

# Agreement between the Republic of South Africa and the Republic of Cuba for the Promotion and Reciprocal Protection of Investments

The Republic of South Africa and the Republic of Cuba, hereinafter referred to as the "Contracting Parties";

Desiring to create favourable conditions for greater economic cooperation between both States and in particular, for investments by investors of one Contracting Party in the territory of the other Contracting Party; and

Recognising that the encouragement and reciprocal protection under International Agreement of such investments shall contribute to the stimulation of business initiatives and shall increase prosperity in both Contracting Parties;

Have agreed as follows;

## Article 1. Definitions

For the purpose of this Agreement:

1. Irrespective of the legal framework of choice and the code of laws of reference, "investment" is understood to be every kind of asset invested, as well as reinvested returns by natural or legal persons of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter.

The term "investment", in this general framework, includes:

- (a) movable and immovable property as well as other rights in rem such as mortgages, liens or pledges;
- (b) shares in and 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 and goodwill;
- (e) rights or permits conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

Any change in the form in which assets are invested does not affect their character as investments.

2. "Investor" means any natural or legal person of one Contracting Party investing in the territory of the other Contracting Party.

3. "Natural person" means, with respect to each Contracting Party, a person who has citizenship of that State in accordance with its laws.

4. "Legal person" means, with respect to each Contracting Party, any entity established in its territory and recognised by its legislation, such as public institutions, partnerships of persons or capital, foundations, associations, irrespective of whether or not their liability is limited.

5. "Returns" means the amounts yielded by an investment including, in particular, earnings or proceeds, shares, profit, interest, capital gains, dividends, royalties and fees for technical assistance or services or the like.

6. "Territory" means, in addition to the area within the land boundaries, also the "maritime areas". The latter includes the marine and submarine areas over which the Contracting Party concerned exercises sovereign rights and jurisdiction, in accordance with international law.

## Article 2. Promotion of Investments

1. Each Contracting Party shall, subject to its laws and regulations in the field of foreign investment, encourage investments in its territory by investors of the other Contracting Party, and, subject to its right to exercise powers conferred by its laws, shall admit such investment.
2. Each Contracting Party shall grant, in accordance with its laws and regulations, 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 Contracting Party, that Contracting 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 national requirements or according to internationally accepted standards (eg. International Accountancy Standards (IAS) drawn up by the International Accountancy Standards Committee (IASC)). The result of such accountancy and audit shall be freely transferable to the investor.

### **Article 3. Treatment of Investments**

1. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting 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 Contracting Party.
2. Each Contracting Party shall in its territory accord investments and returns of the other Contracting 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 Contracting Party shall in its territory accord investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.
4. For the avoidance of doubt it is confirmed that the investments or returns of investors referred to in paragraphs (2) and (3) above are those governed by national legislation covering foreign investment and that the treatment provided for in paragraphs (2) and (3) above shall apply to the provisions of Articles 1 to 11 of this Agreement.
5. The provisions of paragraphs (2) and (3) shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting 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 Contracting Parties is or may become a party, or
  - (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.
6. If a Contracting Party accords special advantages to development finance institutions with foreign participation and established for the exclusive purpose of development assistance though mainly nonprofit activities, that Contracting Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Contracting Party.

### **Article 4. Compensation for Losses**

1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.
2. Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:
  - (a) requisitioning of their property by the forces or authorities of the latter Contracting Party, or
  - (b) destruction of their property by the forces or authorities of the latter Contracting 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. Expropriation**

1. Investments of investors of either Contracting 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 Contracting Party except in the public interest, under due process of law, on a non-discriminatory basis, and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine 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 be effectively realizable.

2. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

## **Article 6. Transfers of Investments and Returns**

1. Each Contracting Party shall allow investors of the other Contracting Party the free transfer of payments relating to their investments and returns, including compensation paid pursuant to articles 4 and 5. Transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer.

2. 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.

## **Article 7. Subrogation**

If a Contracting Party or its designated Agency makes a payment to its own investor under a guarantee against non-commercial risk it has given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment, whether by law or by legal transaction, to the former Contracting Party of all the rights and claims of the indemnified investor, and shall recognize that the former Contracting 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 8. Settlement of Disputes between an Investor and a Contracting Party**

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party relating to an investment of the former which have 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 Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) The Court of Arbitration of the International Chamber of Commerce; or,

(b) 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.

If, after a period of three months from written notification of the investor's decision to submit the dispute to international arbitration, there is no agreement on 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.

3. The award shall be binding on the parties to the dispute. Each Contracting Party undertakes to execute the awards according to its national law.

## **Article 9. Settlement of Disputes between the Contracting Parties**

1. Disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall, if possible, be settled amicably through diplomatic channels.

2. If a dispute cannot be thus settled within a period, of three months after written notification by either Contracting Party to the other Contracting Party, such a dispute shall, upon request of either Contracting Party, be submitted to an ad hoc Arbitral Tribunal, in accordance with the provisions under this Article.

3. Such Arbitral Tribunal shall be constituted in the following way. Within two months from the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. Those two members shall then select a national of a Third State to be appointed as Chairman of the Tribunal. The Chairman shall be appointed within three months after 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 Contracting Party may, in absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President of the Court shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too 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 Contracting Party shall be invited to make the necessary appointments.

5. The Arbitral Tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the costs of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The Tribunal shall determine its own procedure.

## **Article 10. Application of other Rules**

1. If the provisions of the 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 rules, whether general or specific, entitling investments and returns of investors of the other Contracting Party to treatment more favourable than is provided for by the present Agreement, such rules shall, to the extent that they are more, prevail over the present Agreement.

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

## **Article 11. Scope of the Agreement**

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

## **Article 12. Final Clauses**

1. This Agreement shall be ratified and shall enter into force on the exchange of Instruments of Ratification.

2. This Agreement shall remain in force for a period of twenty (20) years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other.

3. In respect of investments made prior to the date when the notice of termination becomes effective, the provisions of articles 1 to 11 shall remain in force with respect to such investments for a further period of twenty (20) years from that date.

In witness whereof the undersigned, duly authorised thereto, have signed this Agreement.

DONE in duplicate at Pretoria this 8th day of December 1995 in the English and Spanish languages, both texts being equally authentic.

For the Republic of South Africa

For the Republic of Cuba

On the signing of the Agreement between the Republic of South Africa and the Republic of Cuba for the Promotion and Reciprocal Protection of Investments, the undersigned representatives have agreed on the following provisions which shall constitute an integral part of the Agreement:

### **With Reference to Article 6**

1) The provisions of Article 6 shall not be applicable to nationals of the Republic of Cuba to the extent that such provisions are incompatible with the foreign exchange restrictions on foreign nationals having permanent residence in the Republic of South Africa in force on the date of entry into force of the Agreement.

2) In the case of the Republic of Cuba, any reference to transfers in accordance with the legislation pertaining to transfers, includes provisions relating to restrictions on transfers in USD.

The exemptions to Article 6 provided for in terms of this Article shall automatically terminate for each restriction upon removal of such restriction.

DONE at Pretoria on this the 8th day of December 1995, in the English and Spanish languages, both texts being equally authentic.

For the Republic of South Africa

For the Republic of Cuba