

Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea

The Government of the Kingdom of the Netherlands

And

The Government of the Republic of Korea

(hereinafter referred to as "the Contracting Parties"),

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

Recognising 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 and that fair and equitable treatment of investments is desirable,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investments" means every kind of asset owned or controlled, directly or indirectly, by an investor of one Contracting Party in the territory of the other Contracting Party and in particular, though not exclusively, includes:

- a) Movable and immovable property and any other property rights such as mortgages, liens, leases or pledges;
- b) Shares in, stocks and debentures of, and any other form of participation in a company or any business enterprise and rights or interest derived therefrom;
- c) Claims to money or to any performance under contract having an economic value;
- d) Intellectual property rights including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, technical processes, know-how, and goodwill;
- e) Concessions having an economic value conferred by law or under-contract, including concessions to search for, cultivate, extract or exploit natural resources.

Any change of the form in which assets are invested or reinvested shall not affect their character as an investment.

2. The term "returns" means the amounts yielded by investments and, in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and all kinds of fees.

3. The term "investors" means with regard to either Contracting Party:

- a) Natural persons having the nationality of that Contracting Party; and
- b) Legal persons constituted under the law of that Contracting Party, who made an investment in the territory of the other Contracting Party.

4. The term "territory" means the territory of the Contracting Party concerned and any area adjacent to the territorial sea

which, under the laws applicable in the Contracting Party concerned, and in accordance with international law, is the exclusive economic zone or continental shelf of the Contracting Party concerned, in which that Contracting Party exercises relevant jurisdiction or sovereign rights.

5. The term "freely convertible currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

Article 2. Promotion of Investments

Each Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

Article 3. Treatment

1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors 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 investors. Each Contracting Party shall accord to such investments full security and protection.

2. More particularly, each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment, as regards inter alia, the operation, management, maintenance, use, enjoyment or disposal of investments, which shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investors concerned.

3. If a Contracting Party has accorded special advantages to investors of any third State by virtue of agreements establishing customs unions, economic unions, monetary 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 investors of the other Contracting Party.

4. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

5. If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

6. The provisions of paragraphs (1) and (2) of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation, including an agreement for the avoidance of double taxation. paragraphs (1) and (2) of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation, including an agreement for the avoidance of double taxation.

Article 4. Transfers

1. Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of their investments and returns. Such transfers shall include, in particular, though not exclusively:

- a) Net profit, capital gains, dividends, interest, royalties, fees and any other current income accruing from investments;
- b) Proceeds accruing from the sale or the total or partial liquidation of investments;
- c) Funds in repayment of loans related to investments;
- d) Earnings of investors of the other Contracting Party who are allowed to work in connection with investments in its territory;
- e) Additional funds necessary for the maintenance or development of the existing investments; and
- f) Compensation pursuant to Articles 6. Articles 6.

2. All transfers under this Agreement shall be made in a freely convertible currency, without restriction and delay, at the market exchange rate prevailing at the date of the transfer.

Article 5. Expropriation

1. Investments of investors of one Contracting Party shall not be nationalized, expropriated or otherwise subjected to any other measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for public purpose and against prompt, adequate and effective compensation. The expropriation shall be carried out on a nondiscriminatory basis and under due process of law.

2. Such compensation shall amount to the fair market value of the expropriated investments immediately before expropriation was taken or before impending expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable commercial rate from the date of expropriation until the date of payment and shall be made without delay, be effectively realizable and be freely convertible and transferable.

In both expropriation and compensation, treatment no less favourable than that which the Contracting Party accords to its own investors or to investors of any third State shall be accorded.

3. Investors of one Contracting Party affected by expropriation shall have a right to prompt review by a judicial or other independent authority of the other Contracting Party, of their case and of the valuation of their investments in accordance with the principles set out in this Article.

4. Where a Contracting Party expropriates the assets of a company, which is incorporated or constituted under its laws and regulations and in which investors of the other Contracting Party participate or own shares or debentures, the provisions of this Article shall be applied.

Article 6. Compensation for Losses

Investors of 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 investors or to investors of any third State, whichever is more favourable to the investors concerned.

Article 7. Subrogation

If the investments of an investor of one Contracting Party are insured against non-commercial risks or otherwise give rise to payment of indemnification in respect of such investments under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer or agency designated by one Contracting Party to the rights of the said investor pursuant to the terms of such insurance or under any other indemnity given shall be recognised by the other Contracting Party.

Article 8. Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Any dispute between a Contracting Party and an investor of the other Contracting Party including expropriation or nationalization of investments shall, as far as possible, be settled by the parties to the dispute in an amicable way.

