be given in accordance with its laws, regulations and investment policies, of the control invoked by the investor of the other Contracting Party. Any question arising out of this Agreement concerning the control of a company, legal person or an investment shall be resolved to the satisfaction of the Contracting Parties.

Article 2

Application of the Agreement

1. This Agreement shall apply to investments whenever made but the provisions of Articles 12, 13 and 14 shall not apply to any dispute, claim or difference which arose before its entry into force.

2. This Agreement shall not apply to a company or 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.

3. In respect of Australia, 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 Argentine Republic 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 Argentine Republic.

4. In respect of the Argentine Republic, this Agreement shall not apply to the investments made by citizens of Australia if such persons have, at the time of making the investment, been domiciled in the Argentine Republic for more than two years unless that investor can prove that the investment was admitted into its territory from abroad.

5. A company or legal person duly constituted under the law of a Contracting Party or a legal person having its seat in the territory of a Contracting Party shall not be treated as an investor of the other Contracting Party, but any investments in that company or legal person by investors of that other Contracting Party shall be protected by this Agreement.

Article 3

Promotion of investments

1. Each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall admit investments in accordance with its laws, regulations and investment policies.

2. Each Contracting Party shall make public all laws, regulations and investment policies that pertain to, or affect, investments.

Article 4

Protection of investments

1. Each Contracting Party shall at all times ensure fair and equitable treatment to investments.

2. Each Contracting Party shall, subject to its laws, grant full legal protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments through unjustified or indiscriminate measures.

3. If the laws or regulations of either Contracting Party or any bilateral treaty obligation between the Contracting Parties or any agreement between the investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific, entitling investments to more favourable treatment than are provided for in this Agreement, such rules, to the extent that they are more favourable, shall prevail.

Article 5

Treatment

Each Contracting Party shall accord to investments by investors of the other Contracting Party, made in its territory, treatment which is not less favourable than that which it accords to investments of investors of any third country and, subject to its laws, regulations and investment policies, than that which it accords to investments by its own investors, provided that a Contracting 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 Contracting Party belongs; or

(b) the provisions of an agreement with a third country relating wholly or mainly to taxation; or

(c) the bilateral agreements providing for concessional financing concluded by the Argentine Republic with the Republic of Italy on 10 December 1987 and with the Kingdom of Spain on 3 June 1988.

Article 6

Entry and sojourn of personnel

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

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

Article 7

Expropriation and compensation

1. Neither Contracting 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 Contracting Party unless the following conditions are complied with:

(a) the expropriation is for a public purpose related to the internal needs of that Contracting 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 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, currency exchange rate movements and other relevant factors.

3. The compensation referred to in paragraph 1 of this Agreement shall include interest from the date of expropriation at a commercially reasonable rate, shall be paid without delay and shall be effectively realisable and freely transferable between the territories of the Contracting Parties.

Article 8

Compensation for losses

Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting Party due to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar event shall be accorded with respect to restitution, indemnification, compensation or other settlement, treatment which is no less favourable than that accorded to its own investors or to investors of any third State.

Article 9

Transfers

1. Each Contracting Party shall grant to an investor of the other Contracting Party the unrestricted right to transfer abroad funds related to an investment. Such funds include the following:

(a) the initial capital and any additional sums necessary for the maintenance or development of the investment;

(b) returns;

(c) funds in repayment of loans or other claims to money referred to in Article 1.1(a)(iii);

(d) funds paid in compensation for losses referred to in Article 8;

(e) proceeds from a total or partial sale or liquidation of the investment; and

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

2. Transfers abroad shall be effected without delay in a freely convertible currency, at the applicable exchange rate on the date of transfer, in accordance with the laws and

procedures of the Contracting Party which admitted the investment in such manner so as not to impair the substance of the rights set forth in this Article.

3. Each Contracting 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 Contracting Party or an agency thereof makes a payment to any of its investors under a guarantee, a contract of insurance or other form of indemnity it has granted in respect of an investment, the other Contracting Party shall recognise the transfer of any right or title in connection with such investments in favour of the Contracting Party or any agency thereof. The subrogated right or claim shall not be greater than the original right or claim of the investor.

2. Where subrogation occurs in accordance with paragraph 1 of this Article, the investor shall not, unless authorised to act on behalf of the Contracting Party or an agency thereof making the payment, pursue those rights and claims against the other Contracting Party.

Article 11

Consultations between the Contracting Parties

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

Article 12

Settlement of disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through friendly consultations and negotiations.

2. If a dispute is not resolved by such means within six months of one Contracting Party seeking in writing such negotiations or consultations, it shall be submitted at the request of either Contracting Party to an Arbitral Tribunal which shall consist of three persons appointed as follows:

(a) each Contracting Party shall appoint one arbitrator;

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

(c) the Contracting Parties shall, within sixty days of the selection of the third arbitrator, approve the selection of that arbitrator who shall act as Chairman of the Tribunal.

