

Agreement between the Swiss Confederation and the Kingdom of Lesotho on the Promotion and Reciprocal Protection of Investments

The Swiss Federal Council and the Government of the Kingdom of Lesotho,

Desiring to intensify economic cooperation to the mutual benefit of both States,

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party and thus to encourage new business initiatives,

Recognizing the need to promote and protect foreign investments with the aim to foster the economic development and prosperity of both States,

Have agreed as follows:

Article 1. Definitions

For the purpose of this Agreement:

(1) The term "investor" refers with regard to either Contracting Party to

(a) natural persons who, according to the law of that Contracting Party, are considered to be its citizen;

(b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party;

(c) legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above.

(2) The term "investments" shall include every kind of asset, in particular though not exclusively:

(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges and usufructs;

(b) shares, stock or any other kind of participation in companies;

(c) claims to money, including bonds and debentures, or to any performance having an economic value;

(d) intellectual property rights, in particular copyrights, patents, utility models, designs, trade marks, trade names, indications of origin, technical process, know-how and goodwill;

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

(3) The term "returns" means the amounts yielded by an investment and includes in particular profits, interest, capital gains, dividends, royalties and fees.

(4) The term "territory" refers to the territory of the State concerned as defined by the respective Constitution and other pertinent law.

Article 2. Scope of Application

The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement.

It shall however not be applicable to claims or disputes arising out of events which occurred prior to its entry into force.

Article 3. Promotion, Admission

(1) Each Contracting Party shall create and maintain stable, equitable, favourable and transparent conditions for investments to be made in its territory by investors of the other Contracting Party. Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) When a Contracting Party has admitted an investment, it shall provide, in accordance with its laws and regulations, all necessary permits in connection with such investment including permits for the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance as well as authorisations required for the activities of managerial and technical personnel of the investor's choice.

(3) The Contracting Parties shall, whenever appropriate, consult among themselves concerning their investment frameworks and the investment opportunities of various sectors of their economies.

Article 4. Protection, Treatment

(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 and security 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, extension or disposal of such investments.

(2) Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.

(3) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable to the investor concerned.

(4) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

(5) The national treatment principle referred to in paragraphs (2) and (3) of this Article shall not prevent the Government of the Kingdom of Lesotho from granting, within the framework of its national development policy, certain advantages exclusively to its own small and micro enterprises, such as in particular to "cottage industries".

(6) For the avoidance of doubt it is confirmed that the MFN treatment referred to in paragraphs (2) and (3) of this Article shall not be applied in relation to special advantages granted to foreign development finance institutions operating in the territory of a Contracting Party with the exclusive purpose of development assistance.

Article 5. Free Transfer

(1) Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the transfer without restriction or delay in a freely convertible currency of the amounts relating to such investments, in particular of:

(a) returns;

(b) payments relating to loans incurred, or other contractual obligations undertaken, for the investment;

(c) royalties and other payments deriving from rights enumerated in Article 1, paragraph (2), letters (c), (d) and (e) of this Agreement;

(d) earnings and other remuneration of personnel engaged from abroad in connection with the investment;

(e) the initial capital and additional amounts to maintain or increase the investment;

(f) the proceeds of the partial or total sale or liquidation of the investment, including possible increment values.

(2) Unless otherwise agreed with the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force of the Contracting Party in whose territory the investment was made.

Article 6. Expropriation, Compensation

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law, and provided that provisions be made for prompt, effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation shall be settled in a freely convertible currency, be paid without delay and be freely transferable. 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 Contracting Party, of his case and of the valuation of his investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure, that compensation according to paragraph (1) of this Article will be made available to such investors.

Article 7. Compensation for Losses

The investors of one Contracting Party whose investments have suffered losses due to war or to any other armed conflict, revolution, state of emergency, rebellion, civil disturbance, or any other similar event in the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 4 of this Agreement as regards restitution, indemnification, compensation or other settlement.

Article 8. Principle of Subrogation

Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.

Article 9. Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between the Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute either to the courts or the administrative tribunals of the Contracting Party in whose territory the investment has been made or to international arbitration. In the latter event the investor has the choice between either of the following:

(a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965 (hereinafter the "Convention of Washington"); or

(b) an ad hoc-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration.

(4) A company which has been incorporated or constituted according to the laws in force in the territory of one Contracting Party and which before a dispute arises was under the control of investors of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention of Washington, be treated as a company of the other Contracting Party.

(5) The Contracting Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its immunity or the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole

or part of the incurred damage.

(6) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the arbitral award.

(7) The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Contracting Party concerned.

Article 10. Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall if possible be settled through diplomatic channels.

(2) If the dispute between the Contracting Parties cannot be settled within a period of six months from the date on which the issue was raised in writing by one of the Contracting Parties, it shall upon request of either Party to the dispute 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 Contracting Party shall appoint one member of the tribunal. Those two members shall then within two months select a national of a third State who shall be the Chairman, of the tribunal.

(4) If within the periods specified in paragraph (3) of the Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make any 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 shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he is also otherwise prevented from discharging the said function, the Member of the International Court 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 determine its own procedures. Unless otherwise agreed by the Contracting Parties, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the Chairman. The tribunal shall reach its decisions by a majority of votes, and it shall render its award within two months of the date of final submissions or the date of the closing of the hearings, whichever is later.

(6) The decisions by the tribunal shall be final and binding upon both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and its representation in the arbitral proceedings. The cost of the Chairman and remaining costs shall be borne in equal parts by the Contracting Parties, unless the arbitral tribunal decides otherwise.

Article 11. Other Commitments

(1) If provisions in the legislation of either Contracting Party or obligations under international law entitle investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions or obligations shall to the extent that they are more favourable prevail over this Agreement.

(2) Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

Article 12. Entry Into Force

This Agreement shall enter into force thirty days following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures for the entry into force of international agreements have been complied with.

Article 13. Duration and Termination

(1) This Agreement shall remain in force for a period of fifteen 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.

(2) In case of official notice as to the termination of the present Agreement, the provisions of Articles 1 to 11 shall continue to be effective for a further period of fifteen years for investments made before official notice was given.

Done in duplicate, at , on , each in French and English, each text being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

For the Swiss Federal Council

For the Government of the Kingdom of Lesotho