

[ ENGLISH TEXT — TEXTE ANGLAIS ]

AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION  
OF INVESTMENTS BETWEEN THE KINGDOM OF THE NETHER-  
LANDS AND THE REPUBLIC OF SOUTH AFRICA

The Kingdom of the Netherlands

and

The Republic of South Africa

(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 investors 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 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 interests 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 and win natural resources.

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

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

(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, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above.

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

*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 investors 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*

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 which it accords 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 accords special advantages to investors of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions, free trade areas, common markets 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. If a Contracting Party accords special advantages to development finance institutions, that Contracting Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Contracting Party.

5. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

6. 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 entitle investments by investors of the other Contracting Party to a treatment more favourable than is provided for in this Agreement, such provisions or obligations shall to the extent that they are more favourable to the said investors 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 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 Contracting Party:

- a) Under an agreement for the avoidance of double taxation: or
- b) By virtue of its participation in a customs union, free trade area, economic union, monetary union or similar institution; or
- c) On the basis of reciprocity with a third State; or
- d) Under an agreement with a development finance institution.

#### *Article 5*

The Contracting Parties shall guarantee to investors of the other Contracting Party, the free transfer of all payments relating to an investment. 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
  - (i) For the acquisition of raw or auxiliary, 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) Net earnings of natural persons;
- g) The proceeds of sale or liquidation of the investment;
- h) Payments arising under Article 7.

#### *Article 6*

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 which 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 nationals or in any freely convertible currency accepted by the claimants.

*Article 7*

Investors 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 investors or to investors of any third State, whichever is more favourable to the investors concerned.

*Article 8*

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 (he terms of such insurance or under any other indemnity given shall be recognized by the other Contracting Party.

*Article 9*

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former which has not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the investor concerned so wishes.

2. Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

a) The International Centre for the Settlement of Investment Disputes (ICSID) set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, D.C. on 18 March 1965, when each State Party to this Agreement has become a Party to said Convention. As long as this requirement is not met, each Contracting Party agrees that the dispute may be submitted to arbitration in accordance with the Rules of the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings of the ICSID; or

b) The Court of Arbitration of the International Chamber of Commerce; or

c) 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.

3. If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the investor concerned be submitted to the procedure preferred by the investor.

4. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of paragraph (2) above.

*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 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 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 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 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 13*

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 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 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.

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

Done in duplicate at Cape Town on 9 May 1995 in the English and Netherlands languages, the texts being equally authentic. In case of difference of interpretation the English text will prevail.

For the Kingdom of the Netherlands:

A. VAN DOK-VAN WEELE

For the Republic of South Africa:

TREVOR MANUAL

PROTOCOL TO THE AGREEMENT BETWEEN THE KINGDOM OF THE NETHERLANDS AND THE REPUBLIC OF SOUTH AFRICA ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

On the signing of the Agreement between the Kingdom of the Netherlands and the Republic of South Africa on Encouragement and Reciprocal Protection of Investments, the undersigned representatives have agreed on the following provisions which constitute an integral part of the Agreement:

With reference to Articles 5 and 6

1. Transfers shall be done in accordance with legislation pertaining thereto. Such legislation shall not, regarding either the requirements or the application thereof, impair or derogate from the free, unrestricted and undelayed transfer guaranteed in this Agreement.

2. Transfers shall be made at the market rate of exchange in force on the date of transfer.

3. The provisions relating to transfers under Articles 5 and 6 shall not be applicable to nationals, within the meaning of Article I (b)(i), of the Kingdom of the Netherlands who have acquired permanent residence in the Republic of South Africa and who have decided to immigrate to the Republic of South Africa by completing the required Exchange Control Form, once a five year period from the date of immigration has elapsed. This provision shall automatically terminate upon removal of the relevant Exchange Control rules, for which early removal the Republic of South Africa shall endeavour to the best of its ability.

For the Kingdom of the Netherlands:

A. VAN DOK-VAN WEELE

For the Republic of South Africa:

TREVOR MANUAL