3. Arbitration proceedings shall be instituted upon notice being given through the diplomatic channel by the Contracting Party instituting such proceedings to the other Contracting Party. Such notice shall contain a statement setting forth in summary form the grounds of the claim, the nature of the relief sought, and the name of the arbitrator appointed by the Contracting Party instituting such proceedings. Within sixty days after the giving of such notice the respondent Contracting Party shall notify the Contracting Party instituting proceedings of the name of the arbitrator appointed by the respondent Contracting Party.

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 appointment. If the President is a citizen, national or permanent resident of either Contracting Party or is otherwise unable to act, the Vice-President shall be invited to make the appointment. If the Vice-President is a citizen, national or permanent resident of either Contracting Party or is unable to act, the Member of the International Court of Justice next in seniority who is not a citizen, national or permanent resident of either Contracting Party shall be invited to make the appointment.

5. 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.

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

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

8. Before the Arbitral Tribunal makes a decision, it may at any stage of the proceedings propose to the Contracting 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 Contracting Parties have concluded and the generally recognised principles of international law.

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

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

11. An award shall be final and binding on the Contracting Parties.

Article 13

Settlement of disputes between a Contracting Party and an investor of the other Contracting Party

1. Any dispute which arises between a Contracting Party and an investor of the other Contracting Party relating to an investment shall, if possible, be settled amicably. If the dispute cannot so be settled, it may be submitted, upon request of the investor, either to:

(a) the competent tribunal of the Contracting Party which has admitted the investment; or

(b) international arbitration in accordance with paragraph 3 of this Article.

2. Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party which has admitted the investment or to international arbitration in accordance with paragraph 3 of this Article, this choice shall be final.

3. In the case of international arbitration, the dispute shall be submitted, at the investor's choice, either:

(a) to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on 18 March 1965 (hereinafter referred to as "the Convention"),^[1] provided that the Contracting Parties are both parties to the Convention; or

(b) to an arbitration tribunal set up from case to case in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law; or

(c) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

4. Each Contracting Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice made by the investor under paragraph 3(a) or (b) of this Article.

5. A company or legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and which, before the dispute arises, is controlled by a national of the other Contracting Party, shall in accordance with Article 25.2(b) of the Convention, be treated for the purposes of the Convention as a national of the other Contracting Party.

6. The arbitration tribunal shall make its decision in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, the rules on conflict of laws which the tribunal considers applicable, the terms of any specific agreement concluded in relation to the particular investment involved and the relevant principles of international law.

7. The arbitral decision shall be final and binding on the parties to the dispute.

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

9. Once an action referred to in paragraph 1 of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:

(a) the relevant competent tribunal, the Secretary-General of the Centre or the arbitral authority or tribunal, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or

(b) the other Contracting Party has failed to comply with the arbitral or tribunal decision.

Article 14

Settlement of disputes between investors of the Contracting Parties

A Contracting Party shall in accordance with its laws and regulations:

- (a) provide investors of the other Contracting 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 Contracting 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 Contracting Parties shall have notified each other that their constitutional requirements for the entry into force of this Agreement have been fulfilled.^[2] It shall remain in force for a period of ten years and thereafter shall remain in force indefinitely, unless terminated by either Contracting Party giving one year's written notice to the other Contracting Party.

2. In respect of investments made prior to the date when a notice of termination pursuant to paragraph 1 of this Article takes effect, the provisions of this Agreement shall remain in force for a further period of fifteen years from that date.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Agreement.

DONE in two originals at Canberra on the twenty-third day of August, 1995 in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF FOR THE GOVERNMENT OF

AUSTRALIA: THE ARGENTINE REPUBLIC:

[Signed:] [Signed:]

GARETH EVANS GUIDO DI TELLA

PROTOCOL

On signing the Agreement between the Government of Australia and the Government of the Argentine Republic for the Promotion and Protection of Investments, the undersigned have agreed on the following provisions, which constitute an integral part of the said Agreement.

1. The Contracting Parties acknowledge that the question of control with respect to an investor will depend on the factual circumstances of the particular case.

2. The Contracting Party in whose territory the investments are undertaken may require proof of the control invoked by the investors of the other Contracting Party.

3. The following facts, inter alia, shall be accepted as evidence of control:

(a) a level of direct or indirect participation in the capital of a legal person or of a company which allows for control, such as a direct or indirect participation higher than 50% of the capital or a majority shareholding; or

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

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

(ii) the exercise of a decisive power over the composition of the Board of Directors or any other managing body.

4. Where there is doubt as to whether an investor exercises effective control, the investor shall be responsible for demonstrating that such control exists.

DONE in two originals at Canberra on the twenty-third day of August, 1995 in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF AUSTRALIA:

[Signed:] GARETH EVANS

FOR THE GOVERNMENT OF THE ARGENTINE REPUBLIC:

[Signed:] GUIDO DI TELLA