

# Agreement for the promotion and protection of investments between the Kingdom of Spain and the Republic of South Africa

The Kingdom of Spain and the Republic of South Africa, hereinafter referred to as the Contracting Parties,

Desiring to intensify economic cooperation in the mutual benefit of both countries;

Aiming to create favourable conditions for investments by investors of either Contracting Party in the territory of the other contracting party, and

Recognizing that the reciprocal promotion and protection of investments under this agreement will stimulate initiatives in this field,

Have agreed as follows:

## Article I. Definitions

For the purposes of this Agreement:

1. "investor" refers with regard to either Contracting Party:

- a) Any natural person who is a national of either Contracting Party, in accordance with the legislation of the Party;
- b) Any legal entity including companies, partnerships or associations anonymous, branches and other organizations, which are duly constituted or otherwise organized in accordance with the laws of that Contracting Party.

2. "investment" means every kind of asset and shall include in particular, though not exclusively, the following:

- a) Stocks, shares and debentures of a company and any other form of participation in a company or interest;
- b) The right to money or to any other performance having an economic value, including loans;
- c) Movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges;
- d) Intellectual Property Rights, processes, know-how, technical know-how and goodwill;
- e) Rights or permits to engage in economic and commercial activities conferred by law or under contract, including concessions to prospecting, cultivate, extract or exploit natural resources.

The investments made in the territory of a Contracting Party by any legal person of that same Contracting Party but are effectively controlled by investors of the other Contracting Party shall also be considered as investments of investors of the latter Contracting Party provided that have been made in accordance with the laws and regulations of the former Contracting Party.

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

3. "Income" means the yielded returns by an investment and shall include in particular, though not exclusively, profits, dividends, interests, capital gains, royalties and fees.

4. "territory" means the territorial waters and territory of one Contracting Party, as well as the exclusive economic zone and the continental shelf extending from the outer limits of the territorial waters of that Contracting Party, over which it has or may have jurisdiction or sovereign rights under international law for the purpose of exploration and exploitation and preservation of natural resources.

## Article II. Promotion and Admission

1. Each Contracting Party shall promote and create favourable conditions for investors of the other contracting party to make investments in its territory. Each Contracting Party shall admit such investments in accordance with its laws and regulations.
2. In order to encourage mutual investment flows, each Contracting Party shall inform the other Contracting Party, at the request of the latter, investment opportunities in its territory.
3. Each Contracting Party shall grant, in accordance with its legislation, the necessary permits, including the work permits in connection with such investments and with the carrying out of licensing agreements relating to manufacturing and technical assistance, commercial, financial and administrative.
4. This Agreement shall also apply to investments made before its Entry into Force by investors of one Contracting Party in the territory of the other contracting party.

### **Article III. Protection**

1. Each Contracting Party shall accord in its territory the full protection and security and returns to investments of investors of the other contracting party. Neither Contracting Party shall hinder, by arbitrary or discriminatory measures The management, maintenance, use, enjoyment, extension and sale or, where appropriate, the liquidation of such investments. Each Contracting Party shall comply with any other obligation it has assumed in writing in connection with investments made by investors of the other contracting party.
2. Shall at all times be accorded fair and equitable treatment in accordance with international law, to returns of investments or investors of either Contracting Party in the territory of the other contracting party.

### **Article IV. National and Most-favoured-nation Treatment**

1. Each Contracting Party shall accord to investments made in its territory by investors of the other contracting party fair and equitable treatment which in no case shall be less favourable than that accorded to investments made by its own investors to investors or of any third State, which is more favourable to the investor concerned.
2. Each Contracting Party shall accord to investors in its territory of the other contracting party, as regards the management, maintenance, use, enjoyment or disposal of his investment a fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors to investors or of any third State, which is more favourable to the investor concerned.
3. The treatment granted under paragraphs 1 and 2 of this article shall not be construed as to oblige one contracting party to extend to the investors of the other contracting party and their investments the benefit of any treatment, preference or privilege resulting from: paragraphs 1 and 2 of this article shall not be construed as to oblige one contracting party to extend to the investors of the other contracting party and their investments the benefit of any treatment, preference or privilege resulting from:
  - a) Membership of any customs union, economic and monetary existing or future or any other regional economic integration organization, and
  - b) Any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.
4. If a Contracting Party accords special advantages, in addition to the treatment referred to in paragraphs 1 and 2 of this article, a development finance institutions, that Contracting Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other party contratante.apartados 1 and 2 of this article, a development finance institutions, that Contracting Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other contracting party.

### **Article V. Expropriation**

1. Returns of investments and investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "(expropriation) except for reasons of public interest and under due process of law, on a non-discriminatory basis and against payment to the investor or its legal person of a prompt, effective and adequate compensation.
2. Such compensation shall correspond to the market value of the expropriated investment immediately before the

impending expropriation or the same became public knowledge, whichever comes first. the compensation shall include interest at a normal commercial rate until the date of payment and shall be paid without delay in a freely convertible currency and shall be effectively realizable and freely transferable.

3. The Investor affected shall have a right under the law of the contracting party making the expropriation, to prompt review of their case by a judicial or other competent authority of that Contracting Party to determine whether such expropriation and any resulting compensation shall be in accordance with the principles set out in this article.

4. When a Contracting Party shall expropriate 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 have participation of the other Contracting Party, it shall ensure that the provisions of this article to guarantee prompt, adequate and effective compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

## **Article VI. Compensation for Losses**

1. Investors of one Contracting Party whose investments or annuities in the territory of the other contracting party suffer losses owing to war or other armed conflict, revolution, state of national emergency, revolt, disturbance or other similar circumstances, the latter Contracting Party shall be accorded by way of restitution, indemnification, compensation or other settlement, a treatment no less favourable than that which the latter Contracting Party accords to its own investors to investors or of any third State, apply the treatment that is more favourable to the investor concerned.

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: (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) The requisitioning of property by their forces or the authorities of the latter Contracting Party; or
- b) The destruction of their property by the authorities or forces of the latter contracting party without the same occurs in an action to combat or so required by the necessity of the situation,

Shall be accorded adequate restitution or compensation.

3. Any payments made under this article shall be made without delay, be adequate, effective and freely transferable.

## **Article VII. Transfers**

1. Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments relating to their investments and returns, including in particular, though not exclusively, the following:

- a) The capital payments and other additional amounts necessary for the maintenance or development of an investment;
- b) The investment income, as defined in Article I; article I;
- c) The compensation provided for in articles V and VI; articles V and VI;
- d) The proceeds from the sale or the total or partial liquidation of an investment;
- e) The funds in repayment of loans;
- f) Other earnings and remuneration of personnel engaged from abroad in connection with an investment, and
- g) Payments arising out of the settlement of a dispute.

2. The transfers referred to in the present Agreement shall be made without delay in freely convertible currency at the market exchange rate prevailing on the date of transfer.

3. The Contracting Parties undertake to accord to transfers referred to in this article a treatment no less favourable than that accorded to transfers originating from investments made by investors of any third State.

## **Article VIII. More Favourable Terms**

1. If the legislation of either Contracting Party or existing obligations under international law or subsequently arise between the Contracting Parties in addition to the present agreement establishing a general or special rules under which shall be

granted to investments made by investors of the other contracting party to a more favourable treatment than that provided for by the present Agreement, such rules shall prevail over this agreement to the extent that it is more favourable.

2. More favourable terms than those of this Agreement which have been agreed between a Contracting Party and investors of the other Contracting Party shall not be affected by this Agreement.

## **Article IX. Subrogation**

1. If a Contracting Party or its designated agency grant any guarantee against non-commercial risks with regard to an investment made by any of its investors in the territory of the other contracting party and makes payments to the investor under the aforementioned guarantee, the latter Contracting Party shall recognize the assignment by law or by legal transaction of any such right or claim of the investor to former Contracting Party or its designated agency. the subrogation will ensure that the first Contracting Party or its designated agency is direct beneficiary of all payments of compensation to which the investor may have a right.

2. With regard to property rights, use, enjoyment or any other property right, the subrogation shall not be subject to the requirements of the relevant legislation of the host contracting party of the investment.

