

Agreement on promotion, encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the United Mexican States

The Kingdom of the Netherlands and The United Mexican 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,

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 is desirable,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

1. The term "investments" means every kind of asset and more particularly, though not exclusively:

- a) Movable and immovable property acquired in the expectation or used for the purpose of economic benefit or business purposes, as well as any other rights in rem with respect to such property;;
- b) Rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- c) Claims to money, to other assets or to any performance having an economic value, except for:
 - i) Claims to money that arise solely from commercial contracts for the sale of goods or services;
 - ii) The extension of credit in connection with a commercial transaction, such as trade financing;
 - iii) Credits with a maturity of less than three years,

By a national in the territory of a Contracting Party to a national in the territory of the other Contracting Party. However, the exception concerning credits with a maturity of less than three years, shall not apply to credits granted by a national of a Contracting Party to a legal person of the other Contracting Party that is owned or controlled, directly or indirectly, by the former national;

- d) Rights in the field of intellectual property, technical processes, goodwill and know-how;
- e) Rights derived from a concession.

2. A payment obligation from, or the granting of a credit to a Contracting Party or a state enterprise is not considered an investment.

3. The term "nationals" shall comprise with regard to either Contracting Party:

- a) Natural persons having the nationality of that Contracting Party;
- b) Legal persons constituted under the law of that Contracting Party;
- c) Legal persons constituted under the law of the other Contracting Party but controlled, directly or indirectly, by natural

persons as defined in (a) or by legal persons as defined in (b) above.

4. The term "territory" includes any area adjacent to the territorial sea which, under the laws of the State concerned, and in accordance with international law, is the exclusive economic zone or continental shelf of the State concerned, in which it exercises jurisdiction or sovereign rights.

Article 2. Promotion of Investment

With the aim to significantly increase bilateral investment flows,

1. 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. Each Contracting Party shall, subject to its right to exercise powers conferred by its laws or regulations, admit such investments.

2. The Contracting Parties may elaborate investment promotion documents and may provide each other with detailed information regarding:

- a) Investment opportunities;
- b) The laws, regulations or provisions that, directly or indirectly, affect foreign investment including, among others, currency exchange and fiscal regimes; and
- c) Foreign investment statistics in their respective territories.

Article 3. Treatment

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 unjustifiable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full 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, in relevant like circumstances, 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. If a Contracting Party has accorded special advantages to nationals of any third State:

- a) By virtue of agreements establishing free trade zones, customs unions, economic unions, monetary unions or similar institutions;
- b) On the basis of interim agreements leading to such unions or institutions;
- c) Under an agreement for the avoidance of double taxation; or,
- d) On the basis of reciprocity with regard to taxation;

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 other obligation in writing, it has assumed with regard to investments in its territory by nationals of the other Contracting Party. Disputes arising from such obligations shall be settled under the terms of the contracts underlying the obligations.

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. Transfers

1. The Contracting Parties shall guarantee the right 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, interest, dividends and other current income;
- b) Funds necessary for the operation or expansion of the 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 Article 6.

2. Notwithstanding paragraph (1) above, a Contracting Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of measures:

- a) To protect the rights of creditors,
- b) Relating to or ensuring compliance with the laws and regulations:
 - i) On the issuing, trading and dealing in securities, futures and derivatives,
 - ii) Concerning reports or records of transfers, or
- c) In connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings.

However, such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

Article 5. Expropriation and Compensation

1. Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments, unless:

- a) The measures are taken in the public interest and under due process of law,
- b) The measures are not discriminatory, and
- c) Compensation is paid in accordance with paragraphs (2) to (4) of this Article.

2. Compensation shall be equivalent to the fair market value or, in the absence of such a value, to the genuine value of the expropriated investment immediately before the expropriation took place and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include the going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine the fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. The amount paid on the date of payment shall be no less than if the amount of compensation owed had been converted into a convertible currency in the international financial market on the date of expropriation, and this currency had been converted at the market rate of exchange prevailing on the date of valuation, plus the interest that had accrued at a normal commercial rate for such a currency from the date of expropriation until the date of payment.

Article 6. 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 acts of God, war or other armed conflict, revolution, 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 7. Subrogation

If the investments of a national of the one Contracting Party are insured by a wholly privately owned and controlled insurance corporation (hereinafter referred to as "insurance corporation"), 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 insurance corporation 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. Only the national or the insurance corporation shall be entitled to exercise such rights and to engage in a dispute with respect to those rights.

Article 8. Settlement of Disputes between a Contracting Party and a National of the other Contracting Party

As regards the settlement of disputes between a Contracting Party and a national of the other Contracting Party, the provisions of the Schedule forming an integral part of this Agreement are applicable.

Article 9. Application

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 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 the 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. 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 Contracting Parties have otherwise agreed, be submitted, at the request of either Contracting Party, to an arbitral tribunal, composed of three members. Each Contracting 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 Contracting Party.
2. If one of the Contracting Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Contracting Party to make such appointment, the latter Contracting 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 Contracting 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 Contracting Party, the most senior member of the Court available 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 Contracting Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice settlement of the dispute *ex aequo et bono* if the Contracting Parties so agree.
6. Unless the Contracting 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 Contracting 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.

Article 13. Entry Into Force 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 ten 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 twelve 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.

In witness whereof, the undersigned representatives, duly authorised thereto, have signed the present Agreement.

DONE at Mexico City on May thirteenth of nineteen ninety eight, in the Dutch, Spanish and English languages, the three texts being equally authentic. In case of difference of interpretation the English text will prevail.

For the Kingdom of the Netherlands:

(sd.) G. J. WIJERS

Hans Wijers Minister for Economic Affairs

For the United Mexican States,

(sd) HERMINIO BLANCO MENDOZA

Herminio Blanco Mendoza Secretary of Trade and Industrial Development

Protocol

On signing the Agreement on promotion, encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the United Mexican States, the undersigned plenipotentiaries have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Agreement.

Ad Article 1(1)

By way of interpretation of this paragraph and in particular of subparagraph (b) thereof, the benchmark definition of foreign direct investment of the Organisation for Economic Cooperation and Development (OECD), as well as any further development in that respect, as applicable on the date the investment was made, is hereby incorporated by reference.

Ad Article 1(2)

The exclusion of certain items from the definition of the term "investment" is without prejudice to the rights and obligations connected with such items.

For the purposes of Article 5 all receivables of the investment expropriated must be taken into account when valuation is made.

Ad Article 1(1) (c) and 1(3) (c)

The term "controlled" shall not comprise control through legal persons constituted in third countries, but only control through legal persons constituted in the territory of either Contracting Party.

Ad Article 3

Notwithstanding the principle of national treatment, a Contracting Party may require an enterprise in its territory, owned or controlled by a national of the other Contracting Party, to provide routine information for statistical purposes concerning the investment. The Contracting Party requiring such information shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investment.

Ad Article 4

In case of serious balance of payments difficulties or the threat thereof, the United Mexican States may limit temporarily, for a maximum period of twelve months, the free transfer of capital pursuant to Article 4(1) (g) only. These restrictions shall be imposed on an equitable, non- discriminatory and good faith basis.

Ad Article 4 (2)

By way of interpretation of the last sentence of this paragraph, it is agreed that under that sentence a Contracting Party can neither apply measures in an unreasonable manner, nor use a reporting requirement to unduly delay a transfer.

Ad Article Two (2) of the Schedule

An alleged breach of this Agreement must be causally linked to loss or damage to the national or enterprise for the national to have standing to bring a claim against the host state.

The damage, while imminent, will not need to have been incurred before the dispute is ripe for arbitration, but it must have occurred in order for the tribunal to take the corresponding decision, except in the case of Article Nine, paragraph (1), subparagraphs (a) and (d).

DONE at Mexico City on May thirteenth of nineteen ninety eight, in the Dutch, Spanish and English languages, the three texts being equally authentic. In case of difference of interpretation the English text will prevail.

For the Kingdom of the Netherlands,

(sd.) G. J. WIJERS

Hans Wijers Minister for Economic Affairs

For the United Mexican States,

(sd.) HERMINIO BLANCO MENDOZA

Herminio Blanco Mendoza Secretary of Trade and Industrial Development

Schedule. Settlement of Disputes between a Contracting Party and a national of the other Contracting Party

Article One Definitions

For the purposes of this Schedule:

Disputing national means a national that makes a claim under this Agreement;

Disputing party means the disputing national or the disputing Contracting Party;

Disputing Contracting Party means a Contracting Party against which a claim is made under this Agreement;

Disputing parties means the disputing national and the disputing Contracting Party;

Enterprise means a legal person of one Contracting Party owned or controlled by a national of the other Contracting Party;

ICSID means the International Centre for the Settlement of Investment Disputes;

ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;

New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

Secretary-General means the Secretary-General of ICSID;

Tribunal means an arbitration tribunal established under Article Six of this Schedule;

Tribunal of consolidation means an arbitration tribunal established under Article Seven of this Schedule; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

Article Two Settlement of Disputes between a Contracting Party and a national of the other Contracting Party

1. This Schedule establishes a mechanism for the settlement of investment disputes arising from the date the Agreement enters into force.

2. A national of a Contracting Party, either on its own or on behalf of an enterprise of the other Contracting Party, may submit a claim to arbitration based on the fact that the other Contracting Party has breached an obligation under this Agreement, provided the national or its investment have incurred a loss or damage by reason of, or arising out of that breach.

3. A national may not make a claim if more than three years have elapsed from the date on which the national first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of the loss or damage suffered by it.

4. An enterprise may not submit a claim to arbitration under this Schedule.

5. In case a national of the Kingdom of the Netherlands or its enterprise initiates proceedings before any judicial or administrative tribunal of the United Mexican States with respect to a measure that is alleged to be a breach of this Agreement, the dispute may only be submitted to arbitration under this Article if the competent national tribunal has not rendered judgement in the first instance on the merits of the case. The foregoing does not apply to administrative proceedings before the administrative authorities executing the measure that is alleged to be a breach.

