

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

The Government of the Republic of South Africa and the Government of the Republic of Ghana, (hereafter jointly referred to as the Parties, and each in the singular as a Party);

DESIRING to create favourable conditions for greater investment by nationals and companies of one Party in the territory of the other Party;

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 Parties;

HEREBY AGREE as follows:

Article 1. Definitions

In this Agreement, unless the context otherwise indicates -

"Investment" means every kind of asset and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;
- (iv) intellectual property rights, goodwill, technical processes, and know-how;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

A change in the form in which assets are invested does not affect their character as investments and the term investment includes all investments, whether made before or after the date of entry into force of this Agreement;

"Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

"Nationals" means:

- (i) in respect of the Republic of Ghana: physical persons deriving their status' as Ghanaian Nationals from the law in force in the Republic of Ghana;
- (ii) in respect of the the Republic of South Africa: natural persons deriving their status as nationals from the law in force in the Republic of South Africa;.

"Companies" means: any legal person, corporation, firm or association incorporated or constituted under the law in force in the territory of a Party;

"Territory" means: in respect of a Party the territory of that Party including the territorial sea and any maritime area situated beyond the territorial sea of that Party which has been or might in the future be designated under the national law of the Party concerned, in accordance with international law, as an area within which that Party may exercise sovereign rights or rights with regard to the seabed and subsoil and the natural resources.

Article 2. Promotion of Investment

Each Party shall, subject to its general policy in the field of foreign investment, encourage investments in its territory by investors of the other Party, and, subject to its right to exercise powers conferred by its laws, shall admit such investments.

Article 3. Protection of Investment

(1) Investments and returns of nationals or companies of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party.

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

(3) Each Party shall observe any obligation it may have entered into with regard to investments or nationals or companies of the other Party.

Article 4. National Treatment and Most-favoured-nation Provisions

(1) Neither Party shall in its territory subject investments or returns of nationals or companies of the other Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third state.

(2) Neither Party shall in its territory subject nationals or companies of the other Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which is accorded to its own nationals or companies or to nationals or companies of any third state.

Article 5. Compensation for Losses

Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Party, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Party accords to its own nationals or companies or to nationals or companies of any third state. Resulting payments shall be freely transferable.

Article 6. Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Party or of any third State shall not be construed so as to oblige one Party to extend to the nationals or companies of the other, the benefit of any treatment, preference or privilege resulting from:

(a) any existing or future customs union, free trade area common market or similar international agreement to which either of the Parties is or may become a party,

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation, or.

(c) any 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.

Article 7. Expropriation

(1) Investments of nationals or companies of either Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation, (hereinafter referred to as "expropriation"), in the territory of the other Party, except where, for a purpose related to its internal needs, a Party expropriates the investments of nationals or companies of the other Party, in which event the following conditions shall be complied with:

(a) The measures shall be accompanied by provision for the payment of compensation amounting to the full and genuine value of the investment expropriated, immediately before the expropriation or before the impending expropriation became public knowledge whichever is the earlier.

(b) Such compensation shall be effectively realisable and freely transferable.

(c) The compensation shall be paid without undue delay. If the compensation is not paid within six months, it shall after that date attract interest at a normal commercial rate until the date of payment.

(2) A national or company affected shall have a right, under the law of the Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in Paragraph (1) of this Article.

(3) Where a Party expropriates 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 nationals or companies of the other Party own shares, the provisions of paragraphs (1) and (2) of this Article shall apply.

Article 8. Repatriation of Investment and Returns

Subject to its law, each Party shall, in respect of investments, guarantee to nationals or companies of the other Party the unrestricted transfer to the country where they reside of their investments and returns. Transfers of currency shall be effected without undue delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Article 9. Subrogation

(1) If one Party or its designated Agency makes payment under an indemnity given in respect of an investment in the territory of the other Party, the latter Party shall recognise the subrogation of the former Party or its designated Agency by law or any legal transaction to all the rights and claims of the party indemnified and that the former 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 Party indemnified.

(2) The former Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the subrogation and any payments received in pursuance of those rights and claims as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received by the former Party or its designated Agency in pursuance of the rights and claims acquired shall be freely available to the former Party for the purpose of meeting any expenditure incurred in the territory of the latter Party.

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

(1) Disputes between a national or company of one Party and the other Party concerning an obligation of the latter under this agreement in relation to an investment of the former which have not been amicably settled shall be submitted, after a period of three months from written notification of a claim, to international arbitration if either party to the dispute so wishes.

(2) Where the dispute is referred to international arbitration, the Investor and the Party concerned in the dispute may agree to refer the dispute either to -

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, 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 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) 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 written notification of the claim, there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit it to arbitration under the arbitration rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these rules.

Article 11. Disputes between the Parties

(1) Disputes between the Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

(2) If a dispute between the Parties cannot thus be settled, it shall upon the request of either Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who, on approval by the two 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 period specified in paragraph (3) of this Article the necessary appointments have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Party or if he is otherwise prevented from discharging the said functions, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or if he also 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 Party 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 Parties. Each Party shall bear the cost of its own member of 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 Parties. The tribunal may, however, in its decision, direct that a higher proportion of costs shall be borne by one of the two Parties. The decision of the tribunal shall be binding on both Parties. The tribunal shall determine its own procedure, unless the Parties agree otherwise.

Article 12. Application of other Rules

If the provisions of law of either Party or obligations under international law existing at present or established hereafter between the Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favorable prevail over the present Agreement.

Article 13. Entry Into Force

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

Article 14. Duration and Termination and Amendment

(1) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Party shall have given written notice of termination to the other; provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of fifteen years from the date of termination and without prejudice to the application thereafter of the rules of general international law.

(2) The terms of this Agreement may be amended by mutual consent of both Parties at any time after it is in force and any such amendment shall be effected by exchange of Notes between them through the diplomatic channel. The date of entry into force of such amendment shall be the date of last notification. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement prior to the date of such alteration or modification until such rights and obligations are fully implemented.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Agreement in two originals in English, both texts being equally authentic.

Done at Pretoria, this Ninth day of July 1998

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

FOR THE GOVERNMENT OF THE REPUBLIC OF GHANA