

Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and Jamaica

The Government of the Kingdom of the Netherlands and the Government of Jamaica,

Hereinafter referred to as the Contracting Parties,

Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party,

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties,

Have agreed as follows:

Article 1.

For the purposes of the present Agreement:

- a) The term 'investments' shall comprise every kind of asset and more particularly, though not exclusively;
- (i) Movable and immovable property as well as any other rights in rem in respect of every kind of asset;
 - (ii) Rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
 - (iii) Title to money or other assets or to any performance under contract or law having an economic value;
 - (iv) Rights in the field of intellectual property, technical processes, goodwill and know-how;
 - (v) Rights to conduct commercial activities including rights to prospect, explore, extract and win natural resources granted under contract or under the legislation of the Contracting Party in the territory of which such activities are undertaken.
- b) The term 'nationals' shall comprise with regard to either Contracting Party:
- (i) Natural persons having the nationality of that Contracting Party in accordance with its law;
 - (ii) Corporations, firms or associations incorporated or constituted under the law of that Contracting Party;
 - (iii) Corporations, firms or associations wherever located, controlled directly or indirectly by nationals as defined in (i) and (ii) above.
- c) The term "territory" includes the territorial sea as well as the maritime areas beyond the territorial sea to the extent to which a Contracting Party exercises sovereign rights and jurisdiction in those areas in accordance with international law.

Article 2.

1. Each Contracting Party shall, within the framework of its law and regulations, encourage investments in its territory by nationals of the other Contracting Party through the protection of such investments. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

2. The present Agreement shall apply to all investments, whether made before or after its entry into force.

Article 3.

1. Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.
2. More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.
3. If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.
4. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.
5. If the investments by nationals of one Contracting Party are entitled whether by the law of the other Contracting Party or under international law, to a treatment more favourable than is provided for by the present Agreement, such treatment shall prevail.
6. Special incentives granted by one Contracting Party only to its nationals in order to stimulate the creation of local industries are considered compatible with this Article, provided they do not significantly affect the investments and activities of nationals of the other Contracting Party in connection with an investment.

Article 4.

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party:

- a) Under an agreement for the avoidance of double taxation; or
- b) By virtue of its participation in a customs union, economic union or similar institution; or
- c) On the basis of reciprocity with a third State.

Article 5.

1. Each Contracting Party shall in respect of investments made in its territory guarantee the free transfer of:
 - a) Amounts yielded by an investment, and in particular though not exclusively, profits, interest, capital gains, dividends, royalties or fees;
 - b) Funds necessary
 - (i) For the acquisition of raw or auxiliary materials, semi-fabricated or finished products for an investment.
 - (ii) To replace capital assets in order to safeguard the continuity of an investment;
 - c) Additional funds necessary for the expansion of an investment;
 - d) Funds in repayment of loans incurred for an investment;
 - e) A reasonable portion of the earnings of natural persons in respect of salaried work and services performed in relation to an investment;
 - f) The proceeds of sale or liquidation of an investment;
2. The transfers referred to in paragraph 1 of this Article shall be made in a freely convertible currency without undue restrictions or delay.
3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, the free transfer shall be subject to the following conditions:

(i) Approval of the investment in accordance with the exchange control regulations in force at the time the investment was made, if at that time such approval was required;

(ii) In relation to the item mentioned under (d) of paragraph 1, the prior consent, if required, of the competent authorities with respect to the repayment schedule, in accordance with the exchange control regulations in force at the time the loan was contracted.

4. Each Contracting Party retains the right not to apply the provisions of paragraphs 1 and 2 of this Article to the item mentioned under paragraph 1(f) of this Article in cases of exceptional balance of payments difficulties and where large sums are involved. The exercise of this right shall be subject to the following conditions:

(i) It may be used for a limited period only, and only to the extent necessary;

(ii) It shall be exercised on a basis of non-discrimination;

(iii) At the request of the other Contracting Party there shall be prompt and adequate consultations on the measures taken in exercise of the right referred to in this paragraph;

(iv) Transfer of a minimum of thirty-three and one-third (33 1/3) percent a year is guaranteed.

Article 6.

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

a) The measures are taken in the public interest and under due process of law;

b) The measures are not discriminatory;

c) The measures are accompanied by provision for the payment of adequate compensation. Such compensation shall amount to the market value of the relevant investments immediately before the measures were taken or the impending measures were publicly announced and shall include interest at a normal commercial rate until the date of payment. In determining the market value due weight shall be given to any factors which might have affected the value before the measures were publicly announced by the authorities. In order to be effective for the claimants, compensation shall be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

Article 7.

Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned.

Article 8.

If the investments of a national of the other Contracting Party are insured against non-commercial risks under a system established by law, and the insurer or the re-insurer makes a payment or agrees to make a payment pursuant to the terms of such insurance, any subrogation of the insurer or re-insurer into the rights of the said national shall be recognised by the other Contracting Party.

Article 9.

1. Any dispute between one Contracting Party and a national of the other Contracting Party concerning an investment of the latter in the territory of the former shall, if possible, be settled amicably.

2. If such a dispute has not been settled amicably within a period of three months from the date on which either party to the dispute requested amicable settlement, either party may pursue local remedies for the settlement of that dispute.

3. If the dispute has not been settled within a period of eighteen months from its submission to a competent body for the purpose of pursuing local remedies, then for the purpose of Article 36 of the Convention on the Settlement of Investment

Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965 (the Convention) the Contracting Party hereby gives its consent to the submission of the dispute to arbitration under that Article.

4. Nothing in this Article shall be construed as preventing the Contracting Party and the national of the other Contracting Party from agreeing to submit at any time the dispute to conciliation or arbitration under Articles 28 and 36 of the Convention, respectively.

5. A legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares is owned by nationals 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. Neither Contracting Party shall pursue through diplomatic channels any dispute referred to the International Centre for Settlement of Investment Disputes (the Centre), unless:

a) The Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or

b) The other Contracting Party does not abide by and comply with the award rendered by an arbitral tribunal.

This does not preclude informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 10.

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, the Netherlands Antilles and to Aruba, unless the notification provided for in Article 13, paragraph (1) provides otherwise.

Article 11.

Either Contracting Party may propose to the other Contracting Party that consultations be held on any matter concerning the interpretation or application of the Agreement. The other Contracting Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 12.

1. Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable period of time, by means of diplomatic negotiations, shall, unless the parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either Party.

2. If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make such appointment, the latter Party may invite the President of the International Court of Justice to make the necessary appointment.

3. If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either Party may invite the President of the International Court of Justice to make the necessary appointment.

4. If, in the cases provided for in the paragraphs 2 and 3 of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Party the most senior member of the Court available who is not a national of either Party shall be invited to make the necessary appointments.

5. The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the tribunal to decide the dispute *ex aequo et bono* if the Parties so agree.

6. Unless the Parties decide otherwise, the tribunal shall determine its own procedure.

7. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.

Article 13.

1. The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that the procedures constitutionally required therefor in their respective countries have been complied with, and shall remain in force for a period of fifteen years.
2. Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
3. In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date.
4. Subject to the period mentioned in paragraph 2 of this Article, the Government of the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

IN WITNESS WHEREOF, the undersigned representatives, duly authorised thereto, have signed the present Agreement.

Done in duplicate at Kingston, on April 18, 1991 in the English Language.

For the Government of the Kingdom of the Netherlands: A. L. BRUNINGS

For the government of Jamaica