Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments

The Government of the Republic of Colombia and the Swiss Federal Council, hereinafter referred to as the "Parties",

Desiring to intensify economic cooperation to the mutual benefit of both States.

Intending to create and maintain favourable conditions for investments by investors of one Party in the territory of the other Party.

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

(1) The term "investment" means every kind of asset and particularly:

(a) movable and immovable property acquired as well as any other rights in rem, such as servitudes, mortgages, liens and pledges;

(b) shares, parts or any other kind of participation in companies;

(c) claims to money or to any performance having an economic value, except for claims to money that arise solely from commercial contracts for the sale of goods or services or from credits in connection with a commercial transaction, the maturity date of which is less than three years;

(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how, goodwill, traditional knowledge and folklore;

(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

(2) the term "investor" refers with regard to either Party to:

(a) natural persons who, according to the law of that Party, are considered to be its nationals;

(b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Party and have their seat, together with real economic activities, in the territory of the same Party;

(c) legal entities not established under the law of that Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.

(3) the term "returns" means the amounts yielded by an investment and includes. in particular, profits, interest, capital gains, dividends, royalties and fees.

(4) the term "territory" means with respeet to cach Party the land territory, the internal waters, the airspace and, where applicable, the maritime and submaritime areas adjacent to the coast under its sovereignty, including the exclusive economic zone and the continental shelf, over which the Party concerned exercises sovereign rights or jurisdiction in conformity with national and international law.

Article 2. Scope of Application

This Agreement shall apply to investments of investors of one Party, made in the territory of the other Party in accordance with its laws and regulations, whether prior to or after the entry into force of the Agreement. It shall, however, not be applicable to claims or disputes arising out of events which occurred prior to its entry into force.

Article 3. Promotion and Admission

(1) Each Party, with the aim to increase investment flows by investors of the other Party, may make available information regarding:

(a) investment opportunities in its territory;

(b) the laws, regulations or provisions that, directly or indirectly, affect foreign investment including, among others, currency exchange and fiscal regimes; and

(c) foreign investment statistics.

(2) Each Party shall admit investments by investors of the other Party in accordance with its laws and regulations.

(3) When a Party has admitted an investment in its territory, it shall grant, in accordance with: its laws and regulations, the necessary permits in connection with such investment, including permits for the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance, as well as authorizations required for the activities of consultants or experts.

Article 4. Protection and Treatment

(1) Each Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments.

(2) Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party, This treatment shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

(3) If a Party accords special advantages to investments of investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or a similar regional arrangement or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investments of investors of the other Party.

Article 5. Transfers

(1) Each Party shall grant investors of the other Party the transfer without delay in a freely convertible currency of payments in connection with an investment. particularly of:

(a) returns;

(b) payments made under a contract entered into by the investor, or its Investment, including payments pursuant to a loan agreement:

(c) proceeds from the sale of all or any part of the investment, or from the partial or complete liquidation of the investment;

(d) payments arising from the compensation for expropriation or losses; and

(e) payments pursuant to the application of provisions relating to the settlement of disputes.

(2) A transfer shall be deemed to have been made "without delay" if effected within such a period as is normally required for the completion of transfer formalities, including reports of currency transfers. In no case shall such period exceed three months.

(3) Unless otherwise agreed with the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force of the Party in whose territory the investment was made,

(4) It is understood that paragraphs 1 to 3 above are without prejudice to the equitable, non- discriminatory and good faith application of laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;

(b) the issuing, trading or dealing with securities;

(c) criminal or penal offences, and the recovery of proceeds of crimes;

(d) ensuring the satisfaction of judgments in adjudicatory proceedings.

Article 6. Expropriation and Compensation

Neither of the Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions be made for prompt, effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation shall include interest at a normal commercial rate from the date of dispossession until the date of payment, shall be settled in a freely convertible currency, be paid without delay and be freely transferable. The investor affected shall have a right of review, under the law of the Party making the expropriation, by a judicial or other independent authority of that Party, of his case and of the valuation of his investment in accordance with the principles set out in this Article.

Article 7. Compensation for Losses

The investors of one Party whose investments have suffered losses due to war or to any other armed conflict, revolution, state of emergency, rebellion, civil disturbance or any other similar event in the territory of the other Party shall benefit, on the part of this latter, of not less favourable treatment than that which that Party accords for such losses to its own investors or to investors of any third State.

