

[TRANSLATION - TRADUCTION]

TREATY BETWEEN THE REPUBLIC OF CHILE AND THE FEDERAL REPUBLIC OF GERMANY FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Republic of Chile and the Federal Republic of Germany,
Desiring to intensify economic cooperation between the two States,
Seeking to create favourable conditions for investments by nationals and companies of one State in the territory of the other State, and
Recognizing that the promotion of such investments and their protection by means of a treaty could stimulate private enterprise and enhance the well-being of both peoples,
Have agreed as follows:

Article 1

For the purposes of this Treaty:

1. The term "investments" shall include all types of assets, in particular:
 - (a) Ownership of movable and immovable property and other rights in rem, such as mortgages, liens and pledges;
 - (b) Stocks in companies and other forms of participation in companies;
 - (c) Claims to money which has been used to create an economic value or to benefits having an economic value;
 - (d) Intellectual property rights, in particular, copyrights, patents, utility models, industrial designs and models, trade marks and trade names, industrial and commercial secrets, technical processes, know-how and goodwill;
 - (e) Business concessions under public law, including concessions to prospect for, extract and exploit natural resources.

Any alteration of the form in which assets are invested shall not affect their classification as invested capital.

2. The term "income" or "profits" shall mean the amounts yielded by an investment for a given period, such as profit sharing, dividends, interest and licence or other fees.

3. The term "nationals" shall mean:

- (a) In respect of the Federal Republic of Germany:

 Germans within the meaning of the Basic Law of the Federal Republic of Germany;

- (b) In respect of the Republic of Chile:

 Chileans within the Constitution of Chile.

4. The term "companies" shall mean:

- (a) In respect of the Federal Republic of Germany: any legal entity, as well as any commercial or other company or association, with or without legal personality, having its

principal place of business in German territory and established in accordance with German legislation, whether or not its activities are for profit;

(b) In respect of the Republic of Chile: any legal entity constituted in the Republic of Chile in accordance with Chilean legislation and having its principal place of business in Chilean territory, whether or not its activities are for profit.

Article 2

1. Each Contracting Party shall promote investments by nationals or companies of the other Contracting Party in its territory, to the extent possible, and shall admit such investments in accordance with its legal provisions. In any case, it shall accord fair and equitable treatment to investments.

2. Investments made in accordance with the legal provisions of one Contracting Party and within its jurisdiction by nationals or companies of the other Contracting Party shall enjoy full protection under this Treaty.

3. Neither Contracting Party shall in any way impede the management, utilization, use or enjoyment of the investments of nationals or companies of the other Contracting Party in its territory through arbitrary measures or unjustified unequal treatment.

4. This Treaty shall also apply in areas of the exclusive economic zone and the continental shelf to the extent that international law authorizes the Contracting Party concerned to exercise rights of sovereignty or jurisdiction in such areas.

Article 3

1. Neither Contracting Party shall subject investments in its territory belonging to or under the control of nationals or companies of the other Contracting Party to treatment less favourable than that accorded to investments of its own nationals or companies or investments of nationals or companies of third States.

2. Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activities in connection with investments in its territory, to treatment less favourable than that accorded to its own nationals or companies or to nationals or companies of third States.

3. Such treatment shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of its membership in a customs or economic union, common market or free trade area or its association with such groupings.

4. The treatment under this article shall not include privileges accorded by a Contracting Party to nationals or companies of third States by virtue of an agreement for the avoidance of double taxation or other tax agreements.

Article 4

1. Investments by nationals or companies of one Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

2. Investments by nationals or companies of one Contracting Party in the territory of the other Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be comparable to expropriation or nationalization, except for reasons of public interest and against compensation. Such measures must be authorized by law. The compensation shall be equivalent to the value of the expropriated investment immediately before the effective or impending expropriation, nationalization or comparable measure became public knowledge. The compensation shall be paid without delay and shall carry the usual bank interest until the date of payment; it shall be readily convertible and freely transferable. At the latest, by the time of the expropriation, nationalization or comparable measure, the necessary steps shall have been taken to determine and pay the compensation. The legality of the expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review in an ordinary judicial proceeding.

3. Nationals or companies of one Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, state of national emergency or insurrection shall be accorded by that Contracting Party treatment no less favourable than that accorded to its own nationals or companies as regards restitution, settlement, compensation or other payments. Such payments shall be freely transferable.

4. Nationals or companies of one Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters regulated in this article.

Article 5

1. Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, in particular:

- (a) Capital and additional amounts to maintain or increase the investment;
- (b) Income;
- (c) Repayment of loans;
- (d) Proceeds of the liquidation or transfer of all or part of the investment;
- (e) The compensation provided for in article 4.

2. Transfers made in accordance with article 4, paragraphs 2 and 3, article 5 and article 6 shall be effected without delay at the exchange rate in force.

Article 6

If one Contracting Party makes payments to its nationals or companies under a guarantee granted for an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under article 9, recognize the transfer, whether under a law or pursuant to a legal transaction, of all rights of such nationals or companies to the former Contracting Party. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party in respect of all such rights (transferred rights), which it shall be authorized to exercise to the

same extent as its predecessor in title. For the transfer of payments by virtue of the transferred rights, article 4, paragraphs 2 and 3, and article 5 shall apply *mutatis mutandis*.

Article 7

1. If the legislation of one Contracting Party or obligations under international law currently existing or to be established between the Contracting Parties, other than this Treaty, contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to treatment more favourable than that provided for by this Treaty, such regulation shall, to the extent that it is more favourable, take precedence over this Treaty.

2. Each Contracting Party shall observe any other obligation that it may have entered into with regard to investments in its territory by nationals or companies of the other Contracting Party.

Article 8

This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party.

Article 9

1. Disputes between the Contracting Parties relating to the interpretation or application of this Treaty shall, as far as possible, be settled amicably by the Governments of the two Contracting Parties.

2. If the dispute cannot be settled, it shall, at the request of either Contracting Party once a reasonable period of time has elapsed, be submitted to an arbitral tribunal.

3. The arbitral tribunal shall be established on an *ad hoc* basis. Each Contracting Party shall appoint one member and the two members shall, by agreement, designate a national of a third State as Chairman, who shall be appointed by the Governments of the two Contracting Parties. The members shall be appointed within two months and the Chairman within three months after one Contracting Party has informed the other Party of its intention to submit the dispute to an arbitral tribunal.

4. If the time-limits set out in paragraph 3 are not observed and in the absence of any other agreement, either Contracting Party may request the President of the International Court of Justice to make the necessary appointments. If the President is a national of one of the Contracting Parties or is otherwise prevented from discharging the said function, the appointments shall be made by the Vice-President. If the Vice-President is also a national of one of the Contracting Parties or is also prevented from discharging the said function, the appointments shall be made by the member of the Court next in seniority who is not a national of either Contracting Party.

5. The arbitral tribunal shall take its decisions by a majority of votes. Its decisions shall be binding. Each Contracting Party shall bear the costs of its own arbitrator and the

costs of its representation in the arbitral proceedings. The costs of the Chairman and the other remaining costs shall be borne equally by the two Contracting Parties. The arbitral tribunal may adopt a different arrangement with regard to costs. In all other respects, the tribunal shall determine its own procedures.

6. If both Contracting Parties are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, recourse may not be had to the arbitral tribunal provided for above, in view of the provisions of article 27, paragraph 1, of the Convention, when an agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under article 25 of the Convention. The possibility of recourse to the above arbitral tribunal shall not be affected in the case of non-compliance with a judicial decision of the arbitral tribunal established under the Convention (article 27) or in the case of a transfer under a law or pursuant to a legal transaction in accordance with article 6 of this Treaty.

Article 10

1. Disputes between one Contracting Party and nationals or companies of the other Contracting Party relating to an investment in conformity with this Treaty shall, as far as possible, be settled amicably by the parties to the dispute.

2. If a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute submitted a claim, it shall, at the request of one of those parties, be submitted to the competent courts of the Contracting Party in whose territory the investment was made.

3. At the request of one of the parties concerned, the dispute shall be submitted to an international arbitral tribunal:

(a) If within 18 months from the institution of judicial proceedings under paragraph 2 of this article, there has been no ruling on the merits; or

(b) If, even such a ruling exists, one of the parties to the dispute considers that it violates the provisions of this Treaty, in which case arbitral proceedings shall begin within one year from written notification of the award.

4. The provisions of paragraphs 2 and 3 shall not affect the right of the parties to the dispute to submit it to an international arbitral tribunal by mutual agreement.

5. In the cases provided for in paragraphs 3 and 4 of this article, the dispute between the parties concerned shall, unless they have agreed otherwise, be submitted to arbitral proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.

6. The arbitral tribunal shall issue its ruling on the basis of this Treaty, and, where appropriate, of other treaties between the Parties, the domestic laws of the Contracting Party whose territory in which the investment was made, including its rules of private international law, and the general principles of international law.

7. The arbitral award shall be binding and each Party shall enforce it in accordance with its domestic law.

Article 11

This Treaty shall apply regardless of whether or not diplomatic or consular relations exist between the Contracting Parties.

Article 12

1. This Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Bonn.

2. This Treaty shall enter into force one month after the date of the exchange of instruments of ratification. It shall remain in force for a period of 10 years and shall be renewed thereafter for an indefinite period unless one of the Contracting Parties denounces it in writing 12 months before its expiry. After ten years, the Treaty may be denounced at any time by giving 12 months' advance notice.

3. For investments made prior to the expiry of this Treaty, the provisions of articles 1 to 11 shall remain in force for 20 years from the date on which the validity of the Treaty expired.

Done at Santiago on 21 October 1991, in two copies, each in the German and Spanish languages, both texts being equally authentic.

For the Republic of Chile:

ENRIQUE SILVA CIMMA

CARLOS OMINAMI PASCUAL

For the Federal Republic of Germany:

WIEGAND PABSCH

PROTOCOL

In signing the Treaty between the Republic of Chile and the Federal Republic of Germany for the promotion and reciprocal protection of investments, the undersigned plenipotentiaries have also adopted the following additional provisions, which shall be deemed an integral part of the Treaty:

I. Ad article 1

(a) This Treaty shall not apply to investments made in the Republic of Chile by individuals who are nationals of the other Contracting Party, if such individuals, on the date of the initial investment, have been permanently domiciled in the Republic of Chile for over five years, unless it is proved that the investments come from abroad;

(b) Income from an investment and, in the event of its reinvestment, income therefrom shall enjoy the same protection as the investment itself;

(c) Without prejudice to other procedures for determining nationality, any person in possession of a national passport issued by the competent authority of one Contracting Party shall, in particular, be deemed to be a national of that Party. This Treaty shall not apply to investors who are nationals of both Contracting Parties;

(d) The claims to money referred to in paragraph 1 (c) shall include claims arising from loans related to an investment which, by virtue of their purpose and amount, have the nature of an investment (investment loans). However, they shall not include third party loans such as bank loans at market rates;

(e) The claims to benefits referred to in paragraph 1 (c) shall include supplies of products derived from investment projects and obtained under service contracts, particularly in the raw materials sector.

2. Ad article 3

(a) The following in particular, although not exclusively, shall be deemed "activities" within the meaning of paragraph 2: the management, utilization, use and enjoyment of an investment. The following in particular shall be deemed treatment "less favourable" within the meaning of article 3: restrictions on the purchase of raw materials and other inputs, energy and fuel, as well as on all kinds of production and operation; obstacles to the sale of products within and outside the country; and any measure with similar effects. Measures taken for reasons of public security and order, public health or morality shall not be deemed "less favourable" treatment within the meaning of article 3;

(b) The provisions of article 3 shall not require a Contracting Party to extend to individuals and companies resident in the territory of the other Contracting Party the tax privileges, exemptions and relief accorded under its tax laws only to individuals and companies resident in its territory;

(c) The Contracting Parties shall, within the framework of their domestic legislation, give favourable consideration to applications for entry and stay by persons of one Contracting Party who, in connection with an investment, wish to enter the territory of the other Contracting Party; the same rule shall apply to wage-earners of one Contracting Party who, in connection with an investment, wish to enter and stay in the territory of the other Con-

tracting Party to carry on their activity as wage-earners. Applications for work permits shall also be given favourable consideration.

3. Ad article 4

A right to compensation shall also exist when State measures are taken against the company in which the investment was made and the company's economic situation is severely impaired as a result.

