

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

The Government of the Republic of South Africa and the Government of the Republic of Guinea (hereinafter jointly referred to as the Contracting Parties and separately as a Contracting Party);

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

RECOGNISING that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both Contracting 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 and all other rights such as mortgages, liens, pledges, securities and all similar rights;
- (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;

and any change in the legal form in which assets are invested or reinvested shall not affect their character as investments under this Agreement on condition that the aforesaid changes conform to the domestic law in force in the territory of the Contracting Party where the investment is made;

"Investor" means in respect to either Contracting Party-

- (a) the nationals of a Contracting Party, being those natural persons deriving their status as nationals of a Contracting Party from the domestic law in force in the country of that Contracting Party; and
- (b) a legal entity being a company, any legal person, corporation, firm or association incorporated or constituted in accordance with the domestic law in force in the country of that Contracting Party, that has its seat, as well as effective economic activities in the territory of that Contracting Party and has made investments in the territory of another Contracting 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 Contracting Party, including the territorial sea, air space and any maritime area situated beyond the territorial sea of that Contracting Party, which has been or might in the future be designated under the domestic

law in force in the country of the Contracting Party concerned, in accordance with international law, as an area within which the Contracting Party may exercise sovereign rights and jurisdiction.

Article 2. Scope of 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 that arose before entry into force of this Agreement.

Article 3. Promotion of Investments

(1) Each Contracting Party shall, subject to its general policy 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 the powers conferred by the domestic law in force in its country, shall admit such investments.

(2) Each Contracting 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 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 or its national requirements or according to internationally accepted standards such as International Accountancy Standards (IAS) drawn up by the International Accountancy Standards Committee (IASA). 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 Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the 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 to investments and returns of investors 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 to 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) The provisions of sub-Articles (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 Contracting Party; or

(b) any international agreement or arrangement relating wholly or mainly to taxation or domestic law relating wholly or mainly to taxation;

(c) domestic 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 Contracting Party accords special advantages to development finance institutions with foreign participation and established for the exclusive purpose of development assistance mainly through non-profit 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 5. Compensation for Losses

(1) If investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other

Contracting Party, shall be accorded by the other Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the other Contracting Party accords its own investors or investors of any third State.

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

(a) expropriation 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 6. Compensation for Expropriation

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

(2) The investor affected by expropriation shall have a right, under the domestic law in force in the country of the Contracting Party making the expropriation, to prompt review, by a court of law or other independent and impartial forum of that Contracting 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 7. Transfer 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 the:

(a) compensation paid pursuant to Articles 4 and 5;

(b) amounts intended for the payment of contractual obligations, including the amounts required for the repayment of loans, the payment of royalties for licences, franchises, concessions and other similar rights;

(c) revenue from investments; and

(d) proceeds of the total or partial liquidation of the investments, including the appreciation or increase of the capital invested.

(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 in force in the country pertaining thereto. Such law shall not impair and undelayed transfer allowed in terms of sub-Articles (1) and (2).

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

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party relating to an investment which has not been amicably settled shall, after the expiry of a period of six months from written notification thereof 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) 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; or

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

(3) If after the expiry of 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 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 domestic law in force in the territory of the Contracting Party in whose country the investment was made, the provisions of this Agreement as well as a specific agreement, which might have been entered into regarding the investment and the principles of international law, shall be applied in resolving the dispute.

(5) The award made by the arbitrator appointed in terms of sub-Articles (2) or (3) shall be binding on the Contracting Parties to the dispute.

Article 9. Disputes between the Contracting Parties

Any dispute between the Contracting Parties arising out of the interpretation or application of this Agreement shall be settled amicably through consultation or negotiations between the Contracting Parties.

Article 10. Subrogation

If a Contracting 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 Contracting Party, the latter Contracting Party shall recognize 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 designate agency is entitled to exercise such rights and to enforce such claims by virtue of subrogation, to the same extent as the original investor.

Article 11. Application of other Rules

(1) If the domestic law in force in the country of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this 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 this Agreement, such rules shall to the extent that they are more favourable prevail over this Agreement.

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

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

(1) This Agreement shall enter into force on the date on which the Contracting Parties have notified each other in writing through the diplomatic channel that their respective constitutional requirements for entry into force of this Agreement have been fulfilled. This Agreement shall enter into force thirty (30) days after the date of receipt of the last notification.

(2) This Agreement shall remain in force for an initial period of ten years, whereafter it shall automatically be renewed for further periods of twelve months, unless terminated by either Contracting Party by giving twelve months written notice in advance through the diplomatic channel to the other Contracting Party of its intention to terminate this Agreement.

(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 years from that date.

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

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

FOR THE GOVERNMENT OF THE REPUBLIC OF GUINEA

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

Protocol to the agreement between the government of the republic of south africa and the government of the republic of guinea for the promotion and reciprocal protection of investments

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

Ad Article 7

1. Foreign nationals who have resided in the Republic of South Africa for more than five years and who have completed the required exchange control formalities connected with immigration to South Africa, are, in terms of South African exchange control rules, deemed to have become permanently resident in the Republic of South Africa and the provision of transfer of investments and returns as contemplated in Article 6 shall not apply in their favour.
2. The exemptions to Article 6 as contemplated in paragraph 1 of this Protocol shall terminate automatically in respect of each restriction, upon removal of the relevant restriction as part of the domestic law of South Africa.
3. The Republic of South Africa shall make every effort to remove the said restrictions from their domestic law as soon as possible.
4. Paragraph 1 of this Protocol shall not apply to or restrict the transfer of compensation payments made pursuant to Articles 4 and 5 of this Agreement.
5. This Addendum shall enter into force at the same time as the Agreement.

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

DONE at..... on this 25th day of September 2007.

FOR THE GOVERNMENT OF THE REPUBLIC OF GUINEA

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA