

Agreement on promotion and reciprocal protection of investments between the Kingdom of the Netherlands and Ukraine

The Government of the Kingdom of the Netherlands

And

The Government of Ukraine,

(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 and that fair and equitable treatment of investment on reciprocal basis will serve this aim,

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. Claim to money, to other assets or to any performance having an economic value;
- iv. Rights in the field of industrial and intellectual property, such as copyrights, patents, industrial design or models, trade or service marks, trade names, technical processes, goodwill and know-how and any other similar rights;
- v. Rights granted under public law, including rights to prospect, explore, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of competent authorities in accordance with the law.

(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 by natural persons as defined in i. or by legal persons as defined in ii. above.

(c) The term 'territory' shall mean in respect of each Contracting Party the territory under its sovereignty and the sea and submarine areas over which the Contracting Party exercises, in conformity with international law, sovereignty, sovereign rights of jurisdiction.

Article 2.

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 of regulations, each Contracting Party shall admit such investments.

Article 3.

1) Each Contracting Party shall in its territory accord to investments of nationals of the other Contracting Party treatment which is not less favourable than that which it accords to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the nationals concerned.

2) 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.

3) 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 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 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.

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, connected with an investment, treatment not less favourable than that accorded in the same circumstances 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, free trade area or similar institution; or
- (c) On the basis of reciprocity with a third State.

Article 5.

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 undue restriction or delay. Such transfers include in particular though not exclusively:

- (a) Profits, interest, 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 partial or total liquidation of the investment.

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 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 at the time immediately before the measures became known in such a way as to affect the value of the investment, shall include interest at a commercial rate established on a market basis from the date the measures were taken until the date of payment and shall, in order to be effective for the claimants, 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 one Contracting Party are insured against noncommercial risks under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer to the rights of the said national pursuant to the terms of such insurance shall be recognized by the other Contracting Party.

Article 9.

1) Any dispute between either Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Party shall as far as possible be settled by the parties to the dispute in amicable way.

2) If such disputes cannot be settled within a period of three months from the date at which either party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted to an arbitral tribunal.

3) In case both Contracting Parties have become members of the Convention on the settlement of investment disputes between States and Nationals of other States of 18 March 1965, disputes between either Contracting Party and a national of the other Contracting Party under the first paragraph of the present Article shall be submitted for settlement by conciliation or arbitration to the International Centre for Settlement of Investment Disputes.

4) In case the Contracting Party concerned is not or has not yet become a Contracting State of the Convention referred to in paragraph 3, the dispute may, at the choice of the national concerned, be referred either to:

(a) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in paragraph 3 under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules); or

(b) An international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law. The parties to the dispute may agree in writing to modify these Rules. The awards of arbitration shall be final and binding and shall be enforced in accordance with domestic law.

5) A legal person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by

nationals of another Contracting Party shall for the purpose of Article 25 (2)(b) of the Convention referred to in paragraph 3 above be treated as a national of that other Contracting Party.

6) Each Contracting Party hereby gives its unconditional consent to the submission of disputes to international arbitration in accordance with the provisions of this Article.

7) Nothing in this Article impairs the right of parties to a dispute to settle amicably at any time the dispute between them.

Article 10.

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.

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.

1) Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable lapse 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 this Agreement and other relevant agreements between the two Contracting Parties, rules of international law and relevant rules of domestic 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.

8) Each Contracting Party shall bear the costs of the member appointed by that Contracting Party. The costs of the chairman as well as any other costs shall be borne in equal parts by the two Contracting Parties.

Article 13.

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.

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 or legally 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 authorized thereto, have signed the present Agreement.

DONE in duplicate at [place] on [date], in the Netherlands, Ukrainian and English languages, the three texts being equally authentic. In case of difference of interpretation the English text will prevail.

For the Government of the Kingdom of the Netherlands

For the Government of Ukraine

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

It is understood that, under Article 2, special conditions may apply according to Ukrainian legislation concerning the acquisition of property rights connected with privatization, concessions and the purchase of land.

For the Government of the Kingdom of the Netherlands

For the Government of Ukraine