

Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments

The Republic of Zimbabwe and The Federal Republic of Germany

DESIRING to intensify economic co-operation between both States,

INTENDING to create favourable conditions for investments by nationals and companies of either State in the territory of the other State,

RECOGNISING that the encouragement and legal protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations,

Have agreed as follows:

Article 1. Definition

For the purpose of this Agreement:

1. the term "investments" comprises every kind of asset, in particular:

- a) Movable and immovable property as well as any other rights in rem such as mortgages, liens and pledges;
- b) Shares in companies and other kinds of interests in companies;
- c) Claims to money or to any performance under contract having an economic value;
- d) Intellectual property rights such as copyrights, patents, utility models, industrial designs, trade marks, trade names, trade and business secrets, technical processes, know-how, and goodwill;
- e) Business concessions under public law, including rights to search for, extract and exploit natural resources;

And any alteration of the form in which assets are invested shall not affect their classification as investments;

2. The term "returns" means the amounts yielded by an investment over any given period such as profit, dividends, interest, royalties or fees;

3. The term "nationals" means:

- a) In respect of the Republic of Zimbabwe: natural persons deriving their status as nationals of Zimbabwe from the laws in force in Zimbabwe;
- b) In respect of the Federal Republic of Germany: Germans within the meaning of the Basic Law of the Federal Republic of Germany;

4. The term "companies" means:

- a) In respect of the Republic of Zimbabwe: corporations, firms and associations incorporated or constituted under the laws in force in Zimbabwe and having their principal place of business in Zimbabwe;
- b) In respect of the Federal Republic of Germany: any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit;

5. The term "laws" includes legislation as well as administrative rules and regulations which are officially published and

issued to the general public.

Article 2. Promotion and Protection of Investments

(1) Each Contracting Party shall in its territory promote as far as possible investments by nationals or companies of the other Contracting Party and admit such investments into its territory in accordance with its laws. It shall in any case accord such investments fair and equitable treatment.

(2) Neither Contracting Party shall in any way impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.

Article 3. National Treatment and Most Favoured Nation Treatment

(1) Neither Contracting Party shall in its territory subject investments owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activities in connection with their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) The treatment granted under this Article shall not relate to the benefit of any treatment, preference or privilege which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs, monetary, or economic union or a common market or free trade area.

(4) The treatment granted under this Article shall not relate to any benefit which either Contracting Party accords to nationals or companies of third States by virtue of a double taxation agreement or any other agreement regarding matters of taxation.

Article 4. Protection and Safeguards

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to any other measure the effect of which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except for a public purpose and against prompt, adequate, and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or impending expropriation, nationalisation or other comparable measure becomes publicly known. Such compensation shall be paid without delay, shall carry the usual commercial interest until the date of payment and shall be effectively realisable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalisation, or other comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalisation or other comparable measure and the amount of such compensation shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or revolt shall be accorded treatment no less favourable by such other Contracting Party than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State, whichever is the more favourable, as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

Article 5. Transfer of Funds

Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, in particular:

a) Of the principal and additional amounts to establish, maintain or increase the investment;

- b) Of the returns;
- c) In repayment of loans;
- d) Of royalties and fees for the rights referred to in Article 1 1. d);
- e) Of the proceeds from the liquidation or sale of the whole or any part of the investment;
- f) Of the compensation provided for in Article 4.

Article 6. Currency of Payment and Rate of Exchange

(1) Transfers under Article 4, 5, or 7 shall be made without delay in a freely convertible currency at the rate of exchange applicable on the date of transfer.

(2) This rate of exchange shall not substantially deviate from the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversion of the currencies concerned into Special Drawing Rights.

Article 7. Subrogation

If either Contracting Party makes a payment to any of its nationals or companies under a guarantee which it has assumed in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 10, recognise the assignment, whether by operation of law or pursuant to a legal transaction, of any right or claim of such national or company to the former Contracting Party. The latter Contracting Party shall also recognise the subrogation of the former Contracting Party to any such assigned right or claim which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments, Articles 4 and 5 shall, mutatis mutandis, apply to any such assigned right or claim.

Article 8. More Favourable Treatment

(1) If the laws 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 a provision, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that it is more favourable prevail over this Agreement.

(2) Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party.

Article 9. Scope of Application

This Agreement shall apply to all investments made before or after its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party which have been or are:

- a) Made in accordance with the laws of the latter Contracting Party; and
- b) Specifically approved by the competent authorities of the latter Contracting Party at the time of their admission.

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 by the governments of the two Contracting Parties.

(2) If a dispute cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be constituted ad hoc as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the governments of the two Contracting Parties. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contracting Party has notified the other Contracting Party that it intends to submit the dispute to an arbitral tribunal.

(4) If the necessary appointments have not been made within the periods specified in paragraph (3) above, either Contracting Party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the 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 Court 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 reach its decisions on the basis of this Agreement, any treaties in force between the Contracting Parties and rules of general international law, and shall take into account, as may be appropriate, the domestic law of the Contracting Party in the territory of which the investment in question is situated.

