

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA AND THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON THE PROMOTION AND THE MUTUAL PROTECTION OF INVESTMENTS

THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA AND THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (hereinafter referred to as the "Contracting Parties"),

DESIRING to create favourable conditions for greater economic co-operation between the Contracting Parties, and

RECOGNIZING that the promotion and reciprocal protection of investments may strengthen the readiness for investments by investors of one Contracting Party in the territory of the other Contracting Party and thereby make an important contribution to the strengthening of economic relations between the Contracting Parties.

HAVE AGREED AS FOLLOWS:

Article 1. Definitions

In this Agreement, unless the context otherwise indicates

(1) "investment" means every kind of asset which in particular, though not exclusively includes:

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

(b) Shares and other types of participation in business enterprises;

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

(d) Intellectual and industrial property rights, as defined in the Agreement of the World Intellectual Property Organization, including, but not limited to copyrights, trademarks, patents, industrial designs and technical processes, know-how, trade secrets, trade names and goodwill;

(e) Business concessions under public law to search for, cultivate, extract or exploit natural resources.

Any change in the form in which assets are invested in accordance with the legislation of either Contracting Party does not affect their character as investments.

(2) "investor" means

In respect of the Republic of Austria

(a) Any natural person who is a citizen of the Republic of Austria and makes an investment in the other Contracting Party's territory;

(b) Any juridical person, or partnership, constituted in accordance with the legislation of the Republic of Austria, having its seat in the territory of the Republic of Austria and making an investment in the other Contracting Party's territory;

(c) Any juridical person, or partnership, constituted in accordance with the legislation of a third Party in which any natural person who is a citizen of the Republic of Austria or any juridical person, or partnership, constituted in accordance with the legislation of the Republic of Austria, having its seat in the territory of the Republic of Austria exercises a dominant influence;

In respect of the Republic of South Africa

(a) Any natural person who is a national of the Republic of South Africa and makes an investment in the other Contracting Party's territory;

(b) Any juridical person, or partnership, constituted in accordance with the legislation of the Republic of South Africa having its seat in the territory of the Republic of South Africa and making an investment in the other Contracting Party's territory;

(c) Any juridical person, or partnership, constituted in accordance with the legislation a third Party in which any natural person who is a citizen of the Republic of South Africa or any juridical person, or partnership constituted in accordance with the legislation of the Republic of South Africa having its seat in the territory of the Republic of South Africa exercises a dominant influence.

(3) "returns" means the amounts yielded by an investment, and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and licence and other fees.

(4) "expropriation" also comprises a nationalization or any other measure having equivalent effect.

(5) "associated activities" means activities connected with an investment and undertaken in accordance with the applicable laws and regulations of the host Contracting Party.

(6) "without undue delay" means such period as is normally required for the completion of the necessary formalities for the transfer of payments. The said period shall commence on the day on which the request for transfer has been submitted and may on no account exceed one month.

(7) "territory" means the territory of a Contracting Party, including the territorial sea and any maritime area situated beyond the territorial sea of that Contracting Party, which has been designated under the national law of the Contracting Party concerned, in accordance with international law, as an area within which the Contracting Party may exercise sovereign rights and jurisdiction.

Article 2. Promotion and Protection of Investments

(1) Each Contracting Party shall in its territory promote, as far as possible, investments and associated activities of investors of the other Contracting Party and shall admit them in accordance with its legislation.

(2) Investments and associated activities referred to in paragraph (1) of Article 1 and their returns shall be accorded fair and equitable treatment and shall enjoy the full protection of the present Agreement. The same applies, without prejudice to the provisions of paragraph (1), also to the returns of such investments in case of reinvestment of such returns.

Article 3. Treatment of Investments

(1) Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than that accorded to its own investors and their investments or to investors of any third State and their investments.

(2) The provisions of paragraph (1) shall not be construed as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the present or future benefit of any treatment, preference or privilege resulting from

(a) Any customs union, common market, free trade area or membership of an economic community;

(b) Any international agreement, international arrangement or domestic legislation regarding taxation; or

(c) Any regulation to facilitate frontier traffic.

