BILATERAL AGREEMENT BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE REPUBLIC OF TUNISIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

PREAMBLE

The Republic of South Africa and the Republic of Tunisia, (hereinafter jointly referred to as the "Contracting Parties", and separately as a "Contracting Party");

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

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 Contracting Parties;

HEREBY AGREE as follows:

Article 1. Definitions

In this Agreement, unless the context indicates otherwise -

"investment" means every kind of asset constituted or recognized in the territory of a Contracting Party according to its laws and regulations and in particular, though not exclusively, includes -

(a) movable and immovable property as well as other rights such as mortgages, liens or pledges;

(b) shares in and stocks 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, in particular copyrights, 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 or reinvested does not affect their character as investments under this Agreement, on condition that this alteration shall be in accordance with laws and regulations of the host Contracting Party;

"investor" means in respect of either Contracting Party -

(a) natural persons having the nationality of a Contracting Party in accordance with the law of that Contracting Party; and

(b) any legal person, corporation, firm or association incorporated or constituted in accordance with the law of that Contracting 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 Contracting Party, including the territorial sea, air space and any maritime area over which the Contracting Party may exercise sovereign rights or jurisdiction in accordance with international law.

Article 2. Promotion of Investments

(1) Each Contracting Party shall, subject to its general policy in the field of investment, encourage investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its laws and regulations.

(2) Each Contracting Party shall endeavour to grant, in accordance with the laws and regulations of 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.

Article 3. Treatment of Investments

(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 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 investments and returns of investors of any third State.

(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.

(4) The provisions of subarticles (2) and (3) 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) any existing or future customs union, free trade area, common a market, any similar international agreement or any interim arrangement leading up to such customs union, free trade area, common market or any other form of regional economic organisation to which either of the Contracting Parties is or may become a party, or

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

(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 in its territory.

(5) If a Contracting 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 Contracting Party shall endeavour to accord such advantages to development finance institutions with foreign participation of the other Contracting Party established for the same exclusive purpose but shall not extend such advantages to other investors of the other Contracting Party.

Article 4. Compensation for Losses

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, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.

Article 5. Compensation for Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall 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, shall be made without delay, and be effectively realizable and shall include fair compensation for any delay in payment caused by the Contracting Party.

(2) The investor affected by the expropriation shall have a right, under the laws and regulations of the country of the Contracting Party making the expropriation, to prompt review, by the appropriate judicial or administrative authorities of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles referred to in subarticle (1).

Article 6. Transfers of Investments and Returns

(1) Each Contracting Party shall ensure to investors of the other Contracting Party the free transfer of payments in connection with investments and returns. Such payments shall include in particular, though not exclusively -

(a) the principal and additional amounts to maintain, develop or increase the investment;

(b) returns;

(c) proceeds obtained from the total or partial sale or disposal of investment, including the sale of shares;

(d) the amounts required for payment of expenses which arise from the operation of the investment, such as loans, repayments of royalties, management fees, licence fees or other similar expenses;

(e) compensation payable pursuant to Articles 4 and 5;

(f) payments arising out of the settlement of a dispute;

(g) the maximum amount of earnings or remuneration of personnel engaged from abroad working in connection with an investment permitted by the prevailing laws and regulations of the host Contracting Party.

(2) The Contracting Parties shall further ensure that transfers referred to in subarticle 1 of this Article shall be made without any restriction or delay, in a freely convertible currency and at the prevailing market rate of exchange applicable on the date of transfer and shall be effectively realisable and immediately transferable.

(3) The free transfer must conform to the legal procedures of currency transfer of the country concerned. Such procedures must not impair or derogate from the free and undelayed transfer allowed in terms of subarticles (1) and (2).

Article 7. Settlement of Disputes between an Investor and a Contracting Party

(1) Any legal dispute between an investor of one Contracting Party and the other Contracting Party relating to an investment of the former shall be settled amicably between the two parties concerned.

(2) If the dispute has not been settled within six (6) months, from the date at which it was raised in writing the dispute may, at the choice of the investor, be submitted -

(a) to the competent courts of the Contracting Party in whose territory the investment is made: or

(b) to arbitration by 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

(c) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) If the investor submits the dispute to a competent court of the host Contracting Party or to international arbitration mentioned in subarticle 2 of this Article, the choice shall be final.

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

(5) The award shall be final and binding on the parties to the dispute and shall be executed according to national law.

Article 8. Disputes between the Contracting Parties

(1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through negotiations between the Governments of the two Contracting Parties.

(2) If the dispute cannot thus be settled within a period of six months, following the date on which such negotiations were requested by either Contracting Party, 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. 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 two 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.

(4) If within the periods specified in subarticle (3) of this Article 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 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 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 Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall decide the dispute according to this Agreement and the principles of international law. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. 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 cost shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties. The tribunal shall determine its own procedures, unless the Contracting Parties agree otherwise.

Article 9. Subrogation

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

Article 10. Application of other Rules

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

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

Article 11. Scope of the Agreement

(1) This Agreement shall apply to all investments made in accordance with the laws and regulations of the host Contracting Party, 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.

(2) Notwithstanding the provisions of subarticle 1 of this Article, this Agreement shall apply to all investments made in accordance with the laws and regulations in force in the territory of the Republic of Tunisia after the 1st day of January 1957 and existing at the entry into force of this Agreement.

Article 12. Entry Into Force, Duration and Termination

(1) The Contracting Parties shall notify each other in writing through the diplomatic channel when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force thirty (30) days after receipt of the last notification.

(2) This Agreement shall remain in force for a period often (10) years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination through the diplomatic channel to the other Party.

(3) In respect of investments made prior to the date when the notice of termination becomes effective, the provisions of

Articles 1 to 11 remain in force with respect to such investments for a further period of ten (10) years from that date.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective governments, have signed this Agreement in two originals in the English and Arabic languages, both texts being equally authentic. In case of any divergence in interpretation, the English text shall prevail.

DONE at Cape Town on this 28 th day of February, 2002

FOR THE REPUBLIC OF SOUTH AFRICA

Alec Erwin

Minister of Trade and Industry

FOR THE REPUBLIC OF TUNISIA

Tahar Sioud

Minister of Trade

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

On the signing of the Agreement between the Republic of South Africa and the Republic of Tunisia 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:

1. With regard to the Republic of South Africa the provisions relating to transfer under Article 6 of the Agreement do not apply to natural persons who are foreign nationals and who have applied for permanent residency connected with immigration to South Africa, and who are, after having completed the required exchange control formalities, accordingly deemed to be permanent residents of South Africa.

2. The exemptions to Article 6 as contemplated in Articlel of this Protocol shall terminate automatically in respect of each restriction, upon removal of the relevant restriction as part of the laws and regulations of South Africa.

3. The Republic of South Africa shall make every effort to remove the said restrictions from their laws and regulations 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 the Agreement.

5. The terms of the Agreement may be amended by negotiated agreement between the Contracting Parties. The Contracting Parties shall notify each other in writing through the diplomatic channel when their respective constitutional requirements for entry into force of such amendment have been fulfilled. Such amendment shall enter into force thirty (30) days after receipt of the last notification.

6. This Protocol shall enter into force at the same time as the Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective governments, have signed this Protocol in two originals in the English and Arabic languages, both texts being equally authentic. In case of any divergence in interpretation, the English text shall prevail.

DONE at Cape Town on this 28 th day of February 2002

FOR THE REPUBLIC OF SOUTH AFRICA

Alec Erwin

Minister of Trade and Industry

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