

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

The Kingdom of the Netherlands,

And

The State of Eritrea

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 nationals of one Contracting Party in the territory of the other Contracting Party,

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:

a) The term "investments" means 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; 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) Claims to money, to other assets or to any performance having an economic value;

(iv) Rights in the field of intellectual property, technical processes, goodwill and know-how;

(v) Rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

b) The term "nationals" shall comprise with regard to either Contracting Party:

(i) Natural persons having the nationality of that Contracting Party;

(ii) Legal persons constituted under the law of that Contracting Party;

(iii) Legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii). (i) or by legal persons as defined in (ii).

c) The term "investor" shall mean a national of the one Contracting Party investing in the territory of the other Contracting Party.

d) The term "territory" means:

The land territory of the Contracting Party concerned, including the airspace above and all sub-soil resources, 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 jurisdiction or sovereign rights.

Article 2. Promotion and Admission

Either 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. Protection

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 physical security and protection.

2. Each Contracting Party shall accord to such investments treatment which in any case 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 investor 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 the present 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 the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

Article 4. Taxation

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors 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 investors or to those of any third State who are in the same circumstances, whichever is more favourable to the investors concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:

- a) Under an agreement for the avoidance of double taxation; or any other fiscal arrangement; or
- b) By virtue of its participation in a customs union, economic union or similar institution.

Article 5. Transfers

The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay. Such transfers include in particular though not exclusively:

- a) Profits, interests, dividends and other current income;
- b) Funds in repayment of loans;
- c) Royalties or fees;
- d) Earnings of natural persons;
- e) The proceeds of sale or liquidation of the investment;

f) Payments arising under Article 7. Article 7.

Article 6. Expropriation

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors 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 or contrary to any undertaking which the Contracting Party which takes such measures may have given;
- c) The measures are taken against just compensation. Such compensation shall represent the fair market value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are investors or in any freely convertible currency accepted by the claimants.

Article 7. Compensation for Loss or Damage

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

Article 8. Subrogation

1. If the investments of an investor of the 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 the 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.
2. Any payment by the insurer or re-insurer or Agency designated by the one Contracting Party to its investors, shall not affect the right of such investors to make their claims against the other Contracting Party in accordance with Article 9, provided that the exercise of such a right does not overlap, or is not in conflict, with the exercise of a right by virtue of subrogation under paragraph 1) above. Article 9, provided that the exercise of such a right does not overlap, or is not in conflict, with the exercise of a right by virtue of subrogation under paragraph 1) above.

Article 9. Settlement of Disputes between an Investor and a Contracting Party

1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, if possible, be settled amicably.
2. If the dispute referred to in paragraph 1 of this Article cannot be settled within three months from the date on which either party to the dispute requested in writing an amicable settlement, the investor shall be entitled to submit the dispute, at his choice, for settlement to:
paragraph 1 of this Article cannot be settled within three months from the date on which either party to the dispute requested in writing an amicable settlement, the investor shall be entitled to submit the dispute, at his choice, for settlement to:
 - a. The International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation 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, when both Contracting Parties have become a party to the said Convention;
 - b. The International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules), when one of the Contracting Parties is not a party to the Convention mentioned under a);
 - c. A sole arbitrator or an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); United Nations Commission on International Trade Law (UNCITRAL);

d. The Court of Arbitration of the International Chamber of Commerce (ICC).

3. Each Contracting Party hereby gives its consent to the submission of a dispute to international conciliation or arbitration in accordance with the provisions of this Article.

4. The arbitral awards shall be final and binding on the parties to the dispute and shall be executed under the laws of the Contracting Party in whose territory the investment was made.

5. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention mentioned under paragraph 2 a) above, for the purpose of the Convention be treated as a national of the other Contracting Party. paragraph 2 a) above, for the purpose of the Convention be treated as a national of the other Contracting Party.

Article 10. Scope 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.

Article 11. Settlement of Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled by negotiations between the Governments of the Contracting Parties.

2. Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within six months 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.

3. 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.

4. 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.

5. 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.

6. 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 settlement of the dispute *ex aequo et bono* if the Parties so agree.

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

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

9. Each Contracting Party shall bear the costs of its own member of the tribunal and of its representation in the arbitration proceedings and half of the costs of the chairman and the remaining costs. The tribunal may, however, in its decision direct that a higher proportion of the costs shall be borne by one of the two Parties, and this award shall be binding on both Parties.

Article 12. Territorial Application

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.

As regards to the State of Eritrea the present Agreement shall apply to the territory of the State of Eritrea.

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 ten 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.

DONE in two originals at Asmara, on 2 December 2003, in the English language.

For the Kingdom of the Netherlands J. M. G. BRANDT

For the State of Eritrea:

Protocol to the Agreement on encouragement and reciprocal protection of investments between the State of Eritrea and the Kingdom of the Netherlands.

On the signing of the Agreement on encouragement and reciprocal protection of investments between the State of Eritrea and the Kingdom of the Netherlands, the undersigned representatives have agreed on the following provision which constitutes an integral part of the Agreement:

Ad Article 3, Paragraph 1

For the avoidance of doubt it is confirmed that the transfer in a freely convertible currency, without restriction or delay of:

- funds necessary (i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or (ii) to replace capital assets in order to safeguard the continuity of an investment;

- additional funds necessary for the development of an investment,

shall not be impaired by unreasonable or discriminatory measures.

For the State of Eritrea:

For the Kingdom of the Netherlands: