

Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments

Preamble

The Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe (hereinafter referred to as the Contracting Parties),

DESIRING to create favourable conditions for investments in both States and to intensify the co-operation between private enterprises in both States with a view to stimulating the productive use of resources,

RECOGNIZING that a fair and equitable treatment of investments on a reciprocal basis will serve this aim,

HAVE AGREED as follows:

Article 1. Definitions

For the purpose of this Agreement,

(1) The term »investment« means every kind of asset and shall include in particular, but not exclusively:

(i) Tangible and intangible, movable and immovable property, as well as any other rights such as leases, mortgages, liens, pledges, privileges, guarantees and any other similar rights,

(ii) A company or business enterprise, or shares, stock or other forms of participation in a company or business enterprise and bonds and debt of a company or business enterprise,

(iii) Returns reinvested, claims to money and claims to performance pursuant to all contracts having an economic value,

(iv) Industrial and intellectual property rights, including copyrights, patents, trade names, technology, trademarks, goodwill, know-how and any other similar rights,

(v) Concessions or other rights conferred by law or under contract, including concessions to search for, extract or exploit natural resources.

(2) A change in the form in which assets are invested, does not affect their character as investments.

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

(4) Returns, and in case of reinvestment amounts yielded from the reinvestment shall be given the same protection as the investment in accordance with the provisions of this Agreement.

(5) »Investor« means with regard to each Contracting Party:

(a) Natural persons having the citizenship or nationality of, or who are permanently residing in each Contracting Party in accordance with its laws.

(b) Any entity established in accordance with, and recognized as a legal person by the law of that Contracting Party, such as companies, firms, associations, development finance institutions, foundations or similar entities irrespective of whether their liabilities are limited and whether or not their activities are directed at profit.

(6) The term »laws« includes legislation as well as administrative rules and regulations which are officially published.

(7) »Territory« means in respect of each Contracting Party the territory under its sovereignty as well as the exclusive 200 nautical miles broad maritime zones over which the Contracting Party exercises, in conformity with international law, sovereign rights or jurisdiction.

Article 2. Promotion and Protection of Investments

(1) Each Contracting Party shall allow investments by investors of the other Contracting Party in accordance with its laws and encourage such investments, including facilitating the establishment of representative offices.

(2) Investments of investors of each Contracting Party shall at all times 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 or disposal of investments in its territory of investors of the other Contracting Party.

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

Article 3. Treatment of Investments

(1) Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever is the more favourable from the point of view of the investor.

(2) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.

Article 4. Exceptions

(1) The provisions of this Agreement relating to the granting of treatment not less favourable than that accorded to the investors of each Contracting Party or of any third State shall not be construed 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 resulting from:

(a) Membership of any existing or future Regional Economic Integration Organisation or customs union of which one of the Contracting Parties is or may become a party, or

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

Article 5. Expropriation and Compensation

(1) Investments of investors of each Contracting Party shall not be nationalized, 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 expropriations made in the public interest, on a basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation.

(2) Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment. The fair market value shall include but not exclusively the net asset value thereof as certified by an independent firm of auditors.

(3) Compensation shall be paid promptly and include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.

(4) The investor affected shall have a right to prompt review under the law of the Contracting Party making the expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its investment, and of the payment of compensation, in accordance with the principles set out in paragraph 1 of this Article.

(5) When a Contracting Party expropriates the assets of a company or an enterprise in its territory, which is incorporated or constituted under its law, and in which investors of the other Contracting Party have an investment, including through

shareholding, the provisions of this Article shall apply to ensure prompt, adequate and effective compensation for those investors for any impairment or diminishment of the fair market value of such investment resulting from the expropriation.

Article 6. 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 to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.

(2) Without prejudice to paragraph 1 of this Article, an investor of a Contracting Party who, in any of the situations referred to in that section, suffers a loss in the area of another Contracting Party resulting from paragraph 1 of this Article, an investor of a Contracting Party who, in any of the situations referred to in that section, suffers a loss in the area of another Contracting Party resulting from

(a) Requisitioning of its investment or part thereof by the latter's forces or authorities, or

(b) Destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

Shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.

Article 7. Transfer of Capital and Returns

(1) Each Contracting Party shall with respect to investments in its territory by investors of the other Contracting Party allow the free transfer into and out of its territory of:

(a) The initial capital and any additional capital for the maintenance and development of an investment;

(b) The invested capital or the proceeds from the sale or liquidation of all or any part of an investment;

(c) Interests, dividends, profits and other returns realized;

(d) Payments made for the reimbursement of the credits for investments, and interests due;

(e) Payments derived from rights enumerated in paragraph (1) (iv) of Article 1 of this Agreement;

(f) An appropriate proportion of the earnings and other remunerations of personnel engaged from abroad in connection with an investment;

(g) Compensation, restitution, indemnification or other settlement pursuant to Articles 5 and 6 of this Agreement.

(2) Transfers of payments under paragraph (1) of this Article shall be effected without delay and in a freely convertible currency.

