

AGREEMENT BETWEEN THE KINGDOM OF SWEDEN AND THE REPUBLIC OF SOUTH AFRICA ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

The Kingdom of Sweden and the Republic of South Africa (hereinafter referred to as the "Contracting Parties"),

DESIRING to intensify economic cooperation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;

RECOGNISING that the promotion and reciprocal protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives;

HAVE AGREED as follows:

Article 1. Definitions

In this Agreement, unless the context otherwise indicates:

(1) "investment" shall mean any kind of asset, invested by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the other Contracting Party, and shall include in particular, though not exclusively -

(a) Movable and immovable property as well as any other right in rem such as mortgage, lien, pledge and usufruct;

(b) Shares and other kinds of interest in companies;

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

(d) Intellectual property rights, technical processes, trade names, know-how, goodwill and other similar rights; and

(e) Business concessions conferred by law, administrative decisions or under contract, including concessions to search for, develop, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. Goods, that under a leasing agreement are placed at the disposal of a lessee in the territory of one Contracting Party by a lessor being an investor of the other Contracting Party, shall be treated no less favourably than an investment. (2) "investor" shall mean -

(a) Any natural person who is a national of a Contracting Party in accordance with its laws;

(b) Any legal person constituted in the territory of a Contracting Party and having its seat in the territory of that Contracting Party; and

(c) Any legal person not established under the laws of a Contracting Party but effectively controlled by natural persons, as defined in (a) above, or by legal persons, as defined in (b) above.

(3) "returns" shall mean the amounts yielded by an investment and in particular, though not exclusively, include profit, interest, capital gains, dividends, royalties or fees.

(4) "territory" shall mean the territory of each Contracting Party as well as the maritime areas, including the exclusive economic zone, the seabed and subsoil, over which the Contracting Party concerned exercises, in accordance with international law, sovereign rights or jurisdiction.

Article 2. Promotion and Protection of Investments

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

(2) Subject to the laws relating to the entry and sojourn of aliens, individuals working for an investor of one Contracting Party, as well as members of their household, shall be permitted to enter into, remain on and leave the territory of the other Contracting Party for the purpose of carrying out activities associated with investments in the territory of the latter Contracting Party.

(3) In order to create favourable conditions for assessing the financial position and results of activities related to investments in the territory of one of the Contracting Parties, that Contracting Party shall notwithstanding its own national requirements for bookkeeping and auditing permit the investment to be subjected also to bookkeeping and auditing according to standards which the investor is subjected to by his national requirements or according to internationally accepted standards (e.g. International Accounting Standards (IAS) drawn up by the International Accounting Standards Committee (IASC)). The result of such accountancy and audit shall be freely transferable to the investor.

(4) The investments made in accordance with the laws of the Contracting Party in whose territory they are undertaken, shall enjoy the full protection of this Agreement.

Article 3. Treatment of Investments

(1) Each Contracting Party shall apply to investments made in its territory by investors of the other Contracting Party treatment which is no less favourable than that accorded to investments made by its own investors or by investors of third States, whichever is the more favourable.

(2) Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof as well as the acquisition of goods and services and the sale of their production, through unreasonable or discriminatory measures.

(3) Notwithstanding the provisions of Paragraph (1) of this Article, a Contracting Party which has concluded or may conclude an agreement regarding the formation of a customs union, a common market or a free-trade area shall be free to grant more favourable treatment to investments by investors of the State or States which are also parties to the aforesaid agreements, or by investors of some of these States.

(4) The provisions of Paragraph (1) of this Article shall not be construed so as to oblige one Contracting Party to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

(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 not be obliged to accord such advantages to development finance institutions or other investors of the other Contracting Party.

Article 4. Expropriation and Compensation

(1) Neither Contracting Party shall take any measures depriving, directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:

(a) The measures are taken in the public interest and under due process of law;

(b) The measures are distinct and not discriminatory; and

(c) The measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency.

(2) The provisions of Paragraph (1) of this Article shall also apply to the returns from an investment as well as, in the event of liquidation, to the proceeds from the liquidation.

(3) Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting Party due to war or other armed conflict, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party, with respect to restitution, indemnification, compensation or other settlement, treatment which is no less favourable than that accorded to its own investors or to investors of any third State. Resulting payments shall be transferable without delay in a freely convertible currency.

Article 5. Transfers

(1) Each Contracting Party shall allow without delay the transfer in a freely convertible currency of payments in connection with an investment, such as -

(a) The returns;

(b) The proceeds from a total or partial sale or liquidation of any investment by an investor of the other Contracting Party;

(c) Funds in repayment of loans; and

(d) The unspent earnings of individuals, not being its nationals, who are allowed to work in connection with an investment in its territory and other amounts appropriated for the coverage of expenses connected with the management of the investment.

(2) Any transfer referred to in this Agreement shall be effected at the market rate of exchange existing on the day of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent 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 legislation pertaining thereto. Such legislation shall not, regarding either the requirements or the application thereof, impair or derogate from the undelayed transfer allowed in terms of this Agreement.

