

Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Chile

The Kingdom of the Netherlands and the Republic of Chile, hereinafter referred to as the Contracting Parties,

Desiring to strengthen further the friendly relations between both countries, to extend and intensify the economic relations between them, with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party, particularly with respect to the transfer of capital.

Recognising that agreement upon the treatment to be accorded to such foreign 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" shall comprise every kind of asset or rights related to it, in particular 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) Title to money, to other assets or to any performance having an economic value;

(iv) Intellectual and industrial property rights, including copyrights, industrial property rights, technical processes, goodwill and knowhow;

(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 the following subjects which have made investments in the territory of the other Contracting Party in accordance with the present Agreement:

(i) Natural persons having the nationality of that Contracting Party in accordance with its law;

(ii) Without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party and being domiciled, as well as having real economic activities, in the territory of that same Contracting Party;

(iii) Legal persons constituted under the law of any country which are effectively controlled by natural persons of that Contracting Party or by legal persons being domiciled, as well as having real economic activities, in the territory of that Contracting Party.

(c) The term "territory" means:

The territory of the Contracting Party concerned and any area adjacent to the territorial sea which, under the laws of 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 of Investments

Either Contracting Party shall, within the framework of its laws and regulations and subject to its general policy in the field of foreign investments, 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. Treatment of Investments

1. Each Contracting Party shall ensure fair and equitable treatment to 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 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. If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing a free trade agreement, customs union, economic union, common market, monetary union, or similar institution, 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. Taxation

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, 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 or similar institution; or
- c) On the basis of reciprocity with a third State.

Article 5. Free Transfer

1. 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 delay. Such transfers include in particular though not exclusively:
 - a) Profits, interests, dividends and other current income;
 - b) Funds necessary for the acquisition of raw or auxiliary materials, semi-fabricated or finished products;
 - c) Funds necessary for the development of an investment;
 - d) Funds in repayment of loans duly contracted and authorized according to the law of the Contracting Party in the territory of which the investment was made, applicable at the time the loan contract was established;
 - e) Royalties or fees;
 - f) Salaries and fees of natural persons in respect of salaried work and services in relation to an investment;
 - g) The proceeds of sale or liquidation of the investment;

h) Payments arising under Article 7. Article 7.

2. Transfers shall be made at the commercial exchange rate applicable on the date of transfer pursuant to the exchange regulations in force.

Article 6. Expropriation and Indemnity

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 or national 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 accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate from the date of expropriation 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 any freely convertible currency accepted by the claimants.

Article 7. Compensation for Losses

Nationals of each 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. Subrogation

- 1. If the investments of a national of one Contracting Party are insured against non-commercial risks 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 into 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.
- 2. Whereas a Contracting Party has made a payment to its national and by virtue of this, has assumed its rights and claims, that national shall not pursue those rights and claims against the other Contracting Party, unless under express authorization of the former Contracting Party.

Article 9. Settlement of Disputes between a Contracting Party and a National of the other Contracting Party

- 1. Any legal dispute between one Contracting Party and a national of the other Contracting Party concerning an investment of the latter in the territory of the former shall, if possible, be settled amicably.
- 2. If such a dispute cannot be settled according to the provisions of paragraph 1 of this article within a period of three months from the date either party to the dispute requested amicable settlement, the dispute shall at the request of the national concerned be submitted either to the judicial procedures provided by the internal law of the Contracting Party in the territory of which the investment has been made, or to international arbitration.
- 3. If the difference has been submitted to the competent court of the Contracting Party in whose territory the investment was made, reference may only be made to the international tribunal within thirty days from the date on which notice of reply to the claim has been given, or if the competent court has failed to make a final decision on the matter in the term of eighteen months from the date on which notice of claim is given. However, each Contracting Party can offer a more favourable treatment.
- 4. In case the dispute is referred to international arbitration in accordance with the provisions of this Article, each Contracting Party hereby gives its consent to its submission to the International Centre for Settlement of Investment Disputes for settlement by arbitration 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. 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. Neither Contracting Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and the other Contracting Party shall have consented to submit or shall have submitted to judicial procedures or arbitration under this Article, unless:

- a) The former Contracting Party shall have failed to abide by and comply with the award rendered in such a dispute; or
- b) The Secretary-General of the International Centre for Settlement of Investment Disputes, or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre.

For the purpose of this paragraph, diplomatic protection shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 10. Scope of the Application

The present Agreement shall apply to investments in the territory of one Contracting Party which are, whether before or after its entry into force, made by nationals of the other Contracting Party in accordance with its laws and regulations of the former Contracting Party, in force at the time the investments were made. It shall however, not be applicable to divergencies or disputes which have arisen prior to its entry into force or to disputes directly related to events which have occurred prior to its entry into force.

Article 11. Consultations

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

Article 12. Settlement of 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 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 and who shall be a national of a third country which has diplomatic relations with both Contracting Parties.

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 the provisions of this Agreement, the principles of International law on this subject and the General Principles of Law as recognised by the Contracting Parties. 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. Each Contracting Party shall bear the cost of the respective arbitrator and those of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs of the process shall be borne in equal parts by the Contracting Parties unless agreed otherwise.

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.

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 both Contracting Parties have notified each other in writing that the procedures constitutionally required therefor in their respective countries have been complied with.

2. The Agreement shall remain in force for an initial period of fifteen years and shall be extended thereafter for an unlimited period, unless either Contracting Party gives one year's written notice of termination through diplomatic channels.

3. With respect to 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 twenty 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 in two originals at Santiago, on this thirtieth day of November one thousand nine hundred ninety eight, in the Spanish, Netherlands 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.) GERRIT YBEMA

For the Republic of Chile:

On signing the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Chile, the undersigned representatives of both Contracting Parties have agreed on the following provisions, which constitute an integral part of this Agreement.

1. ad Article 1

a) Natural persons defined in Article 1, b, (i) who, at the time their investment is made, for more than five years have had their residence in the territory of the Republic of Chile in which their investment is located, may only invoke the rights granted under Article 4 and 8 of this Agreement if their investment constituted a capital inflow from outside the respective territory.

b) Natural persons as defined in Article 1, b, (i) of Kingdom of the Netherlands who are holding their investment in the territory of the Republic of Chile through a legal person located in a third State (i.e. nationals within the meaning of Article 1, b, (iii) of this Agreement) shall not be entitled to submit a dispute to international arbitration in accordance with the provisions of Article 8 of this Agreement, unless such persons have at the time their investment was made and ever since been domiciled in the territory of the Kingdom of the Netherlands.

2. ad Article 4

a) the Republic of Chile retains the right to exclude natural persons having its nationality from the provisions of Article 4 with respect to the item mentioned under f);

b) Notwithstanding the provisions of Article 4 and as long as it is provided for in the legislation of the Republic of Chile as applicable at the time of the signature of the Agreement, the Republic of Chile retains the right to allow the repatriation of capital only after one year has elapsed from the date it was brought in by the national. In no case shall nationals from the

Kingdom of the Netherlands in transfer matters be treated less favourably than nationals of any third State.

3. ad Article 8

Without prejudice to the provisions of Article 8 intended to settle disputes between a Contracting Party and a national or corporation of the other Contracting Party, Chilean nationals or corporations who make or have made investments in the territory of the Kingdom of the Netherlands shall be entitled to submit any difference to an arbitration tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), done on March 18, 1965. This right may also be exercised if nationals or corporations have previously referred the differences to the competent courts in the Kingdom of the Netherlands, even if a decision has been taken on the matter.

For the Kingdom of the Netherlands For the Republic of Chile