

Agreement on the promotion and reciprocal protection of investments between the Republic of Guatemala and the Kingdom of the Netherlands.

The Kingdom of the Netherlands

And

The Republic of Guatemala,

Hereinafter referred to as the Contracting Parties,

Preamble

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,

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 investment 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 interest 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 or exploit natural resources.

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

(i) Natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

(ii) Legal persons constituted under the law of that Contracting Party, or legal persons directly or indirectly controlled by nationals of that Contracting Party or by legal persons constituted under the law of that Contracting Party.

c) The term "territory" means:

(i) The land area of the Contracting Party concerned including its airspace and the territorial sea, as well as the exclusive economic zone and the continental shelf, which extends outside the limits of the territorial sea, over which jurisdiction or sovereign rights are exercised by the Contracting Party concerned, in accordance with international law.

Article 2. Scope of Application

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments that legally exist on that date, but they shall not apply to investment disputes which arose before its entry into force.

Article 3. Promotion and Admission

Each Contracting Party shall in its territory encourage investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

Article 4. Protection and 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 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 the present Agreement, such regulation shall be applicable to the extent that it is more favourable.

Article 5. 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, 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 any other arrangement in the fiscal field; or
- b) By virtue of its participation in a customs union, economic union or similar institution.

Article 6. Free Transfer

Each Contracting Party 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 incomes;
 - 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 and other remuneration of personnel engaged from abroad in connection with the investment;
- g) The proceeds of sale or liquidation of the investment;
- h) Payments arising under Article 8.

Article 7. 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 that 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 investors or in any freely convertible currency accepted by the claimants.

Article 8. 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 investor concerned.

Article 9. Subrogation

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.

Article 10. Disputes between a Contracting Party and an Investor of the other Contracting Party

Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party to:

- a) The International Centre for Settlement of Investment Disputes (ICSID), 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;
- 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), if one of the Contracting Parties is not a Contracting State of the Convention as mentioned in paragraph a) of this Article;
- c) An international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), if none of the Contracting Parties is a Contracting State of the Convention as mentioned in paragraph a) of this Article.

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.

Article 11. 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 12. Disputes between Contracting Parties

1. Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a period of six months through diplomatic channels, 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 settlement of 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. 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 14, paragraph 1 provides otherwise.

Article 14. Final Provisions

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. The Kingdom of the Netherlands will notify the Republic of Guatemala in writing of such a termination.

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

DONE in two originals at Guatemala on 18th of May 2001, in the Netherlands, Spanish and English languages, the three texts being authentic. In case of difference of interpretation the English text will prevail.

For the Republic of Guatemala

For the Kingdom of the Netherlands