Article 8. Taxation

(1) This Agreement shall not apply to tax matters, except for Article 6 and Article 10 paragraph 2.

(2) If an investor invokes Article 6 as the basis of a claim according to Article 11, he must first refer to the competent tax authorities of the host Party the issue of whether the lax measure concerned involves an expropriation. In case of such referral. the competent authorities of both Parties shall consult, If within six months of the referral, they do not reach an agreement that the measure does not involve an expropriation, the investor may pursue the dispute settlement procedure.

(3) In the event of any inconsistency between this Agreement and any tax convention between the Parties, that convention shall prevail to the extent of the inconsistency.

Article 9. Subrogation

(1) If a Party or its designated agency has made a payment in accordance with a financial guarantee against non-commercial risks concerning an investment by one of its investors in the territory of the other Party, the latter shall recognize the rights of the first Party by virtue of the principle of subrogation to the rights of the investor.

(2) If a Party has made a payment to one of its investors and thereby entered into the rights of the investor, the latter may not make a claim based on these rights against the other Party without the consent of the first Party.

Article 10. Other Obligations

(1) If provisions in the legislation of either Party or in international agreements entitle investments by investors of the other Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.

(2) Each Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Party with regard to a specific investment, which the investor could rely on in good faith when establishing, acquiring or expanding the investment.

Article 11. Settlement of Disputes between a Party and an Investor of the other Party

(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.

(2) Any such matter which has not been settled within a period of six months from the date of written request for consultations may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. In the latter event the investor has the choice between either of the following:

(a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965; and

(b) an ad-hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.

(4) Once the investor has referred the dispute to either a national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final.

(5) An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.

(6) The Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its immunity or the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

(7) Neither Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Party does not abide by and comply with the arbitral award.

(8) The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Party concerned.

Article 12. Disputes between the Parties

(1) Disputes between the Parties regarding the interpretation or application of the provisions of this Agreement shall if possible be settled through direct negotiations.

(2) If both Parties cannot reach an agreement within six months after the beginning of the dispute between themselves, the latter shall, upon request of either Party, be submitted to an arbitral tribunal of three members. Each Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

(3) If one of the Parties has not appointed its arbitrator and has not followed the invitation of the other Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Party by the President of the International Court of Justice.

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

(5) If, in the cases specified under paragraphs 3 and 4 of this Article, the President of the International Court of Justice is prevented from carrying out the said function or is a national of either Party, the appointment shall be made by the Vice-President, and if the latter is prevented or is a national of either Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Party.

(6) Subject to other provisions made by the Parties, the tribunal shall determine its own rules and procedures. The tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules and principles of international law. It shall reach its decisions by a majority of votes.

(7) Each Party shall bear the cost of its own member of the tribunal 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 Parties, unless the arbitral tribunal decides otherwise.

(8) The decisions of the tribunal are final and binding for each Party.

Article 13. Entry Into Force

This Agreement shall enter into force 60 days after the date on which both Parties have notified each other in writing on the compliance with their respective constitutional requirements in relation to the approval and entry into force of this Agreement.

Article 14. Duration and Termination

(1) This Agreement shall be in force for an initial period of ten years and shall remain in force thereafter for an indefinite period of time, unless terminated in accordance with paragraph 2 of this Article.

(2) Either Party may terminate this Agreement at the end of the initial ten year period or at any time thereafter, by giving a twelve month written notice to the other,

(3) With respect to investments made before termination of this Agreement, its provisions shall continue to be effective with respect to such investments for a period of ten years after the date of termination.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate, at Berne, on 17 May 2006, in the Spanish, French and English languages, each text being equally authentic. In case of any divergence of interpretation, the English text shall prevail,

For the Government of the Republic of Colombia

JORGE H. BOTERO

Minister of Trade, Industry and Tourism

For the Swiss Federal Council

JOSEPH DEISS

Federal Councillor

Head of the Federal Department of Economic Affairs

Protocol

On signing the Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, the undersigned plenipotentiaries have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Agreement.

Ad Article 1 Paragraph 1 (c)

With respect to loans contracted abroad, this Agreement shall only apply if the loan has been contracted after the entry into force of the Agreement. A payment obligation from, or the granting of a credit to, the State or a State enterprise is not considered an investment.

Ad Article 1 Paragraph 2 (a)

This Agreement shall not apply to investments of natural persons who are nationals of both Parties unless such persons

have at the time of the investment and ever since been domiciled outside the territory of the Party in which the investment was made.

Ad Article 1 Paragraph 2 (c)

An investor pretending that he controls an investment may be requested to submit proof of his claim. Acceptable proof may be evidence of the fact that the investor has the power to name the majority of the directors or otherwise to legally direct the actions of the legal entity concerned.

Ad Article 2

(1) It is understood that this Agreement is without prejudice to measures adopted by a Party with respect to the financial sector for prudential reasons, including measures aimed at protecting investors, depositors, insurance takers or trustees. or fo safeguard the integrity and stability of the financial system.

(2) Colombia reserves the right to adopt measures for reasons of public order pursuant to Article 100 of the Constitución Política de Colombia (1991), provided that Colombia promptly provides written notice to Switzerland that it has adopted a measure and that the measure:

(a) is applied in accordance with the procedural requirements set out in the Constitución Política de Colombia (1991), such as the requirements set out in Articles 213, 214 and 215 of the Constitucion Política de Colombia (1991); and

(b) is adopted or maintained only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(3) Where measures under 1 or 2 above do not conform with the provisions of this Agreement, they shall:

(a) not be applied in an arbitrary or unjustifiable manner;

(b) not constitute a disguised restriction on investment, and

(c) be necessary and proportional to the objective they seek to achieve.

Ad Article 4 Paragraph 2

(1) It is understood that the standard of national treatment as well as the most favoured nation standard, as set out in the said provision, may allow differentiation of treatment in the event of different situations of fact.

(2) For greater certainty, it is further understood that the most favourable treatment referred to in the said paragraph does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements related to investments concluded by the Party concerned.

Ad Article 5

(1) Notwithstanding the provisions of Article 5, each Party, in circumstances of exceptional balance of payments difficulties or imminent threat thereof, shall have the right, for a limited period of time, to exercise equitably, on a non-discriminatory basis and in good faith, powers conferred by its laws to restrict or delay transfers, provided such measures are taken in accordance with the relevant provisions of the Articles of Agreement of the International Monetary Fund.

(2) As regards capital inflows, it is understood that the Parties may, in circumstances of exceptional macro-economic imbalances and for a limited period of time, take measures in an equitable and non-discriminatory manner with respect to loans contracted abroad, including charges to payments in advance of such loans.

Ad Article 6

(1) It is understood that the said Article is without prejudice to the issuance of compulsory licenses granted in relation to intellectual property rights or other measures taken in accordance with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

(2) With respect to Colombia, it is further understood:

(a) that the criterion "utilidad publica o interés social" contained in Article 58 of the Constitucién Politica de Colombia (1991)

is compatible with the term "public interest" used in Article 6 of this Agreement; and

(b) that the establishment of monopolies depriving investors of economic activities in accordance with Article 336 of the Constitucion Politica de Colombia (1991) shall conform to the obligations set out in Article 6 of this Agreement.

Ad Article 11

(1) It is understood that an arbitral tribunal under the said Article will not be competent to review the legality of a domestic law or regulation under the constitutional and legal order of the Party concerned.

(2) With regard to paragraph 3 of the said Article, on request of a Party five years after the entry into force of this Agreement or at any time thereafter, the Parties shall consult with a view to assessing whether the provision on consent with respect to Article 10 paragraph 2 is appropriate considering the performance of this Agreement.

(3) With respect to Colombia, in order to submit. a claim for settlement under the said Article, domestic administrative remedies shall be exhausted in accordance with applicable laws and regulations. Such procedure shall in no case exceed six months from the date of its initiation by the investor and shall not prevent him from requesting consultations according to paragraph 1 of that Article.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Protocol.

Done in duplicate, at Berne, on 17 May 2006, in the Spanish, French and English languages, each text being equally authentic. In case of any divergence of interpretation, the English fext shall prevail.

For the Government of the Republic of Colombia

JORGE H. BOTERO

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