

Agreement between the Swiss Federal Council and the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments

Preamble

The Swiss Federal Council

And

The Government of the Republic of South Africa,

Desirous of creating favorable conditions for increased investment by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing that the promotion and reciprocal protection of such investments under an International Agreement will encourage private initiative in the field of business and enhance prosperity in the territory of each Contracting Party,

Have agreed as follows:

Article 1. Definitions

For the purposes of this Agreement:

(1) The term "investment" means all categories of assets and shall include in particular, though not exclusively:

(a) Ownership of movable and immovable property as well as any other rights in rem, such as charges movable and immovable property, pledges;

(b) The stock and debentures of a company and any other form of participation in a company;

(c) Monetary claims and rights to any performance under contract having an economic value;

(d) Intellectual property rights, processes and technical know-how;

(e) The business concessions conferred by law or under contract, including concessions to search, culture, extract or exploit natural resources, as well as any other rights conferred by law, by contract or by decision of the Authority in accordance with the law.

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

(2) The term means the returns derived from an investment amounts and shall include in particular, though not exclusively, interests, capital gains, profits, dividends, royalties and fees;

(3) The term means investor in respect of either Contracting Party,

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

(b) Companies, including companies registered partnerships and other organizations, which are established under the laws of that Contracting Party and have their seat in the territory of that same Contracting Party;

(c) A company which is not established in accordance with the laws of that Contracting Party but which are effectively controlled by natural persons or by companies respectively in accordance with subparagraphs (a) and (b) of this paragraph.

(4) The term territory means the territory of each Contracting Party and includes the maritime areas adjacent to the coastal State concerned, i.e. the exclusive economic zone and the continental shelf, to the extent that the State they may exercise

sovereign rights or jurisdiction in accordance with international law.

Article 2. Promotion, Admission

(1) Each Contracting Party shall encourage, within the framework of its laws and regulations, investors of the other contracting party to make investments in its territory by creating favourable conditions for their investments and to the extent of the powers conferred by its laws shall admit such investments.

(2) Each Contracting Party shall issue, in accordance with its laws and regulations the necessary permits in connection with such investments and with the carrying out of licensing agreements, technical, commercial or administrative assistance.

Article 3. Protection, Treatment

(1) Returns of investments and investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other contracting party. Neither of the contracting parties will not in any way, unjustified or discriminatory measures by the management, maintenance, use, enjoyment, or disposal of increased investments in its territory by investors of the other contracting party.

(2) Each Contracting Party shall accord in its territory to returns of investments and investors of the other contracting party treatment no less favourable than that which it accords to its own and returns of investments or investors to returns of investments and investors of a third State, quel-conque more favourable treatment to the investor concerned is crucial.

(3) Each Contracting Party shall accord to investors in its territory of the other contracting party treatment no less favourable than that it accords to its own investors to investors or of any third State, more favourable treatment to the investor concerned is crucial.

(4) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a Free Trade Area (libreéchange, a customs union, a common market or a similar regional organization or by virtue of an agreement for the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other contracting party.

(5) In order to remove any ambiguity, it is confirmed that the principles referred to in paragraphs (2) and (3) of this article shall not apply with respect to the special advantages to development finance institutions, such as tax matters.

Article 4. Compensation for Losses

(1) Investors of one Contracting Party whose investments in the territory of the other contracting party have suffered losses due to a war or any other armed conflict, revolution, state of emergency, national revolt riot, insurrection or occurring in the territory of the latter Contracting Party, shall receive, as regards restitution, indemnification, compensation or other settlement, a treatment no less favourable than that which that Contracting Party accords to its own investors to investors or of any third State, more favourable treatment to the investor concerned is crucial. Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

(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

(a) Requisition of property by their forces or the authorities of the latter or

(b) The destruction of their property by the authorities or forces of the latter, provided that this is due to a war or destruction is made necessary by the situation,

Will obtain adequate compensation or restitution.

Resulting payments shall be freely transferable at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 5. Expropriation

(1) Investments of investors of each Contracting Party shall not be subject to any measure of expropriation, nationalization or having an effect equivalent to expropriation or nationalisation (hereinafter referred to as expropriation) in the territory of the other Contracting Party unless they are taken for a public purpose related to the internal needs of that Contracting Party, are non-discriminatory and that it gives rise to a prompt, effective and adequate compensation. The compensation

shall be commensurate with the actual value of the investment immediately before the expropriation or before the impending public knowledge, it became the first of those events in determining. It shall include interest at a normal commercial rate until the date of payment, shall be paid without delay and shall be freely transferable realisable effectively and at the rate of exchange prevailing on the date of transfer pursuant to the exchange regulations in force. The Investor affected shall have a right under the law of the contracting party making the expropriation, to prompt review of its case and of the valuation of its investment by a judicial or other independent authority of that Contracting Party in accordance with the principles set out in this paragraph.

(2) If a Contracting Party expropriating 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 possèdent shares, it shall ensure, to the extent necessary and in accordance with its laws, that the compensation referred to in paragraph (1) of this article shall be made available to those investors.

Article 6. Repatriation of Investment and Income

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party the unrestricted transfer abroad of their investments and returns.

(2) Each Contracting Party shall guarantee to investors of the other Contracting Party the unrestricted transfer of payments for the maintenance of the development or investment; the repayment of loans or other contractual obligations related to the investment.

(3) Cash transfers shall be effected without delay in any convertible currency. Unless otherwise agreed by the investor, they shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 7. Additional Obligations

(1) If the provisions of law of either Contracting Party or international agreements to accord investments of investors of the other contracting party to more favourable treatment than that provided for by the present Agreement, the latter shall prevail to the extent that they are more favourable.

(2) Each Contracting Party shall observe any other obligation assumed by it in respect of investments made in its territory by investors of the other contracting party.

Article 8. Investments Made Prior to the Agreement

This Agreement shall also apply to investments made in the territory of a Contracting Party in accordance with its laws and regulations by investors of the other contracting party prior to the entry into force of this Agreement.

Article 9. Subrogation

(1) If a Contracting Party or its designated agency makes a payment of compensation in respect of an investment in the territory of the other Contracting Party, that Party shall recognize the assignment, law or pursuant to a legal transaction in the former Contracting Party or its designated agency of all rights and claims of indemnified the investor and the capacity of the first Contracting Party, or the body designated by it, to assert such rights and claims by virtue of subrogation to the same extent as the investor.

(2) The first Contracting Party or its designated agency shall be entitled in all circumstances, in respect of claims and the rights acquired by virtue of the assignment and any payments received in arguing such treatment, rights and claims that this agreement ensures compensation to the investor in relation to the concerned and its related investment returns.

(3) Any payments received by the former Contracting Party or by the body designated by it, arising out of the rights and claims shall be freely transferable acquired at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. the first Contracting Party or its designated by it, will be freely amounts assigned to cover expenses occurring in the territory of the other contracting party.

Article 10. Settlement of Disputes between an Investor and the Host State

(1) Any dispute between an investor of one Contracting Party and the other contracting party concerning an obligation of the latter under the present Agreement and to an investment of that investor may, if they have not been settled amicably, be

submitted to international arbitration by the investor concerned, after a period of three months from the date of notification of a claim.

(2) Where a dispute is submitted to international arbitration, the investor Party and the contracting party to the dispute may agree to refer the dispute:

(a) The International Centre for the Settlement of Investment Disputes (having regard to the provisions), where applicable, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington DC on 18 March 1965¹ as well as the additional facility for the administration of arbitration and conciliation, fact-finding¹; and the additional facility for the administration of arbitration and conciliation, fact-finding); or

(b) The Court of Arbitration of the International Chamber of Commerce; or

(c) An international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

(3) If after a period of three months from the date of notification of the claim there is no agreement on one of these procedures, the dispute shall be submitted, at the request in writing of the investor concerned to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law in force. the parties to the dispute may agree in writing to modify these rules.

(4) If both Contracting Parties shall have become parties to the Washington Convention referred to in subparagraph (2), letter (a) above, disputes within the meaning of this article may be submitted by the investor concerned or the International Centre for Settlement of Investment Disputes, or to the procedure referred to in subparagraph (3) above.

Article 11. Disputes between Contracting Parties

(1) In the event of a dispute concerning this agreement and on any issue of interpretation or application, the Contracting Parties agree to consult and negotiate. they shall cooperate with the understanding required in these consultations and negotiations. if the parties reach an agreement, they shall record in writing.

(2) If the consultations and negotiations do not resolve within six months of the request to initiate and unless the contracting parties agree otherwise, either of them may refer the dispute to an arbitral tribunal composed of three members. Each Contracting Party shall appoint an arbitrator. The third arbitrator who shall be the Chair of the Arbitral Tribunal and shall be a national of a third State, shall be appointed by agreement of the other two arbitrators. If any of the arbitrators is unable to perform its functions, a replacement shall be appointed in accordance with this article.

(3) If a Contracting Party has not appointed its arbitrator within two months of the receipt by the other Contracting Party the dispute to arbitration and the name of the arbitrator, the latter Contracting Party may invite the President of the International Court of Justice to make the appointment. If the latter is prevented or if he is a national of either Contracting Party, the Vice-President or the most senior member of the court will conduct the designation.

(4) If the two arbitrators appointed by the Contracting Parties cannot reach an agreement about the choice of the third arbitrator within two months after their appointment the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice. If the latter is prevented or if he is a national of either Contracting Party, the Vice-President or the most senior member of the court will conduct the designation.

(5) Unless the Contracting Parties decide otherwise, the tribunal shall determine its own rules of procedure. It shall act in accordance with this Agreement and other rules of international law. It shall take its decisions by a majority of the votes; they shall be final and binding on both contracting parties.

(6) Each Contracting Party shall bear the costs of its own member of the Tribunal and of its representation in the arbitration proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the contracting parties.

Article 12. Entry Into Force

This Agreement shall enter into force thirty days after the date on which the contracting parties have notified each other of the completion of the constitutional formalities required for the entry into force of this Agreement.

Article 13. Duration and Termination of the Agreement

(1) This Agreement shall remain in force for a period of ten years. After the term, it shall remain in force until the expiration

of twelve months from the date on which either Contracting Party has notified its notice to the other contracting party.

(2) The provisions of this Agreement shall apply for a further period of twenty years from the date of its termination in investments made prior to that date.

In WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Berne this 27th day of June 1995 in the English and French languages, each text being equally authentic.

For the Swiss Federal Council:

Jean-Pascal Delamuraz

For the Government of the Republic of South Africa:

Thabo Mbeki