

Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Zambia and the Government of the Kingdom of the Netherlands.

The Government of the Kingdom of the Netherlands

And

The Government of the Republic of Zambia,

(their States 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;

(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 controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).

(c) The term "territory" means:

(i) In respect of the Republic of Zambia:

The territory in which the Republic of Zambia exercises sovereign rights and jurisdiction in accordance with international law;

(ii) In respect of the Kingdom of the Netherlands:

The territory of the Kingdom of the Netherlands and any area adjacent to the territorial sea which, under the laws applicable in the Kingdom of the Netherlands, and in accordance with international law, is the exclusive economic zone or continental shelf of the Kingdom of the Netherlands, in which the Kingdom of the Netherlands exercises jurisdiction or sovereign rights.

Article 2. Promotion of Investments

Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals 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 of Investments

- 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. Each Contracting Party shall accord to such investments, full physical security and protection.
- 2) More particularly, 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 nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.
- 3) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.
- 4) 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 nationals 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. Exception

If a Contracting Party has accorded special advantages to nationals 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 as stated in Article 3, paragraph 2 to nationals of the other Contracting Party.

Article 5. Taxes and other Fiscal Matters

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 who are in the same circumstances, whichever is more favourable to the nationals 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
- 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 6. 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 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;
- c) Additional funds necessary for the development of an investment;
- d) Funds in repayment of loans;
- e) Royalties or fees;
- f) Earnings of natural persons;
- g) The proceeds of sale or liquidation of the investment;
- h) Payments arising under the Articles 7 and 8.

Article 7. Expropriation

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 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 genuine 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 nationals or in any freely convertible currency accepted by the claimants.

Article 8. Compensation for Losses

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 who are in the same circumstances, whichever is more favourable to the nationals concerned.

Article 9. Subrogation

If the investments of a national 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 national pursuant to the terms of such insurance or under any other indemnity given shall be recognised by the other Contracting Party.

Article 10. Settlement of Investment Disputes between a Contracting Party and a National of the other Contracting Party

- 1) Disputes between a national of one Contracting Party and the other Contracting Party concerning an investment of the former, which have not been settled amicably shall be notified in writing, including detailed information, by the investor to the host party of the investment and shall, if possible, be settled amicably.
- 2) If the dispute cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute may be referred to the competent court of the Contracting Party.
- 3) The dispute may also be referred to international dispute settlement. Where the dispute is referred to international dispute settlement, the national may choose to refer the dispute to:
 - a) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, 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); or

b) An ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. Arbitration Rules of the United Nations Commission on International Trade Law.

(4) 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, for the purpose of the Convention be treated as a national of the other Contracting Party.

5) The arbitral awards shall be final and binding on the parties to the dispute and shall be executed according to national law.

6) Each Contracting Party hereby consents to submit investment disputes for resolution to the alternative dispute settlement fora mentioned in the preceding paragraphs 3a) and 3b).

Article 11. Disputes between the Contracting Parties

1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through diplomatic channels.

2) If a dispute cannot thus be settled within six months, it shall upon request of either Contracting Party be submitted to an arbitral tribunal.

3) Such a tribunal shall be constituted for each individual case in the following way: within two months of the receipt of the request for arbitration each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State as 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, either Contracting Party may, in absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or if he too is 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 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 settlement of the dispute *ex aequo et bono* if the Parties so agree.

6) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting 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 Contracting Parties. The tribunal may, however, in its decision, direct that a higher proportion of the costs shall be borne by one of the two Contracting Parties, and the award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

Article 12. 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. This Agreement, however, will not apply to previous disputes or claims related to investments made before its entry into force.

Article 13. Consultations

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

Article 14. 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 15, paragraph (1), provides otherwise.

Article 15. 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 (15) 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 (10) 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 (15) years from that date.
- 4) The terms of this Agreement may be amended by mutual agreement of both Contracting Parties, and such amendments shall be effected by exchange of notes between them through the diplomatic channel, once the Contracting Parties have fulfilled their constitutional obligations.
- 5) 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.

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

DONE in two originals at Lusaka, on 30 April 2003, in the English language.

For the Government of the Republic of Zambia:

For the Government of the Kingdom of the Netherlands:

(sd.) P. SCHÖNHERR

Protocol to the Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Zambia and the Government of the Kingdom of the Netherlands.

On the signing of the Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Zambia and the Government of 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 2

The Republic of Zambia may grant to its nationals, within the framework of its development policy, special incentives in order to stimulate the creation of small and medium sized companies provided that they do not significantly affect the investments of nationals of the Kingdom of the Netherlands. In this respect the Republic of Zambia shall accord to nationals of the Kingdom of the Netherlands treatment not less favourable than that accorded to nationals of any third State.