

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Government of the Republic of South Africa and the Government of the Federal Democratic Republic of Ethiopia (hereinafter jointly referred to as the Parties" and separately as a Party");

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

RECOGNISING that the mutual encouragement and 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 the Parties;

PROMOTING the interest of both Parties and beneficiaries on a mutually advantageous basis;

SECURING an overall balance of rights and obligations between and among investors and host countries;

ACKNOWLEDGING the right of the Parties to regulate, on a non-discriminatory basis, the manner and flow of investments within their territories in order to meet national policy objectives;

RECOGNISING that investment has a vital role in ensuring sustainable economic growth and development, when accompanied by appropriate domestic policies;

HEREBY AGREE as follows:

Article 1. Definition

In this Agreement, unless the context indicates otherwise -

"investment" means assets invested or acquired by an investor of one Party in the territory of the other Party, through-

The total ownership of enterprise or the participation in the ownership of an enterprise which gives a significant grade of influence to the investors in the management of the enterprise. Such assets shall include-

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

(ii) shares, stock and other forms of equity participation in an enterprise;

(iii) claims to money or to performance under contract having an economic value;

(iv) 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;

(v) rights conferred by law or contract to carry out economic and commercial activities, such as concessions, licences, authorisations and permits,

But shall exclude assets not acquired in the expectation, or not used for the purpose of, economic activity or other business purpose and shall also exclude portfolio investments such as stocks or shares of companies in a Party acquired for speculative purposes and held for a short-term by investors of the other Party. A change in the legal form in which assets are invested or reinvested does not affect their character as investments under this Agreement.

"investor" means-

(i) natural persons being nationals of a Party, deriving their status as nationals from the domestic law of that Party, and who have made investments in the territory of the other Party; and

(ii) a legal entity being a company, any legal person, corporation, firm or association incorporated or constituted in accordance with the domestic law 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-

(i) in respect of the Republic of South Africa, the territory shall include the territorial sea, air space and any maritime area situated beyond its territorial sea, which has been or might in the future be designated under its domestic law, in accordance with international law, as an area within which it may exercise sovereign rights and jurisdiction.

(ii) in respect of the Federal Democratic Republic of Ethiopia, the territory under which it exercises sovereign rights or jurisdiction in accordance with its domestic law and in terms of international law.

Article 2. 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 powers conferred by the domestic law of its territory, shall admit such investments.

(2) Each Party shall grant, in accordance with the domestic law of its territory, 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 (IAS A)). The results of such accountancy and audit shall be freely transferable to the investor.

Article 3. 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 as favourable as 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 of 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 any domestic law 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 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 4. Compensation for Losses

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

(2) Without derogating from the provisions of sub-Article (1) of this Article, investors of one Party who in any of the situations referred to in sub-Article (1) 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 5. Compensation for Expropriation

(1) (a) Investments of investors of either Party shall not be nationalised or expropriated (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.

(b) The compensation contemplated in paragraph (a) 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 include interest at a normal commercial rate until the date of payment, shall be made without delay, and be effectively realizable.

(2) The investor affected by the expropriation shall have a right, under the domestic law in the territory 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 sub-Article (1).

Article 6. Transfers of Investments and Returns

(1) Each Party shall allow investors of the other Party free transfer of payments relating to their investments and returns, including compensation paid in terms of Articles 4 and 5.

(2) 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.

(3) 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 the free and undelayed transfer allowed in terms of sub-Articles (1) and (2).

Article 7. 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, at the choice of the investor, after a period of six months from written notification of a claim, be submitted to either the competent courts of law of the Party in whose territory the investment has been made or international arbitration. Once the investor concerned has made a choice, the choice shall be final.

(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.

As long as this requirement is not met, each Party agrees that the dispute may be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID; 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 investor's 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 written request 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 the territory 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 under its domestic law.

Article 8. Disputes between the Parties

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

Article 9. Subrogation

If a 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 Party, the latter Party shall recognise 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 designated 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 domestic law in the territory 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 11. Scope of the Agreement

This Agreement shall apply to all investments, 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 12. Entry Into Force, Validity, Amendment and Termination

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

(2) This Agreement shall remain in force for a period of fifteen (15) 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.

(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.

(4) The terms of this Agreement may be amended by negotiated agreement between the Parties. The Parties shall notify each other when their respective constitutional requirements for entry into force of such amendment have been fulfilled.

Such amendment shall enter into force on the date of receipt of the last notification.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed and sealed this Agreement in two originals in the English language, both texts being equally authentic.

DONE at..... on this.....day of..... 2008.

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

FOR THE GOVERNMENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

Protocol to the Agreement between the Government of the Republic of South Africa and the Government of the Federal Democratic Republic of Ethiopia 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 Federal Democratic Republic of Ethiopia 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 6

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 the Republic of 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 provisions for transfers of investments and returns as contemplated in Article 6 shall not apply in their favour.
2. The exemptions to Article 6 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 the Republic 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. The provisions for transfer of investments and returns as stipulated under Article 6 of this Agreement shall not apply to foreign nationals who have applied for and acquired the status of domestic investors in the Federal Democratic Republic of Ethiopia.
5. Paragraph 1 and 4 of this Protocol shall not apply to or restrict the transfer of compensation payments made pursuant to Articles 4 and 5 of this Agreement.
6. This Protocol shall upon signature enter into force at the same time as the Agreement.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed and sealed this Protocol in two originals in the English language, both texts being equally authentic.

DONE at..... on this.....day of..... 2008.

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

FOR THE GOVERNMENT OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA