

Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investments

The Federal Republic of Germany and the Republic of South Africa –

Desiring to intensify economic co-operation between both States,

Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State,

Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations —

Have agreed as follows:

Article 1.

For the purposes of this Treaty

(1) The term "investments" comprises every kind of asset, in particular:

- (a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
- (b) Shares of companies and other kinds of interest in companies;
- (c) Claims to money or to any performance 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 good will;
- (e) Business concessions under public law, including concessions to search for, extract and exploit natural resources;

Any alteration of the form in which assets are invested shall not affect their classification as investment;

(2) The term "returns" means the amounts yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;

(3) The term "nationals" means

(a) In respect of the Federal Republic of Germany:

Germans within the meaning of the Basic Law of the Federal Republic of Germany,

(b) In respect of the Republic of South Africa:

Natural persons, who, according to the law of the Republic of South Africa, are considered to be its nationals;

(4) The term "companies" means

Any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Contracting Party concerned, irrespective of whether or not its activities are directed at profit.

Article 2.

(1) Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other

Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.

(2) Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use or enjoyment of investments in its territory of nationals or companies of the other Contracting Party.

Article 3.

(1) Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

(3) Such treatment shall not relate to privileges which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area or on the basis of interim agreements leading up to such unions, common markets or free trade areas.

(4) The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to nationals or companies of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.

(5) If a Contracting 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 Contracting Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Contracting Party.

Article 4.

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public interest and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the normal commercial interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting Party than that which the latter Contracting Party accords to its own nationals or companies as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

Article 5.

Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, in particular

(a) The principal and additional amounts to maintain or increase the investment;

(b) The returns;

(c) The repayment of loans;

(d) The proceeds from the liquidation or the sale of the whole or any part of the investment;

(e) The compensation provided for in Article 4.

Article 6.

If either Contracting Party makes a payment to any of its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 10, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim of such national or company to the former Contracting Party. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party to any such right or claim (assigned claims) which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments made by virtue of such assigned claims, Article 4 (2) and (3) as well as Article 5 shall apply *mutatis mutandis*.

Article 7.

(1) Transfers under Article 4 (2) or (3), under Article 5 or Article 6 shall be made without delay at the rate of exchange valid on the date of transfer.

(2) In the absence of a market for foreign exchange, the rate to be used will be the most recent cross rate obtained from those rates which would be applied for conversions of the currencies concerned into Special Drawing Rights.

Article 8.

(1) If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty.

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

Article 9.

This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation.

Article 10.

(1) Divergencies between the Contracting Parties concerning the interpretation or application of this Treaty should as far as possible be settled by the governments of the two Contracting Parties.

(2) If a divergency cannot thus be settled within a reasonable period, it shall upon the request of either Contracting Party be submitted to an arbitration tribunal.

(3) Such arbitration tribunal shall be constituted *ad hoc* as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the governments of the two Contracting Parties. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitration tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other arrangement, 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 should 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 Court next in seniority who is not a national of either Contracting Party should make the necessary appointments.

(5) The arbitration tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting

Party shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitration tribunal may make a different regulation concerning costs. In all other respects, the arbitration tribunal shall determine its own procedure.

(6) If both Contracting Parties are Contracting States of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States the arbitration tribunal provided for above may in consideration of the provisions of Article 27 (1) of the said Convention not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitration tribunal in the event that a decision of the Arbitration Tribunal established under the said Convention is not complied with (Article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 6 of this Treaty.

Article 11.

(1) Divergencies concerning investments between a Contracting Party and a national or company of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.

(2) If the divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the national or company of the other Contracting Party, be submitted for arbitration. Unless the parties in dispute agree otherwise, the divergency shall be submitted for arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. For the time being whilst the Republic of South Africa is not a party to that Convention, the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes.

(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said Convention. The award shall be enforced in accordance with domestic law.

(4) During arbitration proceedings or the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the national or company of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.

Article 12.

This Treaty shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting Parties.

Article 13.

(1) This Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in Bonn.

(2) This Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing by either Contracting Party twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time by either Contracting Party giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of this Treaty, the provisions of Articles 1 to 12 shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.

Done at Cape Town on 11 September 1995 in two originals, each in English and German, both texts being equally authentic.

For the Federal Republic of Germany

Dr. Uwe Kaestner

For the Republic of South Africa

Trevor Manuel

Protocol

On signing the Treaty between the Federal Republic of Germany and the Republic of South Africa concerning the Reciprocal Encouragement and Protection of Investments, the undersigned plenipotentiaries have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Treaty.

1. Ad Article 1

(a) Returns from the investment and, in the event of their re-investment, the returns therefrom shall enjoy the same protection as the investment.

(b) Without prejudice to any other method of determining nationality, in particular any person in possession of a passport issued by the competent authorities of the Contracting Party concerned shall be deemed to be a national of that Party.

2. Ad Article 2

(a) Investments made in accordance with the laws and regulations of either Contracting Party, within the territory of that Contracting Party by nationals or companies of the other Contracting Party shall enjoy the full protection of the Treaty.

(b) The Treaty shall also apply to the areas of the exclusive economic zone and the continental shelf insofar as international law permits the Contracting Party concerned to exercise sovereign rights or jurisdiction in these areas.

3. Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3(2): the management, maintenance, use and enjoyment of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.

(b) The provisions of Article 3 do not oblige a Contracting Party to extend to natural persons or companies resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to natural persons and companies resident in its territory.

(c) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to nationals of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.

4. Ad Article 4

A claim to compensation shall also exist when, as a result of State intervention in the company in which the investment is made, its economic substance is severely impaired.

5. Ad Article 5

(a) With regard to the Republic of South Africa the provisions relating to transfers under Articles 4 (2) and (3), 5 and 6 do not apply to nationals of the Federal Republic of Germany who have obtained permanent residence in the Republic of South Africa and who have decided to immigrate to the Republic of South Africa by completing the required Exchange Control Form once a five year period from the date of immigration has lapsed.

This provision shall terminate upon removal of the relevant Exchange Control limitations by the Republic of South Africa, for which early removal the Republic of South Africa will undertake every effort possible.

(b) On the request of either side the Contracting Parties will hold consultations on the interpretation or application of the

present provision.

6. Ad Article 7

A transfer shall be deemed to have been made "without delay" within the meaning of paragraph of Article 7(1) if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.

7. Ad Article 9

The Treaty shall not be applied to disputes which arose prior to entry into force of the Treaty.

8.

Whenever goods or persons connected with the making of investments are to be transported, each Contracting Party shall neither exclude nor hinder transport enterprises of the other Contracting Party and shall issue permits as required to carry out such transport, unless otherwise agreed between the Contracting Parties.

Done at CapeTown on 11 September 1995 in duplicate in the German and English languages, both texts being equally authentic.

For the Federal Republic of Germany

For the Republic of South Africa