6. If a national of a Contracting Party submits a claim to arbitration, neither the national, nor its enterprise, may initiate or continue proceedings before a national tribunal.

Article Three Settlement of a Claim through Consultation and Negotiation

The disputing parties should first attempt to settle a claim through consultation or negotiation.

Article Four Submission of a Claim to Arbitration

1. Provided that six months have elapsed since the events giving rise to a claim occurred a disputing national may submit the claim to arbitration under:

- a) The ICSID Convention, provided that both the disputing Contracting Party and the Contracting Party of the national are parties to the Convention;
- b) The Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the national, but not both, is a party to the ICSID Convention;
- c) The UNCITRAL Arbitration Rules.

2. The disputing national shall deliver to the disputing Contracting Party written notice of the intention to submit a claim to arbitration at least ninety days before the claim is submitted; this notice could be submitted, at the earliest, after the first three months of the six months mentioned in paragraph 1 above have elapsed.

3. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Schedule.

Article Five Consent to Arbitration

1. Each Contracting Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Schedule.

2. The consent given by paragraph (1) and the submission by a disputing national of a claim to arbitration shall satisfy the requirement of:

- a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
- b) Article II of the New York Convention for an agreement in writing;

c) Article I of the UNCITRAL Arbitration Rules: "The parties to a contract have agreed in writing".

Article Six Number of Arbitrators and Method of Appointment

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by the arbitrators.
2. The arbitrators appointed under this Schedule, shall have experience in international law and investment matters.
3. If a tribunal established under this Schedule has not been constituted within ninety days from the date that a claim is submitted to arbitration, either because a disputing party fails to appoint an arbitrator or the appointed arbitrators are unable to agree on a presiding arbitrator, any of the disputing parties, may invite the Secretary-General to appoint, at his discretion, the arbitrator or arbitrators not yet appointed. Nevertheless, the Secretary-General, in the case of the appointment of the presiding arbitrator, shall assure that the said presiding arbitrator is neither a national of the disputing Contracting Party, nor a national of the Contracting Party of the disputing national.

Article Seven Consolidation

1. A tribunal of consolidation established under this Article shall be installed under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Schedule.
2. Proceedings will be consolidated in the following cases:
 - a) When a disputing national submits a claim on behalf of an enterprise that it controls directly or indirectly and, simultaneously, another national or nationals participating in the same enterprise, but not controlling it, submit claims on their own behalf as a consequence of the same breaches; or
 - b) When two or more claims are submitted to arbitration arising from common legal and de facto issues.
3. The tribunal of consolidation will decide the jurisdiction of the claims and will jointly review such claims, unless it determines that the interests of any disputing party are harmed.

Article Eight Governing Law

1. A tribunal established under this Schedule shall decide the submitted issues in dispute in accordance with this Agreement and the applicable rules of law.
2. An interpretation jointly formulated and agreed by the Contracting Parties of a provision of this Agreement shall be binding on any tribunal established under this Schedule. If the Contracting Parties fail to submit an interpretation within sixty days from the date of the request of either Contracting Party, the tribunal shall decide the issue.

Article Nine Final Award

1. Where a tribunal established under this Schedule makes a final award against a Contracting Party, the tribunal may only award, separately or jointly:
 - a) A declaration that the Contracting Party has failed to comply with its obligations under this Agreement;
 - b) Monetary damages and any applicable interest;
 - c) Restitution of property, in which case the award may provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution;
 - d) With the agreement of the parties to the dispute, any other form of relief.
2. Where a claim is made by a national on behalf of an enterprise:
 - a) An award of restitution of property shall provide that the restitution be made to the enterprise;
 - b) An award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise.
3. The award shall provide that it is made without prejudice to any right that any person with a legal interest may have in the relief under applicable domestic law.
4. A tribunal established under this Schedule may not order a Contracting Party to pay punitive damages.

Article Ten Finality and Enforcement of an Award

1. An award made by a tribunal established under this Schedule shall solely be binding for the disputing parties and only with respect to the particular case.
2. Subject to paragraph (3) of this Article and to the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
3. A disputing party may not seek enforcement of a final award until:
 - a) In the case of a final award made under the ICSID Convention:
 - i) One hundred and twenty days have elapsed from the date the awards was rendered and no disputing party has requested revision or annulment of the award, or
 - ii) Revision or annulment proceedings have been completed; and
 - b) In the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
 - i) Three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
 - ii) A court has dismissed an application to revise, set aside or annul the award and there is no further appeal, or
 - iii) A court has allowed an application to revise, set aside or annul the award and the proceeding have been completed and there is no further appeal.
4. Each Contracting Party shall provide for the enforcement of an award in its territory.
5. A disputing national may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention.
6. For purposes of Article 1 of the New York Convention, a claim that is submitted to arbitration under this Schedule shall be considered arisen from a commercial relationship or transaction.

Article Eleven Publication of an Award

The final award shall only be published if there is an agreement in writing between the disputing parties.

Article Twelve Exclusions

The dispute settlement provisions of this Schedule shall not apply to the resolutions adopted by a Contracting Party for national security reasons.