AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Republic of South Africa and the Government of the Federal Republic of Nigeria (hereinafter referred to as the 'Parties");

DESIRING to create favourable conditions for greater investment by investors of either Party in the territory of the other Party;

RECOGNISING that the reciprocal promotion and protection of investments will be conducive to the stimulation of individual business initiative, contribute to development and increase the prosperity of both Parties;

RECOGNISING the right of the Parties to define the conditions under which foreign investment can be received and the investors duty to respect the host country's sovereignty and domestic law;

DETERMINED to increase favourable conditions for greater investment by nationals and companies of a Party in the territory of the other Party;

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

In this Agreement, unless the context indicates otherwise-

(1) "investment" means every kind of asset and in particular, though not exclusively, includes-

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

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

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

(4) Intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how and goodwill; and

(5) 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;

(2) "investors" means in respect of either Party-

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

(2) the companies of a Party, being any legal person, corporation, firm or association incorporated or constituted in accordance with the domestic law of that Party;

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

(4) "territory" means the territory of a Party, including the territorial sea and any maritime area situated beyond the

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

Article 2. Scope of the Agreement

This Agreement shall apply to all investments made by investors in accordance with the domestic law of either Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute which arose before the entry into force of this Agreement.

Article 3. 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 shall, subject to its domestic law, admit such investments.

2 Each Party shall grant, in accordance with its domestic law, 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 (such as International Accountancy Standards drawn up by the International Accountancy Standards Committee). The results of such accountancy and audit shall be freely transferable to the investor.

Article 4. 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 returns 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 investments and returns of investors of any third State.

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 paragraphs 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-

(1) 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;

(2) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or

(3) 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 7.

Article 5. 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 paragraph 1 of this Article, investors of one Party who, in any of the situations referred to in that paragraph suffer losses in the territory of the other Party resulting from-

(1) requisitioning of their property by the forces or authorities of the latter Party; or

(2) 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 6. 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 payment of prompt, adequate and fair compensation. Such compensation shall 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, shall include interest at a normal commercial rate until the date of payment, shall be made without delay and shall be effectively realizable.

2. The investor affected by the expropriation shall have a right, under the domestic law 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 paragraph 1 of this Article.

Article 7. Transfers

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 5 and 6.

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: Provided that where no exchange rate for inward investments exists, the most recent exchange rate for conversion of currencies into Special Drawing Rights shall be used.

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

4. The foregoing paragraphs shall be subject to the attached Protocol which forms an integral part of this Agreement.

Article 8. Settlement of Investment Disputes between an Investor and a Party

1. Any legal dispute arising 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:

(1) 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, where each Party has become a party to the 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

(2) an international arbitrator or ad hoc arbitral 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 investors decision to refer the dispute to international arbitration, there is no agreement on one of the alternative procedures referred to in paragraph 2 of this Article, 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 derived by application of the domestic law, including the rules relating to conflicts of law, of 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. An arbitration award made under this Article shall be binding on the parties to the dispute and shall be enforceable in the territories of the Parties.

6. Neither Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Party does not abide by and comply with the award rendered by such an arbitral tribunal.

Article 9. Settlement of Disputes between the Parties

1. Any dispute arising between the Parties concerning the interpretation or application of this Agreement shall, if possible, be settled amicably through negotiations between the Parties.

2. If a dispute cannot thus be settled within a period of six months, following the date on which such negotiations were requested in writing 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 a written 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 Chair of the tribunal. The Chair shall be appointed within two months from the date of appointment of the other two members.

4. If, within the periods specified in paragraph 3 of this Article, 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 is also 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. An arbitral tribunal shall decide the dispute according to this Agreement and the principles of international law. An arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties. Each Party shall bear the cost of its own member of the tribunal and of its representation on the arbitral proceedings; the cost of the Chair and the remaining cost shall be borne in equal parts by the Parties. A tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties. The tribunal shall determine its own procedures, unless the Parties agree otherwise.

Article 10. 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 Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original investor.

Article 11. Application of other Rules

1. If the provisions of the domestic law of either Party or obligations under international law' existing at present or established hereafter between the Parties in addition to the present 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 the present Agreement, such rules shall to the extent that they are more favourable prevail over the present 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 12. Entry Into Force

The Parties shall notify each other when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. This Agreement shall enter into force on the date of the receipt of the last written notification.

Article 13. Amendment or Revision

Any amendment to or revision of this Agreement shall be in writing and the Parties shall notify each other when their respective constitutional requirements for entry into force of such amendment or revision have been fulfilled. Such amendment shall enter into force on the date of receipt of the last written notification.

Article 14. Duration and Termination

This Agreement shall remain in force for an initial period of ten years. 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: Provided that in respect of investments made at any time before the termination of this Agreement, its provisions shall remain in force for a period of ten years from that date.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed and sealed this Agreement.

Done at ..... on this .... day of.... 200 in two originals in the English language.

FOR GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

FOR THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA