

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

The Republic of Zimbabwe

And

The Kingdom of the Netherlands,

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.

For the purposes of the present Agreement:

(1) The term "investments" shall comprise every kind of asset and more particularly, though not exclusively:

- (a) 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;
- (b) Rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- (c) Title to money and other assets and to any performance having an economic value;
- (d) Copyrights, industrial property rights, technical processes, trademarks, trade-names, know-how and goodwill;
- (e) Rights granted under public law, including rights to prospect, explore, extract and win natural resources.

(2) The term "nationals" shall comprise with regard to either Contracting Party:

- (a) Natural persons having the nationality of that Contracting Party in accordance with its law;
- (b) Without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party;
- (c) Legal persons, wherever located, controlled directly or indirectly by nationals of that Contracting Party.

(3) The term "territory" includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

(4) The term "laws" includes published administrative rules and regulations.

Article 2.

Either Contracting Party shall, within the framework of its laws, 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, each Contracting Party shall admit such investments.

Article 3.

(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) 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 laws 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 provision 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 provision 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, 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 under an agreement for the avoidance of double taxation, by virtue of its participation in a customs union, economic union or similar institution, or 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 restriction or delay, at the rate of exchange applicable on the date of transfer. 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) A reasonable portion of the earnings of natural persons in respect of salaried work and services performed in relation to the investment;

g) The proceeds of sale or liquidation of the investment;

h) Payments arising under Article 7.

Article 6.

Neither Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, 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 former Contracting Party 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 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. The genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.

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 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 recognized by the other Contracting Party. For this purpose, the insurer or re-insurer or Agency shall not be entitled to assert any rights other than the rights which the said national would have been entitled to assert.

Article 9.

(1) Any legal dispute between a Contracting Party and a national of the other Contracting Party arising directly out of an investment of that national in the territory of the former Contracting Party shall as far as possible be settled amicably between the parties in dispute. If the dispute cannot be settled within six months of the date when it is raised by one of the parties in dispute, it shall, at the request of the national concerned, be submitted for settlement by conciliation or arbitration.

(2) Each Contracting Party hereby consents to submit such legal dispute to the International Centre for the Settlement of Investment Disputes for settlement by conciliation or 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, be treated for the purposes of the Convention as a national of the other Contracting Party.

(3) The arbitral tribunal to which such legal dispute is submitted shall, unless the parties to the dispute agree otherwise, decide in accordance with the laws of the Contracting Party – party to the dispute – (including its rules on the conflict of laws) and such rules of international law as may be applicable.

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.

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph (1) provides otherwise.

Article 12.

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

Article 13.

(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 agree upon a third arbitrator, who is not a national of either Party, to be appointed by the Parties as their chairman.

(2) The arbitrators shall be appointed within two months and the chairman within three months from the date on which either Party has requested the submission to arbitration.

(3) If the necessary appointments have not been made within the periods specified in paragraph (2) of this Article, either Party may invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is prevented from discharging the said function or is a national of either 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.

(4) The tribunal shall decide on the basis of international law and any treaties in force between the Parties (including the present Agreement) and shall take into account, as may be appropriate, the relevant 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.

(5) Unless the Parties decide otherwise, the tribunal shall determine its own procedure.

(6) The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.

(7) If any legal dispute is referred to conciliation or arbitration pursuant to Article 9 of the present Agreement, the arbitration provisions of this Article 13 shall not be involved in relation to such dispute, except where any award, decision or agreement rendered or concluded pursuant to conciliation or arbitration under the said Article 9 is not complied with.

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 informed 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, 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 hereof shall continue to be effective for a further period of fifteen years from that date.

(4) Subject to the periods of notice and validity mentioned in the foregoing paragraphs 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 authorized thereto, have signed the present Agreement.

DONE in duplicate at Harare on 11/12/96, in the English language.

For the Republic of Zimbabwe:

(sd.) W. G. WESSELS

For the Kingdom of the Netherlands:

(sd.) D. J. VAN DEN BERG

Protocol to the Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands

At the time of signing the Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands, the undersigned representatives have agreed on the following provisions which constitute an integral part of the Agreement:

Ad Article 3 of the Agreement

With regard to the Republic of Zimbabwe the following shall not be deemed as "treatment less favourable" within the meaning of Article 3:

Limitations regarding the acquisition of land or other immovable property, save for land and immovable property which is directly connected with an investment.

Ad Article 5 of the Agreement

With respect to the Republic of Zimbabwe the obligation to guarantee the free transfer of payments referred to in paragraph (g) of Article 5 (the proceeds of sale or liquidation of the investment) shall apply as follows:

- a) In the case of investments made on or after the 1st of May 1993 these payments shall be fully and freely transferable;
- b) In the case of investments made before the 1st May 1993 these payments shall be subject to such conditions as to remittability (in particular, conditions governing the proportion of such payments that may be remitted) as may have been agreed with the national and fixed in terms of the laws of the Republic of Zimbabwe at the time of admission of the investment provided that:
 - i) Such conditions as to remittability shall not, after entry into force of the Agreement, be altered so as to place the national in a less favourable position; and
 - ii) If such laws as to remittability are more favourable at the time of transfer, then the transfer shall be permitted in accordance with such more favourable laws; and
 - iii) These payments are transferable by way of instalments over a period not exceeding 18 months provided that not less than 50% of the total proceeds shall be made transferable at the time when the application for transfer is made, 25% of the proceeds shall be transferable 9 months after such application, and the remaining 25% of the proceeds shall be transferable 18 months after such application; and
 - iv) Any remaining balance of the proceeds which is not transferred shall, until it is transferred as aforesaid, be retained in Zimbabwe in an account denominated in local currency and shall accrue interest at the prevailing local market rate.

For the Kingdom of the Netherlands

For the Republic of Zimbabwe