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

1. Any dispute between the contracting parties concerning the interpretation or application of this Agreement shall be settled as far as possible through diplomatic channels.

2. If the dispute cannot be settled in this way within six months from the beginning of negotiations, the dispute shall be submitted, at the request of either of the two contracting parties to an arbitral tribunal.

3. The arbitral tribunal shall be constituted as follows: each Contracting Party shall appoint one arbitrator and these two arbitrators shall elect a president is a national of a third country. the arbitrators shall be appointed within three months and the Chairman within five months from the date on which either Contracting Party has informed the other contracting party of its intention to submit the controversía to an arbitral tribunal.

4. If the necessary appointments have been made within the periods specified in paragraph 3 of this article, a 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 unable to perform this function for other purposes, it shall ask the Vice-President to make the necessary appointments. if the Vice-President is a national of one of the contracting parties or nor to perform this function would be encouraged to make the necessary appointments to the member of the International Court of Justice to continue in seniority who is not a national of any of the Parties contratantes. apartado 3 of this article, a 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 unable to perform this function for other purposes, it shall ask the Vice-President to make the necessary appointments. if the Vice-President is a national of one of the contracting parties or nor to perform this function would be encouraged to make the necessary appointments to the member of the International Court of Justice to continue in seniority who is not a national of either of the Contracting Parties.

5. The arbitral tribunal shall render its decision on the basis of respect for the law, to the provisions contained in this Agreement or in other agreements in force between the contracting parties, as well as the principles of international law.

6. Unless the Contracting Parties decide otherwise, the tribunal shall determine its own procedure.

7. The tribunal shall reach its decision by a majority of votes and that decision shall be final and binding on both contracting parties.

8. Each Contracting Party shall bear the costs of the arbitrator appointed by it and costs of its representation in the arbitral proceedings. The other expenses, including the President, shall be borne in equal parts by the two contracting parties.

## **Article XI. Disputes between Investors and a Contracting Party of the other Contracting Party**

1. Disputes between a Contracting Party and an investor of the other contracting party concerning an investment under this Agreement shall be notified in writing, including detailed information by the investor to the former Contracting Party. To the extent possible, the parties concerned shall endeavor to settle these disputes amicably.

2. If such disputes cannot be settled amicably within six months from the date of the written notification mentioned in paragraph 1, the dispute shall be submitted, at the choice of the investor, to: (1), the dispute shall be submitted, at the choice of the investor, to:

The competent court of the Contracting Party in whose territory the investment has been made; or

An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law; or

The International Centre for International Settlement Centre for Settlement of Investment Disputes) established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965, in case both contracting parties become Parties to this Convention. If one of the contracting parties involved in a dispute has not become a party to the Convention, the dispute may be settled by the secretariat of the Centre under the additional facility for the administration of proceedings.

3. The arbitration shall be based on:

The provisions contained in this Agreement or any other agreements in force between the contracting parties;

The rules and the universally accepted principles of international law; and

The national law of the Contracting Party in whose territory the investment was made, including the rules relating to conflicts of law.

4. The arbitral decisions shall be final and binding on the parties to the dispute. Each Contracting Party undertakes to execute the decisions in accordance with its national legislation.

## **Article XII. Entry Into Force , Duration and Termination**

1. This Agreement shall enter into force on the date on which the contracting parties have notified each other of the completion of the respective constitutional formalities required for the Entry into Force of international agreements. It shall remain in force for an initial period of ten years and thereafter, by tacit renewal, for periods of two consecutive years.

2. Either Contracting Party may terminate this Agreement by written notification six months before the date of expiry.

3. With respect to investments made or acquired prior to the date of termination of this Agreement and to which it applies, the provisions of all the other articles of this Agreement shall remain in force for a further period of ten years from such date of termination.

4. The terms of this Agreement may be amended by agreement negotiated between the contracting parties. Such amendments shall enter into force when the contracting parties will have notified each other to the fulfillment of their constitutional procedures for entry into force.

Done in two originals in the English and Spanish languages, both texts being equally authentic, in Pretoria on 30 September 1998.

For the Kingdom of Spain

Elena Pisonero Ruiz

State Secretary of Commerce, Tourism and SME

The Republic of South Africa

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