AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GREAT SOCIALIST PEOPLES LIBYAN ARAB JAMAHIRIYA FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Government of the Republic of South Africa and the Great Socialist Peoples Libyan Arab Jamahiriya, (hereinafter jointly referred to as the "Parties", and in the singular as a "Party");

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

RECOGNISING that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiatives and will increase prosperity in the territories of both Parties;

HEREBY AGREE as follows:

Article 1. Definitions

In this Agreement, unless the context otherwise indicates -

"investment" means every kind of asset and in particular, though not exclusively, includes -

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

(b) shares in and stock and debentures of a company and any other form of participation in a company;

(c) claims with regard to money, or any performance under contract having an economic value;

(d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trade-marks, tradenames, trade and business secrets, technical processes, knowhow and goodwill; and

(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.

"investor" means in respect to either Party -

(a) the nationals of a Party, being those natural persons deriving their status as nationals of a Party from the law of that Party; and

(b) the companies of a Party, being any legal person, corporation, firm or association incorporated or constituted in accordance with the law of that Party;

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

"territory" means the territory of a Party, including the territorial sea 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 of the Party concerned, in accordance with international law, as an area within which the Party may exercise sovereign rights and jurisdiction.

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 country, admit such investments.

(2) Each Party shall, in accordance with the domestic law of its country, grant 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, her 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). The results of such bookkeeping and audit shall be freely available 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 means of 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 of subArticles (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, similar international agreement or interim arrangement leading 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, arrangement or domestic legislation 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 which was 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-profitable 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 subArticle (1), investors of one Party who in any of the situations referred to in subArticle (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 required by the necessity of the situation,

Shall be accorded restitution or full compensation. This compensation shall be convertible and freely transferable to the Party carrying the loss, without any restriction or delay.

Article 5. Expropriation

(1) Investments of investors of either Party shall not be nationalised, expropriated or be subjected to measures having effects equivalent to nationalisation or 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) Such compensation shall at least be equal to the market value of the investment immediately before the expropriation or before the impending expropriation became public knowledge, whichever occurred first, and shall -

(a) include interest at a normal commercial rate until the date of payment;

(b) be made without delay; and

(c) be effectively realizable.

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

Article 6. Transfers 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 compensation paid pursuant to the provisions 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 conform to the legal procedure of currency transfer of the country concerned. However such procedures shall not impair or derogate from the free and undelayed transfer allowed in terms of subArticles (1) and (2).

(4) 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 regarding 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 provisions for transfers of investments and returns as contemplated in sub Article 6 shall not apply in their favour.

(5) The exemptions to Article 6 as contemplated in subArticle (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.

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

(7) The provisions of subArticle (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.

Article 7. Settlement of Disputes between Investor and 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 for international arbitration if the investor concerned so wishes.

(2) Where the dispute is referred for 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: Provided that each Party has become a party to the said Convention; or

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

(3) If either Party has not become a party to the Convention mentioned in subArticle (2)(a), both the investor and the Party to the dispute agree that the dispute be settled under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID.

(4) If after a period of three months upon written notification of the investor's decision to refer the dispute for international arbitration there is no agreement on one of the alternative procedures referred to in subArticles (2) or (3) the dispute shall, at the written request of the investor concerned, be dealt with in terms of the procedure preferred by the investor.

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

(6) The award made by the arbitrator concerned in terms of subArticles (2), (3) or (4) shall be binding on the parties to the dispute and shall be executed according to the domestic law of the host Party.

Article 8. Settlement of Disputes between Parties

(1) Any dispute between the Parties arising out of the interpretation or application of this Agreement should, if possible, be settled amicably through consultations or negotiation between the Parties.

(2) If the dispute cannot thus be settled within a period of sixth months following the date on which such consultations or negotiations were requested by either Party, it shall, upon the request of either Party, be submitted to an arbitral tribunal.

(3) The arbitral tribunal referred to in subArticle (2) shall, for each individual case, be constituted in the following manner:

(a) Within two months upon receipt of the request for arbitration, each Party shall appoint a member of its choice to the tribunal;

(b) The two members referred to in paragraph (a) shall then select a national for a third State whom, upon approval by the two Parties, shall, within a period of two months from the date of appointment of the two members referred to in paragraph (a), be appointed as chairperson of the tribunal.

(4) If, within the periods specified in subArticle (3), the necessary appointments have not been made, either 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 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 Party or is also prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either 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 Parties. Each Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings. The cost of the Chairperson and the remaining cost shall be borne in equal parts by the Parties. The tribunal may, however, in its decision direct that a higher proportion of the costs shall be borne by one of the two Parties. The tribunal shall determine its own procedures, unless the Parties agree otherwise.

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 of 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 in this Agreement, such rules shall to the extent that they are more favourable prevail, over the provisions of 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 which arose before the entry into force of this Agreement.

Article 12. Entry Into Force, Amendment, Duration and Termination

(1) The Parties shall notify each other when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the date of receipt of the last notification.

(2) This Agreement shall remain in force for a period of twenty years, whereafter it shall continue to remain in force until the expiration of twelve months from the date on which either Party has given written notice in advance through the diplomatic channel to the other Party of its intention to terminate this Agreement.

(3) In respect of investments made prior to the date upon which 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 twenty 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 by their respective Governments, have signed and sealed this Agreement in two originals in the English and Arabic languages, all texts being equally authentic. In the event of any divergence, the English texts shall prevail.

DONE at..... on this .... day of..... 2002

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

FOR THE GREAT SOCIALIST PEOPLES LIBYAN ARAB JAMAHIRIYA