Article 6. Subrogation

If a Contracting Party or its designated agency makes a payment to any of its investors under a guarantee it has granted 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 8, recognise the transfer of any right or title of such an investor to the former Contracting Party or its designated agency and the subrogation of the former Contracting Party or its designated agency to any such right or title.

Article 7. Disputes between an Investor and a Contracting Party

(1) Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.

(2) Each Contracting Party hereby consents to submit to the International Centre for Settlement of Investment Disputes (ICSID) for settlement by conciliation or arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States any such dispute which has not been settled within six months, following the date on which the dispute has been raised by either party. If the parties to such a dispute have different opinions as to whether conciliation or arbitration is the more appropriate method of settlement, the investor shall have the right to choose.

(3) If ICSID should not be available each Contracting Party hereby consents that the dispute, at the choice of the investor, shall be submitted for settlement by binding arbitration either to the Additional Facility of ICSID or to an ad hoc arbitral tribunal to be set up under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(4) Any arbitration under paragraph (3) shall be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.

(5) The consent given by each Contracting Party in paragraph (2) and (3) and the submission of the dispute by an investor under the said paragraphs shall satisfy the requirement of -

(a) Chapter II of the Washington Convention (Jurisdiction of ICSID) and the Additional Facility Rules for written consent of the parties to a dispute;

(b) Article 1 of the UNCITRAL Arbitration Rules for an agreement in writing on referral to arbitration by the parties to a contract; and

(c) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, for "an agreement in writing-.

(6) Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Contracting Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.

(7) In any proceeding involving an investment dispute, a Contracting Party shall not assert, as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

Article 8. Disputes between the Contracting Parties

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

(2) If the dispute cannot thus be settled within six months, following the date on which such negotiations were requested by either Contracting Party, it shall at the request of either Contracting Party be submitted to an arbitration tribunal.

(3) The arbitration tribunal shall be set up from case to case, each Contracting Party appointing one member. These two members shall then agree upon a national of a third State as their chairman, to be appointed by the Governments of the two Contracting Parties. The members shall be appointed within two months, and the chairman within four months, from the date upon which either Contracting Party has advised the other Contracting Party of its wish to submit the dispute to an arbitration tribunal.

(4) If the time limits referred to in Paragraph (3) of this Article have not been complied with, either Contracting Party may, in the absence of any other relevant arrangement, invite the President of the International Court of Justice to make the necessary appointments.

(5) If the President of the International Court of Justice is prevented from discharging the function provided for in Paragraph (4) of this Article or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Contracting Party, the most senior member of the Court who is not incapacitated or a national of either Contracting Party shall be invited to make the necessary appointments.

(6) The arbitration tribunal shall reach its decision by a majority of votes, the decision being final and binding on the Contracting Parties. Each Contracting Party shall bear the cost of the member appointed by that Contracting Party as well as the costs for its representation in the arbitration proceedings; the cost of the chairman as well as any other costs shall be borne in equal parts by the two Contracting Parties. The arbitration tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the Contracting Parties. In all other respects, the procedure of the arbitration tribunal shall be determined by the tribunal itself.

Article 9. Application of the Agreement

(1) This Agreement shall apply to all investments, whether made before or after its entry into force, but shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force.

(2) This Agreement shall in no way restrict the rights and benefits which an investor of one Contracting Party enjoys under national or international law in the territory of the other Contracting Party.

Article 10. Entry Into Force, Duration, Amendment and Termination

(1) The Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the first day of the second month following the date of receipt of the last notification.

(2) This Agreement shall remain in force for a period of twenty years. Thereafter it shall remain in force until the expiration of twelve months from the date that either Contracting Party in writing notifies the other Contracting Party of its decision to terminate this Agreement.

(3) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 9 shall remain in force for a further period of twenty years from that date.

(4) The terms of this agreement may be amended by negotiated agreement between the Contracting Parties, and any such

amendment shall be effected by exchange of Notes between them through the diplomatic channel. The date of entry into force shall be the date of last notification.

IN WITNESS whereof the undersigned, duly authorised thereto, have signed this Agreement.

Done at on 1998 in two originals in the English language.

Protocol to the Agreement between the Kingdom of Sweden and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments

On the signing of the Agreement between the Kingdom of Sweden and the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, the undersigned representatives have agreed on the following provisions which shall constitute an integral part of the Agreement:

With reference to Article 5 -

The provisions relating to transfers under Article 5 shall not be applicable to nationals of the Kingdom of Sweden to the extent that such provisions are incompatible with the foreign exchange restrictions on foreign nationals with permanent residence in and having immigrated to the Republic of South Africa in force on the date of entry into force of the Agreement.

The exemptions to Article 5 provided for in terms of this Protocol shall automatically terminate for each restriction upon removal of such restriction.

The terms of this Protocol shall not apply to or restrict the transfer of compensation payments made pursuant to Article 4 of this Agreement.

Done at on 1998 in two originals in the English language.