No. 30883

SPAIN
and
CHILE

Agreement on the reciprocal protection and promotion of investments (with protocol). Signed at Santiago on 2 October 1991

Authentic text: Spanish.

Registered by Spain on 5 April 1994.

ESPAGNE
et
CHILI

Accord relatif à la protection et à l'encouragement réciproques des investissements (avec protocole). Signé à Santiago le 2 octobre 1991

Texte authentique : espagnol.

Enregistré par l'Espagne le 5 avril 1994.

[TRANSLATION — TRADUCTION]

AGREEMENT[1] BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF CHILE ON THE RECIPROCAL PROTECTION AND PROMOTION OF INVESTMENTS

The Kingdom of Spain and the Republic of Chile, hereinafter referred to as "the Parties",

Desiring to intensify their economic cooperation for the mutual benefit of both countries,

Seeking to create favourable conditions for investments made by investors of each Party in the territory of the other Party which involve transfers of capital,

Recognizing that the promotion and protection of investments under this Agreement will stimulate initiatives of this field,

Have agreed as follows:

Article 1

DEFINITIONS

For the purposes of this Agreement:

1. The term "investors" means individuals who are nationals, under the laws of the relevant Party, and legal entities, including companies, associations of companies, trading corporate entities and other organizations which are incorporated or, in any event, properly organized under the laws of that Party and have their headquarters in the territory of that Party, whether or not they are owned by foreign individuals or legal entities.

2. The term "investment" means any kind of assets, such as goods and rights of all sorts, acquired under the laws of the host country of the investment, including, but not limited to, the following:

— Shares and other forms of participation in companies;

— Claims, securities and rights arising from all types of contributions made for the purpose of creating economic value, expressly including any loans granted for this purpose, whether capitalized or not;

— Movable and immovable property and rights of any kind related thereto;

— Any rights in the field of intellectual property, expressly including patents and trademarks, as well as manufacturing licences and know-how;

— Rights to engage in economic and commercial activities authorized by law or by virtue of a contract, particularly those relating to the prospecting, cultivation, extraction or exploitation of natural resources.

[1] Came into force on 28 March 1994, i.e., one month after the date of the exchange of the instruments of ratification, which took place at Madrid on 28 February 1994, in accordance with article 11 (1).

3. The term "investment returns or earnings" means income deriving from an investment in accordance with the definition set out in the previous paragraph and includes, in particular, profits, dividends and interest.

4. The term "territory" means the land territory and territorial sea of each of the Parties, as well as the exclusive economic zone and the continental shelf extending beyond the limits of the territorial sea of each of the Parties, over which they have or may have jurisdiction and sovereign rights under international law for the purpose of prospecting, exploring and conserving natural resources.

Article 2

PROMOTION, ACCEPTANCE

1. Each Party shall promote, insofar as possible, the investments made in its territory by investors of the other Party and shall accept such investments in accordance with its laws.

2. This Agreement shall apply to investments made following its entry into force by investors of one Contracting Party in the territory of the other. However, it shall also apply to investments made prior to its entry into force which are considered foreign investments under the laws of the relevant Contracting Party.

3. Nonetheless, it shall not apply to disputes or claims initiated or settled prior to its entry into force.

Article 3

PROTECTION

1. Each Party shall protect in its territory the investments made in accordance with its laws by investors of the other Party, and shall not hamper, by means of unjustified or discriminatory measures, the management, maintenance, use, enjoyment, expansion, sale or, as the case may be, liquidation of such investments.

2. Each Party shall grant the necessary permits relating to these investments and shall allow, within the framework of its laws, the execution of contracts relating to manufacturing licences and technical, commercial, financial and administrative assistance.

3. Each Party shall also grant, where necessary and in accordance with its laws, the permits required in connection with the activities of consultants or experts hired by investors of the other Party.

Article 4

TREATMENT

1. Each Party shall guarantee in its territory, in accordance with its domestic laws, fair and equitable treatment of the investments made by investors of the other Party, in conditions which are not less favourable than those enjoyed by its national investors.

2. This treatment shall not be less favourable than that which is extended by each Party to the investments made in its territory by investors of a third country.

3. However, this treatment shall not extend to the privileges which one Party may grant to investors of a third country by virtue of its membership in:

— A free-trade area;

— A customs union;

— A common market; or

— A mutual economic assistance organization or an agreement signed before the date of signature of this Agreement which contains provisions similar to those applied by that Party to the members of such an organization.

4. The treatment granted pursuant to this article shall not extend to tax deductions and exemptions or other similar privileges granted by either of the Parties to investors of third countries by virtue of an agreement to avoid double taxation or any other tax agreement.

Article 5

NATIONALIZATION AND EXPROPRIATION

Nationalization, expropriation or any other measure having similar characteristics or effects that may be adopted by the authorities of one Party against the investments in its territory of investors of the other Party must be adopted exclusively for reasons of public utility or national interest pursuant to constitutional and legal provisions, and shall in no case be discriminatory. The Party adopting such measures shall pay to the investor an adequate indemnity in freely convertible currency without unjustified delay. The legality of the expropriation, nationalization or comparable measure and the amount of the indemnity shall be subject to appeal in ordinary judicial proceedings.

Article 6

TRANSFER

With regard to the investments made in its territory, each Party shall grant to investors of the other Party the right to freely transfer the income deriving therefrom and other payments related thereto, including particularly but not exclusively the following:

— Investment returns, as defined in article 1;

— The indemnities provided for in article 5;

— Amortization payments;

— The proceeds of the sale or liquidation, in full or in part, of an investment.

The transfers shall be made in freely convertible foreign currency.

The host Party of the investment shall give the investor of the other Party, or the company in which he has invested, access to the official foreign-exchange market on a non-discriminatory basis.

Transfers shall be made net of tax after the investor has fulfilled his fiscal obligations pursuant to the laws of the Party in whose territory the investment was made.

The Parties undertake to facilitate the procedures needed to make such transfers without excessive delays or restrictions. In particular, no more than three months may elapse between the date on which the investor properly submits the necessary applications to make the transfer and the date the transfer actually takes place.

Likewise, each Party shall allow the free transfer of salaries, wages and other compensation received by nationals of one Party who have obtained in the other Party the corresponding authorizations and work permits in relation to an investment.

Article 7

MORE FAVOURABLE TERMS

Terms more favourable than those of this Agreement which have been agreed to by one of the Parties with investors of the other Party shall not be affected by this Agreement.

If the laws of a Contracting Party or existing or future obligations arising from international law other than the provisions of this Agreement between the Contracting Parties give rise to general or specific regulations under which the investments of investors of the other Contracting Party are to be granted treatment which is more favourable than that provided for in this Agreement, the said regulations shall take precedence over this Agreement to the extent that they are more favourable.

Article 8

PRINCIPLE OF SUBROGATION

In the event that a Party has given any financial guarantee in respect of non-commercial risks connected with an investment made by an investor of that Party in the territory of the other Party, the latter shall accept the application of the principle of subrogation of the first Party in respect of the economic rights of the investor but not in respect of real rights, from the time when the first Party made a first payment charged to the guarantee issued.

This subrogation will make it possible for the first Party to be the direct beneficiary of all the payments for compensation of which the initial investor could be a creditor. In no event can a subrogation take place of rights to title, use, enjoyment or any other real right arising from ownership of the investment without the pertinent authorizations having previously been obtained, pursuant to the current laws on foreign investments in the Party where the investment was made.

The investors shall be entitled to bring proceedings or become parties to proceedings already under way in order to protect the remaining rights which they may claim and which have not been subrogated. Thus, in the case of a claim, the procedure laid down in article 10 shall apply.

Article 9

CONFLICTS OF INTERPRETATION OF THE AGREEMENT BETWEEN THE PARTIES

1. Any dispute between the Parties concerning the interpretation or application of this Agreement shall, to the extent possible, be settled by the Governments of the two Parties.

2. If the dispute cannot be settled by this means within six months of the start of the negotiations, it may, at the request of either Party, be submitted to a court of arbitration.

3. The court of arbitration shall be constituted as follows: each Party shall appoint an arbitrator, and the two arbitrators shall elect a citizen of a third country to act as president. The arbitrators shall be appointed within three months, and the president within five months, of the date on which either Party informs the other of its intention to submit the dispute to a court of arbitration.

4. If one of the Parties does not appoint its arbitrator by the established deadline, the other Party may request the President of the International Court of Justice to make such appointment. In the event that the two arbitrators do not reach an agreement on the appointment of the third arbitrator by the established deadline, either of the Parties may call upon the President of the International Court of Justice to make the appropriate appointment. If the President is a national of one of the Contracting Parties or is impeded for some other reason, the Vice-President shall make such appointment. If the Vice-President is also a national of one of the Contracting Parties or is also impeded, the member of the Court immediately following in the hierarchical order who is not a national of either Contracting Party shall make such appointment.

