

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

PREAMBLE

The Government of the Republic of South Africa and the Government of the Republic of the Congo (hereinafter jointly referred to as the "Parties" and in the singular as a "Party");

DESIRING to create favourable conditions for greater investment by investors of either Party in the territory of the other Party; and

RECOGNISING that the encouragement and reciprocal protection under this 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 indicates otherwise -

"Investment" means every kind of assets invested by the investor of either Party in the territory of the other Party and, in particular, though not exclusively, includes:

- (a) movable and immovable property and all other rights such as mortgages, liens, pledges, securities and all similar rights;
- (b) shares in and stock and debentures of a company and any other form of participation in a company;
- (c) claims to money, financial commitments owing or to any performance under contract having an economic value;
- (d) intellectual property rights, in particular copyrights, patents, utility model patents, registered designs, trade-marks, trade names, trade and business secrets, technical processes, know-how and goodwill;
- (e) rights or permits conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

and any change in the form in which assets are invested does not affect their character as investments, provided such change is not contrary to the domestic law in force in the countries of the Party in whose territory the investment has been made.

"Investor" means in respect to either Party -

- (a) all natural persons deriving their status as nationals of a Party in accordance with the domestic law in force in the country of that Party, who invest in the territory of the other Party; and
- (b) all juristic persons incorporated or constituted in accordance with the domestic law in force in the country of a Party, that has its seat, as well as effective economic activities in the territory of that Party and has made investments in the territory of the other Party;

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

"Territory" means the territory of a Party, including the territorial sea, air space and any maritime area situated beyond the

territorial sea of that Party, which has been or might in the future be designated under the domestic law in force in the country of the Party concerned, in accordance with international law, as an area within which the Party may exercise sovereign rights and jurisdiction..

Article 2. Scope of Agreement

This Agreement shall apply to all investment, whether made before or after the date of entry into force of this Agreement, but shall not apply to any dispute that arose before entry into force of this Agreement.

Article 3. Promotion of Investments

(1) 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 the powers conferred by the domestic law in force in its country, shall admit such investments.

(2) Each Party shall grant, in accordance with the domestic law in force in its country, the necessary permits in connection with such investments and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.

(3) In order to create favourable conditions for assessing the financial position and results of activities related to investments in the territory of a Party, that Party shall, notwithstanding its own requirements for bookkeeping and auditing, permit the investment to be subject also to bookkeeping and auditing according to standards which the investor is subjected to by his or its national requirements or according to internationally accepted standards (such as International Accountancy Standards (IAS) drawn up by the International Accountancy Standards Committee (IASA) and the Organization for the Harmonization of Business Law in Africa (OHADA)). The results of such accountancy and audit shall be freely transferable to the investor.

(4) The Parties, through the institutions responsible for investment promotion, may conduct periodic exchange of information to assess the implementation of this Agreement.

Article 4. Treatment of Investments

(1) Investments and returns of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. 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 investors of the other Party.

(2) Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.

(3) Each Party shall in its territory accord to investors of the other Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.

(4) The provisions to sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from -

(a) any existing or future customs union, free-trade area, common market, any similar international agreement or any interim arrangement leading up to such customs union, free-trade area or common market 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 domestic law relating wholly or mainly to taxation; or

(c) domestic 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 in its territory.

(5) If a Party accords special advantages to development finance institutions with foreign participation and established for the exclusive purpose of development assistance through mainly non-profit activities, that Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Party.

Article 5. Compensation for Losses

(1) If Investors of one Party suffer losses in respect of their investments 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, that Party shall be accorded by the other Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Party accords its own investors or investors of any third State.

(2) Without derogating from the provisions of sub-Article (1), investors of one Party who in any of the situations referred to in that sub-Article suffer losses in the territory of the other Party resulting from-

(a) requisitioning of their property by the forces or authorities of the latter Party; or

(b) destruction of their property by the forces or authorities of the latter 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.

Article 6. Compensation for Expropriation

(1) Investments of investors of either Party shall not be nationalized, expropriated or subjected to measures having effects equivalent to nationalization or expropriation (hereinafter referred to as expropriation) in the territory of the other Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.

(2) The compensation referred to in sub-Article (1) shall-

(a) be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier,

(b) include interest at a normal commercial rate until the date of payment, and

(c) be made without delay, and be effectively realizable.

(3) The investor affected by expropriation shall have a right, under the domestic law in force in the country of the Party making the expropriation, to prompt review by a court of law or other independent and impartial forum of that Party of his or its case and of the valuation of his or its investment in accordance with the principles referred to in sub-Articles (1) and (2).

Article 7. Transfer of Investments and Returns

(1) Each Party shall allow investors of the other Party the free transfer of payments relating to their investments and returns, including the -

(a) compensation paid pursuant to Articles 4 and 5;

(b) amounts intended for the payment of contractual obligations, including the amounts required for the repayment of loans, the payment of royalties for licenses, franchises, concessions and other similar rights;

(c) revenue from investments; and

(d) proceeds of the total or partial liquidation of the investments, including the appreciation or increase of the capital invested.

All transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is the more favourable to the investor.

Transfers shall be done in accordance with the domestic law of the country pertaining thereto. Such law shall not, however, regarding either the requirements or the application thereof, impair or derogate from free and undelayed transfer allowed in terms of sub-Articles (1) and (2).

Article 8. Settlement of Disputes between an Investor and a Party

(1) Any legal dispute between an investor of one Party and the other Party relating to an investment of the former which has

not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if the investor concerned 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 (ICSID) established by 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; or

(b) an international arbitrator or ad hoc arbitration tribunal to be established by agreement between the parties to the dispute.

(3) If after a period of three months from written notification of the investors decision to refer the dispute to international arbitration there is no agreement on one of the alternative procedures referred to in sub-Article (2), the dispute shall, at the request in writing of the investor concerned, be dealt with in terms of the procedure preferred by the investor.

(4) The decision in resolution of the dispute shall be derived by application of the domestic law, including the rules relating to conflicts of law in force, in the country of the 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.

(5) The award made by the arbitrator concerned in terms of sub-Articles (2) or (3) shall be binding on the parties to the dispute. Each Party shall give effect to the award in terms of the domestic law in force in its country.

Article 9. Disputes between the Parties

Any dispute between the Parties arising out of the interpretation or application of this Agreement shall be settled amicably through consultation or negotiations between the Parties.

Article 10. Subrogation

If a Party or its designated Agency makes a payment to its own investor under guarantee it has given in respect of an investment in the territory of the other Party, the latter Party shall recognize the assignment, whether by law or by legal transaction, to the former Party of all the rights and claims of the indemnified investor, and shall recognize that the former Party or its designate agency is entitled to exercise such rights and to enforce such claims by virtue of subrogation, to the same extent as the original investor.

Article 11. Application of other Rules

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

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

Article 12. Revision or Amendment

This Agreement may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through the diplomatic channel.

Article 13. Entry Into Force, Duration and Termination

(1) This Agreement shall enter into force on the date on which each Party has notified the other in writing through the diplomatic channel of its compliance with the constitutional requirements necessary for the implementation thereof. The date of entry into force shall be the date of the last notification.

(2) This Agreement shall remain in force for a period of 15 years, and shall be automatically renewable for further periods of 10 years, unless terminated in accordance with sub-Article (3).

(3) This Agreement may be terminated by either Party giving 12 months written notice in advance through the diplomatic channel to the other Party of its intention to terminate it.

(4) The termination of this Agreement shall not effect any investment made prior to the termination, and for the purpose of such investment, this Agreement shall remain in force for a further period of 10 years from the date of termination thereof.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed and sealed this Agreement in two originals in the English and French languages, all texts being equally authentic.

DONE at Brazzaville on this 1st day of December 2005.

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

MR. MANDISI MPAHLWA, MP

MINISTER OF TRADE AND INDUSTRY

FOR THE GOVERNMENT OF THE REPUBLIC OF CONGO

MR. PACIFIQUE ISSOIBEKA

MINISTER OF THE ECONOMY, FINANCE AND BUDGET

Protocol to the Agreement between the Government of the Republic of South Africa and the Government of the Republic of the Congo for the Promotion and Reciprocal Protection of Investments.

On the signing of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of the Congo for the Promotion and Reciprocal Protection of Investments, the undersigned representatives have, in addition, agreed on the following provisions, which shall constitute an integral part of the Agreement:

Ad Article 7

1. Foreign nationals who have resided in the Republic of South Africa for more than five years and who have completed the required exchange control formalities connected with immigration to South Africa, are, in terms of South African exchange control rules, deemed to have become permanently resident in the Republic of South Africa and the provision of transfer of investments and returns as contemplated in Article 6 shall not apply in their favour.

2. The exemptions to Article 7 as contemplated in paragraph 1 of this Protocol shall terminate automatically in respect of each restriction, upon removal of the relevant restriction as part of the domestic law of South Africa.

3. The Republic of South Africa shall make every effort to remove the said restrictions from their domestic law as soon as possible.

4. Paragraph 1 of this Protocol shall not apply to or restrict the transfer of compensation payments made pursuant to Articles 4 and 5 of this Agreement.

5. This Addendum shall enter into force at the same time as the Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed and sealed this Protocol in two originals in the English and the French languages, all texts being equally authentic.

DONE at Brazzaville on this 1st day of December 2005.

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

MR. MANDISI MPAHLWA, MP

MINISTER OF TRADE AND INDUSTRY

FOR THE GOVERNMENT OF THE REPUBLIC OF CONGO

MR. PACIFIQUE ISSOIBEKA

MINISTER OF THE ECONOMY, FINANCE AND BUDGET