2. The local remedies under the laws and regulations of the Contracting Party in the territory of which the investment has been made are available for investors of the other Contracting Party on the basis of treatment no less favourable than that accorded by the former Contracting Party to investments of its own investors or investors of any third State, whichever is more favourable to the investor concerned.

3. If the dispute cannot be settled within six (6) months from the date on which either party to the dispute requested amicable settlement, each Contracting Party hereby consents to submission of the dispute to the International Centre for Settlement of Investment Disputes (ICSID) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965. International Centre for Settlement of Investment Disputes (ICSID) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965.

If the parties to such a dispute have different opinions as to whether conciliation or arbitration is the more appropriate method of settlement, the investor shall have the right to choose. In case a legal dispute concerning an investment in the territory of the Republic of Korea has been submitted to a competent domestic court, this dispute shall not be submitted to ICSID, when a judgement rendered by any domestic court has become final. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands, an investor may choose to submit a dispute to ICSID at any time.

Article 9. Application of the Agreement

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date. The present Agreement shall, however, not be applicable to disputes concerning investments which are subject of a dispute settlement procedure under the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Korea, signed on 16 October 1974 at The Hague. The latter Agreement shall continue to apply to these investments, as far as it concerns the disputes referred to.

Article 10. Consultations

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

Article 11. 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 by consultation through diplomatic channels.
2. If any dispute cannot be settled within six (6) months, it shall, at the request of either Contracting Party, be submitted to an ad hoc Arbitral Tribunal in accordance with the provisions of this Article.
3. Such an Arbitral Tribunal shall be constituted for each individual case in the following way: Within two (2) months from the date of receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. These two members shall then select a national of a third State, who shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within two(2) months from the date of appointment of the other two members.
4. If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, a request may be made by either Contracting Party to the President of the International Court of Justice to make such appointments. If the President is a national of either Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointments. If the Vice-President also is a national of either Contracting Party or prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointments. paragraph (3) of this Article the necessary appointments have not been made, a request may be made by either Contracting Party to the President of the International Court of Justice to make such appointments. If the President is a national of either Contracting Party or otherwise prevented from discharging the said function, the Vice-President shall be invited to make the appointments. If the Vice-President also is a national of either Contracting Party or prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the appointments.
5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties.
6. Each Contracting Party shall bear the costs of its own arbitrator and its representation in the arbitral proceedings. The costs of the Chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The Tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties.
7. The Arbitral Tribunal shall determine its own procedure.

Article 12. Application to the Parts of the Kingdom of the Netherlands

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

Article 13. Entry Into Force, Duration and Termination

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 their constitutionally required procedures 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 fifteen years, whereby each Contracting Party reserves 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 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 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. paragraph (2) of this Article, 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 two originals at Seoul, on 12 July 2003, in the Netherlands, Korean and English languages, the three texts being equally authentic. In case of difference of interpretation, the English text shall prevail.

For the Government of the Kingdom of the Netherlands

(sd.) C. E. G. VAN GENNIP

For the Government of the Republic of Korea

(sd.) HWANG DOO-YUN

Protocol to the Agreement on the Promotion and Protection of Investments between the GOvernment of the Kingdon of the Netherlands and the Government of the REpublic of Korea.

On the signing of the Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea, the undersigned represenatives have agreed in the following provisions that constitutute an integral part of the Agreement:

Ad Article 4

1. Notwithstanding other provisions of this Agreement, the Government of the Republic of Korea may, in accordance with its laws and regulations, adopt or maintain measures inconsistent with its obligations under Article 4:

- a) In the event of serious balance-of-payments and external financial difficulties or threat thereof; or
- b) Where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious difficulties for macroeconomic managements, in particular monetary and exchange rate policies.

2. Measures referred to in paragraph 1 above:

- a) Shall be consistent with the Articles of the Agreement of the International Monetary Fund;
- b) Shall not exceed those necessary to deal with the circumstances described in paragraph 1 above;
- c) Shall be temporary and shall be eliminated as soon as conditions permit;
- d) Shall be promptly notified to the other Contracting Party.

Ad Article 8, paragraph 3

For the avoidance of doubt it is confirmed that a judgement is final, when:

- a) A judgement is not eligible for appeal to a higher domestic court; or

b) An investor, party to the dispute, has refrained from his right to appeal to a higher domestic court.

Ad Article 13

Upon the entry into force of the present Agreement, the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Korea, signed on 16 October 1974 at The Hague, shall be terminated and replaced by the present Agreement.

DONE in two originals at Seoul, on 12 July 2003, in the Netherlands, Korean and English languages, the three texts being equally authentic. In case of difference of interpretation, the English text shall prevail.

For the Government of the Kingdom of the Netherlands

(sd.) C. E. G. VAN GENNIP

For the Government of the Republic of Korea

(sd.) HWANG DOO-YUN