4. Ad article 5

(a) Without prejudice to the provisions of article 5, the Republic of Chile shall guarantee the right to repatriate investments made by German investors once three years have elapsed since they were made;

(b) While the Chilean external debt conversion programme remains in force, the Republic of Chile shall also guarantee the right to repatriate investments made by German investors under that programme once 10 years have elapsed since they were made and, once four years have elapsed, to transfer income for subsequent years. Income for the first four years shall be transferred from the fifth year onwards, in annual instalments of 25 per cent. The foregoing shall apply without prejudice to the possibility of having these periods reduced in accordance with the rules established by the Central Bank of Chile;

(c) A transfer shall be deemed to have been made "without delay" within the meaning of article 5, paragraph 2, if it is effected within the period normally required for the completion of transfer formalities. Such period shall commence with the submission of the relevant request and may in no circumstances exceed two months;

(d) The exchange rate within the meaning of paragraph 2 shall not differ substantially from the market value resulting from the conversion of the United States dollar to the currency of the Contracting Party in whose territory the investment was made and to the freely convertible currency desired by the investor on the official markets of the two countries for current transactions.

5. Ad article 8

This Treaty shall in no circumstances apply to disputes concerning events that occurred prior to its entry into force.

6. In respect of the international transport of goods or persons in connection with an investment, each Contracting Party shall neither exclude nor hinder the transport companies of the other Contracting Party and shall, where necessary, issue transport permits.

The preceding paragraph shall include transport of the following:

(a) Goods intended directly for an investment within the meaning of the Treaty or acquired in the territory of one of the Contracting Parties or a third State by a company or by order of a company in which an investment has been made within the meaning of the Treaty;

(b) Persons travelling in connection with an investment.

Done at Santiago on 21 October 1991, in two copies, each in the German and Spanish languages, both texts being equally authentic.

For the Republic of Chile:
ENRIQUE SILVA CIMMA
CARLOS OMINAMI PASCUAL

For the Federal Republic of Germany:
WIEGAND PABSCH

PROTOCOL AMENDING AND SUPPLEMENTING THE TREATY AND PROTOCOL BETWEEN THE REPUBLIC OF CHILE AND THE FEDERAL REPUBLIC OF GERMANY FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS, SIGNED AT SANTIAGO ON 21 OCTOBER 1991

The Republic of Chile and the Federal Republic of Germany,

Aware that the Treaty between the Republic of Chile and the Federal Republic of Germany for the promotion and reciprocal protection of investments, and the Protocol thereto, signed at Santiago on 21 October 1991, need to be amended and supplemented, have agreed as follows:

Article 1

Article 10, paragraph 3, of the Treaty shall be replaced by the following:

"If the dispute has been submitted to the competent court of the Contracting Party in whose territory the investment was made, recourse may be had to an international arbitral tribunal only within 30 days from the date of notification of the reply to the claim or if the competent court has not ruled on the merits within 18 months from the date of notification of the claim. However, either Contracting Party may offer more favourable treatment."

Article 2

The Protocol to article 5 (a) shall be replaced by the following:

"Without prejudice to the provisions of article 5, the Republic of Chile shall guarantee the right to repatriate investments made by German nationals or companies once a year has elapsed since they were made."

Article 3

The Protocol to article 5 (b) shall be deleted.

Article 4

The following addendum to article 10 of the Treaty shall be included in the Protocol:

"Ad article 10

Without prejudice to the provisions of article 10 designed to settle disputes between one Contracting Party and a national or company of the other Contracting Party, Chilean nationals or companies that make or have made investments in the territory of the Federal Republic of Germany shall have the right to submit any dispute to an arbitral tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965. This right may also be exercised if such nationals or com-

panies have previously submitted disputes to the competent courts of the Federal Republic of Germany and, even though a ruling on the merits exists, the national or company considers that the ruling violates the provisions of this Treaty."

Article 5

This Protocol amending and supplementing the Treaty between the Republic of Chile and the Federal Republic of Germany for the promotion and reciprocal protection of investments, and the Protocol thereto, signed at Santiago on 21 October 1991, shall constitute an integral part thereof, and they shall be interpreted and applied as a single instrument.

Done at Bonn on 14 April 1997, in two copies, each in the Spanish and German languages, both texts being equally authentic.

For the Republic of Chile:

JOSÉ MIGUEL INSULZA

For the Federal Republic of Germany:

KLAUS KINKEL