AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF CONGO FOR THE RECIPROCAL PROTECTION AND PROMOTION OF INVESTMENTS

PREAMBLE

The Government of the Republic of South Africa and the Government of the Democratic Republic of Congo, (hereinafter jointly referred to as the "Parties" and separately as a "Party");

DESIRING to create favourable conditions for the flow of investments by investors of either Party in the territory of the other Party; and

RECOGNISING that the encouragement and reciprocal protection of such investments in terms of a bilateral agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both Parties;

HEREBY AGREE as follows:

Article 1. Definitions

In this Agreement, unless the context indicates otherwise -

"investment" means every kind of asset and in particular, though not exclusively, includes:

(a) movable and immovable property as well as other rights such as mortgages, liens or pledges;

(b) shares in stock and debentures of a company and any other form of participation in a company;

(c) claims to money, or to any performance under contract having an economic value;

(d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, goodwill and all similar rights recognized by the domestic law in force in the countries of both Parties;

(e) rights or permits conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources,

And any change in the form in which assets are invested does not affect their character as investments, provided such change is not contrary to the domestic law in force in the countries of the Party in whose territory the investment has been made.

"investor" means in respect to either Party -

(a) the nationals of a Party, being those natural persons deriving their status as nationals of a Party from the domestic law in force in the country of that Party; and

(b) the companies of a Party, being any legal person, corporation, firm or association incorporated or constituted in accordance with the domestic law in force in the country of that Party and having its economic activities in the country of that Party;

"returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and fees;

"territory" means the territory of a Party, including the territorial sea, air space and any maritime area situated beyond the

territorial sea, which has been or might in the future be designated under the domestic law in force in the country of that Party and in accordance with international law, as an area within which the Party may exercise sovereign rights and jurisdiction.

Article 2. Promotion of Investments

(1) Each Party shall, subject to its general policy in the field of foreign investment, encourage investments in its territory by investors of the other Party, and subject to its right to exercise powers conferred by the domestic law in force in its country, shall admit such investments.

(2) Each Party shall grant, in accordance with the domestic law in force in its country, the necessary permits in connection with such investments and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

(3) In order to create favourable conditions for assessing the financial position and results of activities related to investments in the territory of a Party, that Party shall, notwithstanding its own requirements for bookkeeping and auditing, permit the investment to be subject also to bookkeeping and auditing according to standards which the investor is subjected to by his or its national requirements or according to internationally accepted standards. The results of such accountancy and audits shall be freely transferable to the investor.

Article 3. Treatment of Investments

(1) investments and returns of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.

(2) Each party shall in its territory accord to investments and return of investors of the other Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investment and returns of investors of any third country.

(3) Each Party shall in its territory accord to investors of the other Party treatment not less favourable than that which it accords to its own investors or to investors of any third state.

(4) The provisions of sub-Article (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from -

(a) any existing or future customs union, free trade area, common market, any similar international agreement or any interim arrangement leading up to such customs union, free trade area, or common market to which either of the Parties is or may become a party;

(b) any international agreement or arrangement relating wholly or mainly to taxation or any national legislation relating wholly or mainly to taxation;

(c) any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.

(5) If a Party accords special advantages to development finance institutions with foreign participation and established for the exclusive purpose of development assistance through mainly non-profit activities, that Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Party.

Article 4. Compensation for Losses

(1) Investors of one Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Party shall be accorded by the latter Party treatment, as regards restitution indemnification, compensation or other settlement, not less favourable than that which the latter Party accords to its own investors or to investors of any third State.

(2) Without derogating from the provisions of sub-Article (1), investors of one Party who in any of the situations referred to in that sub Article suffer losses in the territory of the other Party resulting from -

(a) requisitioning of their property by the forces or authorities of the latter Party, or

(b) destruction of their property by the forces or authorities of the latter Party, which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation.

Article 5. Compensation for Expropriation

(1) Investments of investors of either Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.

(2) The compensation referred to in sub-Article (1) shall -

(a) be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier;

(b) include interest at a normal commercial rate from the date of expropriation until the date of payment;

(c) be made without delay, and

(d) be effectively realizable.

(3) The investor affected by the expropriation shall have a right, under the domestic law in force in the country of the Party making the expropriation, to prompt review, by a court of law or other independent and impartial forum of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles referred to in sub-Article (1).

Article 6. Repatriation of Investments and Returns

(1) Each Party shall allow investors of the other Party the free transfer of payments relating to their investments and returns, including compensation paid pursuant to Articles 4 and 5.

(2) All transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate applied to inward investments or the.most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is the more favourable to the investor.

(3) Transfers shall be done in accordance with the domestic law of the country pertaining thereto. Such law shall not, however, regarding either the requirements or the application thereof, impair or derogate from the free and undelayed transfer allowed in terms of sub-Article (1) and (2).

(4) The provisions of this Article shall not apply to foreign nationals who have resided in the Republic of South Africa for more than five years and who upon completion of the required exchange control formalities connected with immigration to South Africa are deemed in terms of South African exchange control rules, to have become permanently resident in the Republic of South Africa.

Article 7. Settlement of Disputes between an Investor and a Party

(1) A dispute between an investor of one Party and the other Party relating to an investment of the former which has not been amicably settled shall, after a period of six 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 Party concerned in the dispute may agree to refer the dispute either to

(a) the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965, when each Party has become a party to said Convention. As long as this requirement is not met, each Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID; or

(b) an international arbitrator or ad hoc arbitration tribunal to be established by agreement between the parties to the dispute.

(3) If after a period of three months from written notification of the investor's decision to refer the dispute to international

arbitration there is no agreement on one of the alternative procedures referred to in sub-Article (2), the dispute shall, at the request in writing of the investor concerned, be dealt with in terms of the procedure preferred by the investor.

(4) The decision in resolution of the dispute shall be taken in terms of the domestic law in force in the country of the Party involved in the dispute in whose territory the investment has been made, the provisions of this Agreement, the terms of the specific agreement which may have been entered into regarding the investment as well as the principles of international law.

(5) The Party who is a party to a dispute may at no time during the procedure relating to the investment dispute invoke in its defence its immunity or the fact that the investor has received, pursuant to an insurance contract, an indemnity covering all or part of the damages or losses incurred.

(6) The award made by the arbitrator concerned in terms of sub-Article (2) or

(3) shall be binding on the parties to the dispute. Each Party shall give effect to the award under the domestic law in force in its country.

Article 8. Disputes between the Parties

(1) A dispute between the Parties concerning the interpretation or application of this Agreement should, if possible, be settled through negotiations between the Parties.

(2) If the dispute cannot be settled within a period of six months, following the date on which such negotiations were requested by either Party, it shall upon the request of either Party be submitted to an arbitral tribunal.

3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

4) If within the periods specified in sub-Article (3) the necessary appointments have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or also is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall decide the dispute according to this Agreement and the principles of international law. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties.

(6) Each Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining cost shall be borne in equal parts by the Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties.

(7) The tribunal shall determine its own procedures, unless the Parties agree otherwise.

Article 9. Subrogation

If a Party or its designated Agency makes a payment to its own investor under a guarantee it has given in respect of an investment in the territory of the other Party, the latter Party shall recognise the assignment, whether by law or by legal transaction, to the former Party of all the rights and claims of the indemnified investor, and shall recognize that the former Party or its designate agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original investor.

Article 10. Application of other Rules

(1) If the provisions of the domestic law in force in the country of either Party or obligations under international law existing at present or established hereafter between the Parties in addition to this Agreement contain rules, whether general or specific, entitling investments and returns of investors of the other Party to treatment more favourable than is provided for by this Agreement, such rules shall to the extent that they are more favourable prevail over this Agreement.

(2) Each Party shall observe any other obligation it may have entered into with regard to investments of investors of the

other Party.

Article 11. Scope of Agreement

This Agreement shall apply to all investment, whether made before or after the date of entry into force of this Agreement, but shall not apply to any dispute which arose before the entry into force of this Agreement.

Article 12. Entry Into Force, Amendments, Duration and Termination

(1) This Agreement shall enter into force on the date on which each Party has notified the other in writing through the diplomatic channel of its compliance with the constitutional requirements necessary for the implementation, of this Agreement. The date of entry into force shall be the date of the last notification.

(2) This Agreement may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through the diplomatic channel.

(3) This Agreement shall remain in force for a period of ten years whereafter it may be extended for a further period of ten years by mutual consent of the Parties. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Party shall have given written notice of termination to the other.

(4) In respect of investments made prior to the date when the notice of termination becomes effective, the provisions of Article 1 to 11 remain in force with respect to such investments for a further period of ten years from that date.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed and sealed this Agreement in two originals in' the English and French languages, all texts being equally authentic.

DONE at Kinshasa, on this 31st day of August 2004.

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

Mr. Mandisi MPAHLWA

Minister of Trade and Industry

FOR THE GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF CONGO

Mr. Raymond SHIBANDA

Deputy Minister of Planning