(3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent exchange rate used for conversion of currencies into Special Drawing Rights

Article 8. Subrogation

If one Contracting Party or its designated agency makes a payment to its own investors under a guarantee it has accorded in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognize:

(a) The assignment, whether under the law or pursuant to a legal transaction, of any right or claim by the investor to the former Contracting Party or to its designated agency and

(b) That the former Contracting Party or its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor.

Article 9. Disputes between a Contracting Party and an Investor

(1) Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, as far as possible, be settled amicably.

(2) If such dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of six months, investor shall be entitled to submit the case either to:

(a) International arbitration of the International 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 D.C. on 18 March 1965 (ICSID Convention), or

(b) An arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. Arbitration Rules of the United Nations Commission on International Trade Law.

(3) With regard to the use of the ICSID Convention for arbitration purposes:

(a) The arbitral tribunal constituted pursuant to the said Convention shall reach its decisions on the basis of this Agreement, other Agreements concluded between the Contracting Parties, such rules of international law as may be applicable and the domestic law of the Contracting Party in which the investment in question is situated.

(b) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the said Convention. The award shall be enforceable according to domestic law of the Contracting Party in which the investment in question is situated.

(c) A Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

Article 10. Disputes between the Contracting Parties

(1) If any dispute arises between the Contracting Parties concerning the interpretation and application of this Agreement, the Contracting Party shall, as far as possible, try to settle any such dispute through negotiations.

(2) If such a dispute cannot be settled within six months from the beginning of the dispute, it shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way:

(a) Within three months of the receipt of the request for arbitration, each Contracting 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 Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within three months from the date of appointment of the other two members.

(b) If within any of the periods specified the necessary appointments have not been made, either Contracting 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 Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to 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 International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(c) The arbitral tribunal shall apply the provisions of this Agreement, other Agreements concluded between the Contracting Parties, and international law, and shall take into account, as may be appropriate, the domestic law of the Contracting Party in which the investment in question is situated. It shall reach its decision by a majority of votes. The arbitral tribunal determines its own procedure.

(d) The decisions of the tribunal shall be final and binding upon the Contracting Parties to the dispute.

(e) Each Contracting 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 Contracting Parties.

Article 11. Consultations

Each Contracting Party may propose to the other Party to consult on any matter affecting the implementation of this

Agreement. These consultations shall be held on the proposal of one of the Contracting Parties at a place and at a time agreed upon through diplomatic channels.

Article 12. Applicability of this Agreement

The provisions of this Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party prior to or after the entry into force of the Agreement.

Article 13. Amendments

At the time of entry into force of this Agreement or at any time thereafter the provisions of this Agreement may be amended. Every amendment shall be in writing and signed by both Contracting Parties. Such amendments shall enter into force when the Contracting Parties have notified each other that the constitutional requirements for the entry into force have been fulfilled.

Article 14. Territorial Extension

This Agreement shall not apply to the Faroe Islands and Greenland.

The provisions of this Agreement may be extended to the Faroe Islands and Greenland as may be agreed between the Contracting Parties in an Exchange of Notes.

Article 15. Entry Into Force

The Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force thirty days after the date of that last notification.

Article 16. Duration and Termination

(1) This Agreement shall remain in force for a period of ten years. It shall remain in force thereafter until either Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after the date of notification.

(2) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 12 shall remain in force for a further period of ten years from that date.

DONE at Harare on this 25th day of October 1996 in two originals in the Danish and English languages, both texts being equally authentic.

For the Government of the Republic of Zimbabwe

Dr. Herbert Murerwa

For the Government of The Kingdom of Denmark

Poul Nielson

PROTOCOL to the Agreement between the Government of the Republic of Zimbabwe and the Government of the Kingdom of Denmark on the Promotion and Mutual Protection of Investment

In signing the Agreement between the Government of the Republic of Zimbabwe and the Government of the Kingdom of Denmark on the promotion and mutual protection of investments, the undersigned representatives have agreed to the following provision relating to Article 7, which forms an integral part of the Agreement.

With regard to the Republic of Zimbabwe, the obligation to allow the free transfer of payments in connection with an investment must be used as follows:

The proceeds referred to in Article 7 (1) (b) shall be:

(a) Fully and freely transferable in the case of investments made on or after 1 May 1993.

(b) Transferable in installments over a period not exceeding 18 months in respect of investments made before 1 May 1993, provided that:

(i) At least 50% of the total proceeds must be transferable at the time of filing the transfer application, 25% of the proceeds shall be transferable 9 months after such application, and the remaining 25% of the proceeds shall be transferable 18 months after the application;

(ii) Each installment shall be transferred in a freely convertible currency at the exchange rate prevailing on the date of transfer.

(iii) Any remaining proceeds balance that is not transferred shall, until transferred as mentioned above, be withheld in Zimbabwe in an account expressed in local currency and shall deduct interest at the prevailing local interest rate.

(c) This provision shall be repealed by the Republic

Zimbabwe's repeal of the relevant foreign exchange control provisions that the Republic of Zimbabwe has committed to seek settlement as soon as possible.

Done at Harare on 25 October 1996 in two originals in the English and Danish languages, each text being equally authentic.

For the Government of the Republic of Zimbabwe

Dr. Herbert Murerwa

For the Government of the Kingdom of Denmark

Poul Nielson