

# AGREEMENT BETWEEN THE REPUBLIC OF SOUTH AFRICA AND BELGO-LUXEMBOURG ECONOMIC UNION CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS

## PREAMBLE

The Government of the Kingdom of Belgium,

Acting both in its own name and in the name of the Government of the Grand-Duchy of Luxembourg by virtue of existing agreements,

The Government of Wallonia,

The Government of Flanders

And the Government of the Region of Brussels-Capital, on the one hand,

And

The Government of the Republic of South Africa,

On the other hand

(hereinafter referred to as the "Contracting Parties");

Desiring to create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other;

Recognising that the reciprocal encouragement and protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both Contracting Parties;

Have agreed as follows:

## Article 1. Definitions

For the purpose of this Agreement:

(1) "Investment" means any kind of asset and any direct or indirect contribution in cash, in kind or in services, invested or re-invested in any sector of economic activity and, in particular, though not exclusively, includes -

(a) Movable and immovable property as well as any other rights in rem such as mortgages, liens and pledges;

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

(c) Claims to money or to any performance under contract having an economic value;

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

(e) Business concessions conferred by law or under contract, including concessions to

Search for, cultivate, extract or exploit natural resources as well as all other rights given 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 does not affect their character as investments.

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

(3) "Investors" means

(a) The "nationals", i.e. any natural person who, according to the laws of the Kingdom of Belgium, the Grand-Duchy of Luxembourg or of the Republic of South Africa is considered as a national of the Kingdom of Belgium, the Grand-Duchy of Luxembourg or of the Republic of South Africa respectively;

(b) The "companies", i.e. any legal person constituted in accordance with the laws of the Kingdom of Belgium, the Grand-Duchy of Luxembourg or of the Republic of South Africa and having its registered office in the territory of the Kingdom of Belgium, the Grand-Duchy of Luxembourg or of the Republic of South Africa respectively.

(4) "Territory " means

(a) In respect of the Belgo-Luxembourg Economic Union, the territory of the Kingdom of Belgium, the territory of the Grand-Duchy of Luxembourg and the maritime areas, i.e. the marine and underwater areas which extend beyond the territorial waters, of the States concerned and upon which the latter exercise, in accordance with international law, their sovereign rights and their jurisdiction for the purpose of exploring, exploiting and preserving natural resources; and

(b) In respect of the Republic of South Africa, the territory of the Republic of South Africa and the maritime areas, i.e. the marine and underwater areas which extend beyond the territorial waters, of the Republic of South Africa, over which the Republic of South Africa exercises, in accordance with international law, sovereign rights and jurisdiction for the purpose of exploring, exploiting and preserving natural resources.

## **Article 2. Promotion, Admission**

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

(2) Each Contracting Party shall grant, in accordance with its laws, the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

## **Article 3. Protection, Treatment**

(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 and security 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, extension or disposal of investments in its territory of investors of the other Contracting Party.

(2) Each Contracting Party shall in its territory accord 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 investment and returns of investors of any third State, whichever is more favourable to the investor concerned. This treatment shall in no case be less favourable than that recognised under international law.

(3) Each Contracting Party shall in its territory accord to investors of the other Contracting Party treatment not less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to the investor concerned. This treatment shall in no case be less favourable than that recognised under international law.

(4) The provisions of paragraphs (2) and (3) shall not be construed and applied so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of

(a) An agreement establishing a free trade area, a customs union, a common market or a similar regional organisation; or

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

(5) For the avoidance of doubt, it is confirmed that the principles provided for in paragraphs (2) and (3) of this Article shall apply to the provisions of Articles 1-11, but shall not be applicable in relation to special advantages, such as in the field of taxation, accorded to development finance institutions.

## **Article 4. Compensation for Losses**

(1) Investors of one 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, no less favourable than that which the latter Contracting Party accords to its own investors or investors of any third State whichever is more favourable to the investors concerned. Resulting payments shall be freely transferable at the market 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) Requisitioning of their property by the forces or authorities of the latter Contracting Party, or

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

## **Article 5. Expropriation**

(1) Investments of investors of either Contracting 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 Contracting Party except for a public purpose related to the internal needs of that Party, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the real 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 commercial rate until the date of payment, shall be made without delay, shall be effectively realisable and shall be freely transferable at the market rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force. The investors affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of their case and of the valuation of their investments in accordance with the principles set out in this paragraph.

(2) Where a Contracting 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 investors of the other Contracting Party own shares, it shall, to the extent necessary and subject to its laws, ensure that compensation according to paragraph (1) of this Article will be made available to such investors. paragraph (1) of this Article will be made available to such investors.

## **Article 6. Transfer of Investments and Returns**

(1) Each Contracting Party shall grant to investors of the other Contracting Party, the free transfer of all payments relating to an investment, including particularly:

(a) Amounts necessary for establishing, maintaining or expanding the investment;

(b) Amounts necessary for payments under a contract, including amounts necessary for repayment of loans, royalties and other payments resulting from licences, franchises, concessions and other similar rights, as well as salaries of expatriate personnel;

(c) Returns on investments;

(d) Returns of the recovery of claims, of the total or partial liquidation of the investments, including capital gains or increases in the invested capital;

(e) Compensation paid pursuant to Article 4 and 5.

(2) The nationals of each Contracting Party who have been authorized to work in the territory of the other Contracting Party in connection with an investment shall also be permitted to transfer their net earnings to their country of origin.

(3) Transfers of currency shall be effected without delay in any convertible currency. Unless otherwise agreed by the

investor, transfers shall be made at the market rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

## **Article 7. Other Obligations**

(1) If provisions in the legislation of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, the investors of the other Contracting Party shall be entitled to avail themselves of the provisions that are the most favourable to them, subject, however, to the provisions of paragraphs (4) and (5) of Article 3.

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

## **Article 8. Pre-agreement Investments**

The present Agreement shall also apply to investments in the territory of a Contracting Party made in accordance with its laws by investors of the other Contracting Party prior to the entry into force of this Agreement, but shall not apply to any dispute which arose before entry into force of this Agreement.

## **Article 9. Subrogation**

(1) If one Contracting Party or any public institution of that Party pays compensation to its own investors pursuant to a guarantee providing coverage for an investment, the other Contracting Party shall recognize that the former Contracting Party or the public institution concerned is subrogated into the rights of the investors.

(2) As far as the transferred rights are concerned, the other Contracting Party shall be entitled to invoke against the insurer, who is subrogated into the rights of the indemnified investors, the obligations of the latter under law or contract.

## **Article 10. Settlement of Disputes between an Investor and the other Contracting Party**

(1) Any investment dispute between an investor of one Contracting Party and the other Contracting Party shall be notified in writing by the first party to take action. The notification shall be accompanied by a sufficiently detailed memorandum.

As far as possible, the Parties shall endeavour to settle the dispute through negotiations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels.

(2) In the absence of an amicable settlement by direct agreement between the parties to the dispute or by conciliation through diplomatic channels within six months from the notification, the dispute shall be submitted, at the option of the investor, either to the competent jurisdiction of the State where the investment was made, or to international arbitration.

To this end, each Contracting Party agrees in advance and irrevocably to the settlement of any dispute by this type of arbitration.

(3) In case of international arbitration, the dispute shall be submitted for settlement by arbitration to one of the hereinafter mentioned organizations, at the option of the investor:

- an ad hoc arbitral tribunal set up according to the arbitration rules laid down by the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L.);

- the International Centre for the Settlement of Investment Disputes (T.C.S.I.D.), set up by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965, when each State party to this Agreement has become a party to the said Convention.

As long as this requirement is not met, each Contracting Party agrees that the dispute shall be submitted to arbitration pursuant to the Rules of the Additional Facility of the I.C.S.I.D.;

- the Arbitral Court of the International Chamber of Commerce in Paris.

