

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

The Government of the Republic of South Africa and the Government of the Republic of Mozambique, (hereinafter referred to as the "Contracting Parties");

Desiring to create favourable conditions for greater flow of investments made by investors of either Contracting Party in the territory of the other Contracting Party; and

Recognising that the encouragement and reciprocal protection of such investments will lend greater stimulation to the development of business initiatives and will increase prosperity in the territories of both Contracting Parties;

Have agreed as follows:

Article 1. Definitions

(1) In this Agreement -

(a) "investment" means every kind of asset admissible under the legal provisions of the Contracting Party in whose territory an investment is made and in particular, though not exclusively, includes:

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

(ii) shares, debentures and any other form of participation in a company;

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

(iv) industrial and intellectual property rights, in particular copyrights, patents, utility-model patents, designs, trademarks, tradenames, technical processes, know-how and goodwill;

(v) economic value of concession rights or permits conferred in accordance with the law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

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

(c) "investor" means in respect of either Contracting Party -

(i) a "national", that is a natural person deriving his or her status as a national of a Contracting Party from the relevant laws of that Contracting Party; and

(ii) a "company", that is a legal person, such as a corporation, firm or association incorporated or constituted in accordance with the law of the Contracting Party concerned;

(d) "territory" means the territory of a Contracting Party, including the territorial sea and any maritime area situated beyond the territorial sea of that Contracting Party, which has been designated under the national law of such Contracting Party, in accordance with international law, as an area within which the Contracting Party may exercise sovereign rights and jurisdiction.

(2) Any change in the form in which assets are or have been invested does not affect their character as investments for the purposes of this Agreement.

Article 2. Promotion of Investments

(1) Each Contracting Party shall, subject to its policy in the field of foreign investment, encourage the making of investments in its territory by investors of the other Contracting Party, and, subject to compliance with the provisions of its laws, shall admit such investments.

(2) Each Contracting Party shall grant, in accordance with its laws, the necessary permits in connection with the carrying out of such investments and, whenever necessary, 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 an investment made in the territory of a Contracting Party, such 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 and/or according to internationally accepted standards (such as International Accountancy Standards (IAS) drawn up by the International Accountancy Standards Committee (IASC)). The bookkeeping and auditing as well as the results thereof shall be freely available to the investor.

Article 3. 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 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 by investors of the other Contracting Party.

(2) Each Contracting Party shall in its territory accord investors and 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) The provisions of paragraph (2) shall not be construed so as to oblige either Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from -

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

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

(c) special advantages accorded to foreign development finance institutions operating in the territory of either Contracting Party for the exclusive purpose of development assistance through mainly nonprofit activities.

Article 4. Compensation for Losses

(1) Investors of either Contracting Party whose investments in the territory of the other Contracting 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 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 derogating from the provisions of paragraph (1) of this Article, investors of either 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, acting under and within the scope of the legal provisions relating to their competences, duties and command structures;

(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 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 market rate until the date of payment, shall be made without delay, and be effectively realizable.

(2) The investor affected by the expropriation shall have a right, under the law of the expropriating Contracting Party, to prompt review, by a court of law or other independent and impartial forum of that Contracting Party of the expropriation case and of the valuation of the investment in accordance with the principles referred to in paragraph (1).

Article 6. Transfers of Investment Capital and Returns

(1) Each Contracting Party shall, in accordance with paragraph (3) of this Article, allow investors of the other Contracting Party the free transfer of funds relating to their investments and returns, including compensation paid pursuant to the provisions of Articles 4 and 5 of this Agreement.

(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 exchange rate, the rate to be used will 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 relevant laws pertaining thereto. Such laws shall not, however, regarding either the requirements or the application thereof, impair or derogate from the investor's rights as provided in paragraphs (1) and (2) of this Article.

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

(1) Any legal dispute between an investor of either Contracting Party and the other Contracting Party relating to an investment which has not been amicably settled may, 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 involved in the dispute may agree to refer the dispute either to -

(a) the International Centre for the Settlement of Investment Disputes (ICSID), under the rules of 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 such Contracting Party has become a party to the said Convention.

As long as this requirement is not met, each Contracting Party agrees that the dispute may be settled under the rules of the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID.

(b) an International Arbitrator or ad hoc Arbitration Tribunal to be appointed by agreement between the two 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 paragraph (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 award made through the arbitration in terms of paragraphs (2) and (3) of this Article, shall be binding on and executed by the parties to the dispute.

Article 8. Disputes between the Contracting Parties

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

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

(3) Such Arbitral Tribunal shall be constituted for each individual case in the following way: Within two months from the receipt of the request for arbitration, each Contracting Party shall appoint one member for the Tribunal. Those two members shall then select a national of a Third State who, upon approval by the two Contracting 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 paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the 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 or she 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 or she 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 and not prevented from discharging such functions 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 to 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 may, however, in its decision direct that a higher proportion of costs shall be borne by one of the Contracting Parties, and this award shall be binding on and executed by both Contracting Parties. The Tribunal shall determine its own procedure.

Article 9. 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 made in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party of all the rights and Claims of the indemnified investor, and shall also 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 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 that provided for by the present Agreement, such rules shall, to the extent that they are more favourable, prevail over the present Agreement.

(2) Each Contracting Party shall observe and honour any other 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 -

(a) in the case of the Republic of South Africa to all investments, whether made before or after entry into force of this Agreement; and

(b) in the case of the Republic of Mozambique to all investments made, whether before or after entry into force of this Agreement, in conformity with the laws in force in the Republic of Mozambique from 18 August 1984.

Article 12. Final Clauses

(1) The Contracting Parties shall notify each other promptly when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the day following the date of receipt of the last notification.

(2) This Agreement shall remain in force for a period of ten (10) 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 of this agreement to the other Contracting Party.

(3) In respect of investments approved and/or made prior to the date when the notice of termination of this Agreement

becomes effective, the provisions of the preceding articles 1 to 11 shall remain in force with respect to such investments for a further period of ten (10) years from that date or any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor.

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

Done in duplicate at this day of..... 19..... in the English and Portuguese languages, both texts being equally authentic.

For the Government of the Republic of South Africa

For the Government of the Republic of Mozambique

Protocol

Protocol to the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mozambique 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 Mozambique 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

The provisions relating to transfers under Article 6 shall not be applicable to nationals of either Contracting Party with permanent residence in and having immigrated to the territory of the other Contracting Party, to the extent that such provisions are incompatible with the foreign exchange restrictions on such foreign nationals in the territory of that other Contracting Party in force on the date of entry into force of the Agreement.

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

Done at this day of..... 19..... in the English and Portuguese languages, both texts being equally authentic.