5. The court of arbitration shall issue its decision on the basis of respect for the law, of the rules contained in this Agreement or in other agreements in force between the Parties and of the universally recognized principles of international law.

6. Unless the Parties decide otherwise, the court shall establish its own procedure.

7. The court shall take its decision by majority vote and that decision shall be final and binding for both Parties.

8. Each Party shall bear the expenses of the arbitrator appointed by it and those connected with its representation in the arbitration proceedings. Other expenses, including those of the president, shall be borne in equal parts by both Parties.

Article 10

DISPUTES BETWEEN ONE PARTY AND INVESTORS OF THE OTHER PARTY

1. Any dispute concerning investments, as defined in this Agreement, which arises between a Contracting Party and an investor of the other Contracting Party shall, to the extent possible, be settled by means of friendly consultations between the two parties to the dispute.

2. If the dispute cannot be settled within six months of the time it was initiated by one of the Parties, it shall be submitted, at the discretion of the investor, to:

— The national jurisdiction of the Contracting Party involved in the dispute; or

— International arbitration in the conditions described in paragraph 3.

Once the investor has submitted the dispute to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other procedure shall be final.

3. If the dispute is submitted to international arbitration, it may be brought before one of the following arbitration bodies, at the discretion of the investor:

— The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington, D.C., on 18 March 1965,[1] when each State Party to this Agreement has acceded to it. As long as this condition remains unmet, each Contracting Party gives its consent to submit the dispute to arbitration in accordance with the rules of the Additional Facility of ICSID;

— An *ad hoc* court of arbitration established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. The arbitration body shall take its decision on the basis of the provisions of this Agreement, of the law of the Contracting Party that is a party to the dispute, including the rules relative to conflicts of laws, and of the terms of any specific agreements concluded in relation to investment, as well as of the principles of international law on the subject.

5. The arbitral awards shall be final and binding for the parties to the dispute.

6. The Contracting Parties shall refrain from dealing, through diplomatic channels, with matters concerning arbitration or judicial proceedings already under way until the relevant procedures have been completed, unless the parties to the dispute have not complied with the award of the court of arbitration or the decision of the ordinary court pursuant to the terms of compliance established in the award or decision.

Article 11

Entry into force, extension, termination

1. This Agreement shall come into force one month after the date on which the instruments of ratification are exchanged. It shall remain valid for ten years and shall subsequently be extended indefinitely unless it is terminated in writing by one of the Contracting Parties twelve months prior to its expiration. After ten years have elapsed, the Agreement may be terminated at any time, with 12 months' advance notice.

2. This Agreement shall be applicable regardless of whether or not diplomatic or consular relations exist between the Contracting Parties.

[1] United Nations, *Treaty Series*, vol. 575, p. 159.

3. With respect to investments made prior to the expiration date of this Agreement, the provisions of the Agreement shall thereafter remain in effect for twenty years from such expiration date.

DONE at Santiago in two authentic originals in the Spanish language, on 2 October 1991.

For the Kingdom of Spain:

CLAUDIO ARANZADI
Minister of Industry, Commerce and Tourism

For the Republic of Chile:

CARLOS OMINAMI PASCUAL
Minister of Economic Affairs, Development and Reconstruction

PROTOCOL

In signing the Agreement between the Kingdom of Spain and the Republic of Chile on the reciprocal protection and promotion of investments, the undersigned plenipotentiaries have also adopted the following provisions, which shall be considered an integral part of the Agreement:

1. *Re article 6*

Notwithstanding the provisions of article 6, the Republic of Chile shall guarantee the right, laid down in its legislation, of investors of the other Contracting Party to repatriate the capital they have invested in its territory, after a period of three years has elapsed from the date of entry of such capital. Any change in this time period shall invalidate it for the purposes of this paragraph of the Protocol.

The Parties put on record that article 6 of this Agreement does not apply to investments made through any external-debt-conversion programme for Chile.

For the Kingdom of Spain:

CLAUDIO ARANZADI
Minister of Industry, Commerce and Tourism

For the Republic of Chile:

CARLOS OMINAMI PASCUAL
Minister of Economic Affairs, Development and Reconstruction