(3) If a Contracting Party accords special advantages to foreign development finance institutions, established for the exclusive purpose of development assistance through mainly nonprofit activities, that Contracting Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Contracting Party.

Article 4. Compensation for Damage or Loss

(1) When investments made by investors of either Contracting Party suffer damage or loss owing to war or other armed conflict, a state of national emergency, revolt, civil disturbances, insurrection, riot or other similar events in the territory of the other Contracting Party, they shall be accorded by the latter Contracting Party, treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that the latter Contracting Party accords to its

own investors or investors of any third state, whichever is the most favourable.

(2) Without prejudice to paragraph 1, investors of one Contracting Party who in any of the events referred to in that paragraph suffer damage or loss in the territory of the other Contracting Party resulting from:

- (a) Requisitioning of their property or part thereof by the forces or authorities of the latter Contracting Party;
- (b) Blocking of vital supplies by the latter Contracting Party; or
- (c) Destruction of their property or part thereof 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 prompt restitution or prompt and adequate compensation where restitution is not possible for the damage or loss sustained. Resulting payments shall be made in a freely convertible currency and be freely transferable without undue delay.

Article 5. Expropriation and Compensation

(1) Investments of investors of either Contracting Party shall not be expropriated in the territory of the other Contracting Party except for a public purpose, under due process of law, on a non discriminatory basis, and against compensation.

(2) Such compensation shall be at least equal to the fair market-value of the investment expropriated, as determined in accordance with recognized principles of valuation such as, the capital invested, replacement value, appreciation, current returns, goodwill and other relevant factors, immediately before or at the time when the decision to expropriate was announced or when the impending expropriation became publicly known, whichever is the earlier. In the event that the payment of compensation is delayed, such compensation shall be paid in an amount which would put the investor in a position not less favourable than the position in which he would have been had the compensation been paid immediately on the date of expropriation. To effect this goal the compensation shall include interest at the prevailing commercial rate, which shall in no event be less than the current London Interbank Offered Rate or equivalent, from the date of expropriation until the date of payment. The compensation finally determined shall be promptly paid to the investor in any freely convertible currency and be freely transferable without undue delay. Provision for the determination and payment of such compensation shall be made in an appropriate manner not later than at the moment of the expropriation.

(3) Where a Contracting Party expropriates the assets of a company which is considered as a company of that Contracting Party pursuant to paragraph (2) of Article 1 of the present Agreement and in which an investor of the other Contracting Party owns shares, it shall apply the provisions of paragraph (1) so as to ensure due compensation to that investor.

(4) The investor shall be entitled to have the legality of the expropriation reviewed by the competent authorities of the Contracting Party making the expropriation.

(5) The investor shall be entitled to have the amount and the provisions for the payment of the compensation reviewed either by the competent authorities of the Contracting Party making the expropriation or by an international arbitral tribunal in accordance with Article 9 of the present Agreement.

Article 6. Transfers

(1) Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer, without undue delay in any freely convertible currency, of payments in connection with an investment, which shall include in particular but not exclusively:

- (a) The capital and additional amounts for the maintenance, expansion or extension of the investment;
- (b) Amounts assigned to cover expenses relating to the management of the investment;
- (c) The returns;
- (d) The repayment of loans;
- (e) The proceeds from total or partial liquidation or sale of the investment;
- (f) Compensation paid pursuant to Articles 4 and 5 of the present Agreement;
- (g) Payments arising from the settlement of a dispute.

(2) The payments referred to in this Article shall be effected at the exchange rates prevailing on the day of the transfer of payments in the territory of the Contracting Party from which the transfer is made.

(3) The rates of exchange shall be determined according to the quotations on the stock exchanges on the territory of each Contracting Party or in the absence of such quotations by the respective banking system in the territory of each of the Contracting Parties.

Article 7. Subrogation

Where a Contracting Party or an institution authorized by it makes payments to its investor by virtue of a guarantee for an investment in the territory of the other Contracting Party, the other Contracting Party shall, without prejudice to the rights of the investor of the first Contracting Party under Article 9 of the present Agreement, and to the rights of the first Contracting Party under Article 10 of the present Agreement recognize the assignment to the first Contracting Party of all rights and claims of this investor under a law or pursuant to a legal transaction. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party to any such rights or claims which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to the Contracting Party concerned by virtue of such assignment, Article 5 and Article 6 of the present Agreement shall apply *mutatis mutandis*.