If the arbitration procedure has been introduced upon the initiative of a Contracting Party, this Party shall request the investor involved in writing to designate the arbitration organization to which the dispute shall be referred.

(4) At any stage of the arbitration proceedings or of the execution of an arbitral award, none of the Contracting Parties involved in a dispute shall be entitled to raise as an objection the fact that the investor who is the opponent party in the dispute has received compensation totally or partly covering his losses pursuant to an insurance policy or to the guarantee provided for in Article 9 of this Agreement.

(5) The arbitral tribunal shall decide on the basis of the national law, including the rules relating to conflicts of law, of the Contracting Party involved in the dispute in whose territory the investment has been made, the provisions of this Agreement, the terms of the specific agreement which may have been entered into regarding the investment as well as the principles of international law.

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

## **Article 11. Disputes between the Contracting Parties**

(1) Where a dispute arises concerning this Agreement, the Parties agree to consult and negotiate on any matter related to its interpretation or application. The Parties shall accord the necessary consideration and opportunity for such consultations and negotiations. Should the Parties agree on the controversial issue, a written agreement shall be accorded between the Parties.

(2) In the event that the consultations and negotiations fail to resolve the dispute within a period of six months from the date of the request for consultations or negotiations, any of the Parties may, unless they have otherwise agreed, submit the dispute to an arbitral tribunal composed of three members. Each Party shall appoint one arbitrator. The third arbitrator, who will be the Chairman of the arbitral tribunal and a national of a third State, shall be appointed by agreement of the other two arbitrators. If any of the arbitrators are unable to perform the duties, a substituting arbitrator shall be appointed as provided for in this Article.

(3) Should one of the Parties fail to appoint its arbitrator within two months after the other Party has appointed its arbitrator, the latter Party may request the President of the International Court of Justice to make the corresponding appointment. If the latter is prevented from making such appointment or is a national of either Party, the Vice President or the most senior member of the Court shall be invited to make such an appointment.

(4) In the event that the two arbitrators appointed by the Parties are unable to reach an agreement within two months concerning the third arbitrator, either Party may request the President of the International Court of Justice to make the corresponding appointment. If the latter is prevented from making such an appointment or is a national of either Party, the Vice President or the most senior member of the Court shall be invited to make such an appointment.

(5) The tribunal shall determine its own procedures, unless the Parties agree otherwise. The tribunal shall decide the dispute according to the Agreement and to the principles of international law. The tribunal shall reach its decision by a majority of votes. Such a decision shall be final and binding on both Parties.

(6) 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.

## **Article 12. Entry Into Force and Duration**

(1) This Agreement shall enter into force one month after the date of exchange of the instruments of ratification by the Contracting Parties. The Agreement shall remain in force for a period of ten years.

Unless notice of termination is given by either Contracting Party at least six months before the expiry of its period of validity, this Agreement shall be tacitly extended each time for a further period of ten years, it being understood that each Contracting Party reserves the right to terminate the Agreement by notification given at least six months before the date of expiry of the current period of validity.

(2) Investments made prior to the date of termination of this Agreement shall be covered by this Agreement for a period of ten years from the date of termination.

In witness whereof, the undersigned representatives duly authorized thereto by their respective Governments, have signed the present Agreement.

Done at Pretoria, on 14 August 1998, in two original copies, each in the English, French and Dutch languages, all texts being equally authentic. The text in the English language shall prevail in case of difference of interpretation.

FOR THE BELGO-LUXEMBOURG ECONOMIC UNION: For the Government of the Kingdom of Belgium acting both in its own name and in the name of the Government of the Grand-Duchy of Luxembourg For the Government of Wallonia: For the Government of Flanders: For the Government of the Region of Brussels-Capital: Leo Willems

FOR THE REPUBLIC OF SOUTH AFRICA: P. MLAMBO-MGCUKA