(6) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its representatives at the arbitration proceedings. The cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may make a different decision concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

(7) If any dispute between the Contracting Parties is referred to arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18th March, 1965, pursuant to Article 11 of this Agreement, the provisions of this Article 10 shall not apply to any such dispute except:

a) Where any award or decision rendered under the said Convention pursuant to Article 11 of this Agreement is not complied with; or

b) In the case of any assignment or subrogation referred to in Article 7 of this Agreement.

Article 11. Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

(1) Disputes between a Contracting Party and a national or company of the other Contracting Party concerning an investment of such national or company in the territory of the former Contracting Party shall as far as possible be settled amicably between the parties concerned.

(2) If the dispute is not settled within six months of the date when it is raised by one of the parties in dispute, it shall, at the request of the national or company concerned, be submitted for arbitration. Each Contracting Party hereby consents to submit the dispute to arbitration. Unless the parties in dispute agree otherwise, the dispute shall be submitted for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18th March, 1965. The arbitral tribunal constituted pursuant to the said Convention shall reach its decisions on the basis of this Agreement, any treaties in force between the Contracting Parties, such rules of general international law as may be applicable, and the domestic law of the Contracting Party in the territory of which the investment in question is situated.

(3) The award shall be binding on the parties and shall not be subject to any appeal or remedy other than that provided for in the said Convention. The award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment in question is situated.

(4) During arbitration proceedings or proceedings for the enforcement of an award, the Contracting Party involved in the dispute shall not raise the objection that the national or company concerned has received compensation under an insurance contract in respect of all or part of his or its damage or losses.

Article 12. Entry Into Force, Duration and Termination

(1) This Agreement shall be ratified and shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall be extended thereafter for an indefinite period unless denounced in writing by either Contracting Party twelve months before its expiration. After the expiry of the period of ten years, this Agreement may be denounced at any time by either Contracting Party giving twelve months written notice to the other Contracting Party.

(2) In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 11 shall continue to be effective for a further period of twenty years from the date of termination of this Agreement.

(3) This Agreement shall remain in force notwithstanding any conflict which may arise between the Contracting Parties, without prejudice to their right to take such temporary measures as are permitted under the general rules of international

law. Such measures shall be abrogated at the latest on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations exist between the Contracting Parties at that time.

Done at Harare on 29 September, 1995 in two originals in the English and German languages, both texts being equally authentic.

For the Republic of Zimbabwe

For the Federal Republic of Germany

On signing the Agreement between the Republic of Zimbabwe and the Federal Republic of Germany, concerning the Encouragement and Reciprocal Protection of Investments, the undersigned plenipotentiaries have, in addition, agreed on the following provisions, which shall be regarded as an integral part of the said Agreement:

(1) Ad Article 1

- a) Returns from the investment, and, in the event of their reinvestment, the returns therefrom, shall enjoy the same protection as the investment.
- b) Without prejudice to any other method of determining nationality, in particular, any person in possession of a national passport issued by the competent authorities of the Contracting Party concerned shall be deemed to be a national of that Party.

(2) Ad Article 2

- a) Investments made in accordance with the laws of either Contracting Party within the territory of that Contracting Party by nationals or companies of the other Contracting Party shall enjoy the full protection of the Agreement
- b) The Agreement shall also apply to the areas of the exclusive economic zone and the continental shelf insofar as international law permits the Contracting Party concerned to exercise sovereign rights or jurisdiction in these areas.

(3) Ad Article 3

- a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of Article 3 (2): the management, maintenance, use, enjoyment and disposal of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures necessary for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.
- b) The provisions of Article 3 do not oblige a Contracting Party to extend to natural persons or companies resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to natural persons and companies resident in its territory.
- c) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to employed persons of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.

(4) Ad Article 4

A claim to compensation shall also exist when, as a result of State intervention in the company in which the investment is made, its economic substance is severely impaired.

(5) Ad Article 5

With respect to the Republic of Zimbabwe the obligation to guarantee the free transfer of payments in connection with an investment shall apply as follows:

The proceeds referred to in paragraph (e) of Article 5 shall be:

- a) Fully and freely transferable in the case of investments made on or after the 1st May, 1993.
- b) Transferable by way of instalments over a period not exceeding 18 months in the case of investments made before the 1st May, 1993: provided that
 - i) Not less than 50% of the total proceeds shall be transferable at the time when the application for the transfer is made, 25% of the proceeds shall be transferable 9 months after such application, and the remaining 25% of the proceeds shall be transferable 18 months after such application;
 - ii) Each instalment shall be transferred in a freely convertible currency at the rate of exchange applicable on the date of transfer; and
 - iii) Any remaining balance of the proceeds which is not transferred shall, until it is transferred as aforesaid, be retained in Zimbabwe in an account denominated in local currency and shall accrue interest at the prevailing local market rate.

(6) Ad Article 6

A transfer shall be deemed to have been made "without delay" within the meaning of Article 6 (1) if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.

(7) Ad Article 7

Whenever goods or persons connected with an investment are to be transported, each Contracting Party shall neither exclude nor hinder transport enterprises of the other Contracting Party and shall issue such permits as may be required to carry out such transport.

Done at Harare on 29 September 1995 in two originals in the English and German languages, both texts being equally authentic.

For the Republic of Zimbabwe

For the Federal Republic of Germany