Article 8. Other Obligations

(1) If the provisions of law of either Contracting Party of international obligations existing at present or established hereafter between the Contracting Parties in addition to the present Agreement, contain a rule, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rule shall to the extent that it is more favourable prevail over the present Agreement.

(2) Each Contracting Party shall observe any contractual obligation it may have entered into with an investor of the other Contracting Party with regard to investments approved by it in its territory.

Article 9. Settlement of Investment Disputes

(1) Any legal dispute between a Contracting Party and an investor of the other Contracting Party arising from an investment shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute referred to in paragraph (1) cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures:

(a) To conciliation or arbitration by the International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18th 1965, when each Contracting Party has become a party to said Convention. As long as this requirement is not met, each Contracting 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. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such disputes to this Centre. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted; or

(b) To arbitration by three arbitrators in accordance with the UNCITRAL arbitration rules, as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such disputes to the arbitral tribunal mentioned

(3) The award shall be final and binding; it shall be executed according to national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

(4) A Contracting Party which is a party to a dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise the objection that the investor who is the other party to the dispute has received by virtue of a guarantee indemnity in respect of all or some of its losses.

Article 10. Settlement of Disputes between the Contracting Parties

- (1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled through amicable negotiations.
- (2) If a dispute referred to in paragraph (1) cannot be settled within 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 two 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 two months from the date of appointment of the other two members.
- (4) If within the periods specified in paragraph (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 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.
- (5) The tribunal shall establish its own rules of procedure.
- (6) The arbitral tribunal shall reach its decision according to the present Agreement and pursuant to the generally recognized rules of international law. It shall reach its decision by a majority of votes which decision shall be final and binding.
- (7) Each Contracting Party shall bear the costs of its own member and of its legal representation in the arbitration proceedings. The costs of the chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The tribunal may, however, in its award determine another distribution of costs.

Article 11. Application of the Agreement

This Agreement shall apply to all investments made in the territory of a Contracting Party in accordance with its legislation by investors of the other Contracting Party prior to as well as after entry into force of this Agreement.

Article 12. Entry Into Force and Duration

- (1) This Agreement is subject to ratification and shall enter into force on the first day of the third month that follows the month during which the instruments of ratification have been exchanged.
- (2) This Agreement shall remain in force for a period of ten years; it shall be extended thereafter for an indefinite period and may be terminated in writing through diplomatic channels by either Contracting Party giving twelve months' notice.
- (3) In respect of investments made prior to the date of termination of the present Agreement the provisions of Article 1 to 10 of the present Agreement shall continue to be effective for a further period of twenty years from the date of termination of the present Agreement.

DONE in Pretoria, on November 28, 1996, in duplicate, in the German and English languages, both texts being equally authentic.

For the Government of the Republic of Austria:

H. Farnleitner

For the Government of the Republic of South Africa:

A. Erwin

PROTOCOL

Protocol to the Agreement between the Government of the Republic of Austria and the Government of Republic of South Africa on the promotion and mutual protection of investments.

At the signing of the Agreement between the Government of the Republic of Austria and the Government of the Republic of South Africa on the promotion and mutual protection of investments the undersigned representatives have agreed that the following additional provisions would form an integral Part of the agreement :

To Articles 4, 5 and 6:

The provisions relating to transfer under Articles 4, 5 and 6 on the restrictions on the exchange of foreign currency applicable at the time of the entry into force of the Agreement for foreign nationals are therefore not applicable to the Austrian nationals who have their permanent residence in the Republic of South Africa and immigrated there.

The exceptions to Articles 4, 5 and 6 provided for under this Protocol shall automatically be canceled in the event of any restriction being lifted, the relevant restriction shall automatically be canceled. The Republic of South Africa will make every effort to suspend restrictions on foreign exchange as soon as possible.

Signed in Pretoria, on November 28, 1996, in two originals in German and English languages, both texts being authentic.

For the Government of the Republic of Austria:

H. Farnleitner

For the Government of the Republic of South Africa:

A. Erwin