

# **AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF CANADA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS**

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

RECOGNIZING that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them,

HAVE AGREED AS FOLLOWS:

## **Article I. Definitions**

For the purpose of this Agreement:

(a) "enterprise" means

(i) Any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and

(ii) A branch of any such entity;

(b) "existing measure" means a measure existing at the time this Agreement enters into force;

(c) "financial service" means a service of a financial nature, including insurance, and a service incidental or auxiliary to a service of a financial nature;

(d) "financial institution" means any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Contracting Party in whose territory it is located;

(e) "intellectual property rights" means copyright and related rights, trademark rights, patent rights, rights in layout designs of semiconductor integrated circuits, trade secret rights, plant breeders' rights, rights in geographical indications and industrial design rights;

(f) "investment" means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

(i) Movable and immovable property and any related property rights, such as mortgages, liens or pledges;

(ii) Shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;

(iii) Money, claims to money, and claims to performance under contract having an economic value;

(iv) Goodwill;

(v) Intellectual property rights;

(vi) Rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.

But does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

Any change in the form of an investment does not affect its character as an investment.

(g) "investor" means

In the case of Canada:

(i) Any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws; or

(ii) Any enterprise incorporated or duly constituted in accordance with applicable laws of Canada,

Who makes the investment in the territory of the Republic of South Africa and who does not possess the citizenship of the Republic of South Africa; and

In the case of the Republic of South Africa:

(i) Any natural person possessing the citizenship of or permanently residing in the Republic of South Africa in accordance with its laws; or

(ii) Any enterprise incorporated or duly constituted in accordance with applicable laws of the Republic of South Africa,

Who makes the investment in the territory of Canada and who does not possess the citizenship of Canada;

(h) "measure" means any measure by a Contracting Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form;

(i) "returns" means all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income;

(j) "state enterprise" means an enterprise that is governmentally-owned or controlled through ownership interests by a government;

(k) "territory" means in respect of the country concerned, the territory of that country, as well as those maritime areas, including the seabed and subsoil adjacent to the outer limit of the territorial sea, over which that country exercises, in accordance with international law, sovereign rights and jurisdiction for the purpose of preservation, exploration and exploitation of the natural resources of such areas;

## **Article II. Establishment, Acquisition and Protection of Investments**

(1) Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.

(2) Each Contracting Party shall accord investments or returns of investors of the other Contracting Party;

(a) Fair and equitable treatment in accordance with principles of international law, and

(b) Full protection and security.

(3) Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by:

(a) Its own investors or prospective investors; or

(b) Investors or prospective investors of any third state.

(4)

(a) Decisions by either Contracting Party, pursuant to measures not inconsistent with this Agreement, as to whether or not to permit an acquisition shall not be subject to the provisions of Articles XIII or XV of this Agreement.

(b) Decisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XIII of this Agreement.

### **Article III. Most-favoured-nation (mfn) Treatment after Establishment and Exceptions to Mfn**

- (1) Each Contracting Party shall grant to investments, or returns of investors of the other Contracting Party, treatment no less favourable than that which, in like circumstances, it grants to investments or returns of investors of any third State.
- (2) Each Contracting Party shall grant investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments or returns, treatment no less favourable than that which, in like circumstances, it grants to investors of any third State.
- (3) Subparagraph (3)(b) of Article II and paragraphs (1) and (2) of this Article do not apply to treatment by a Contracting Party pursuant to any existing or future bilateral or multilateral agreement;
- (a) Establishing, strengthening or expanding a free trade area or customs union;
- (b) Negotiated within the framework of the GATT or its successor organization and liberalizing trade in services; or GATT or its successor organization and liberalizing trade in services; or
- (c) Relating to:
- (i) Aviation;
- (ii) Telecommunications transport networks and telecommunications transport services;
- (iii) Fisheries;
- (iv) Maritime matters, including salvage; or
- (v) Financial services.

### **Article IV. National Treatment after Establishment and Exceptions to National Treatment**

- (1) Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments.
- (2) Subparagraph (3)(a) of Article II, paragraph (1) of this Article, paragraphs (1) and (2) of Article V, and paragraphs 4 and 5 of Article IX do not apply to:
- (a)
- (i) Any existing non-conforming measures maintained within the territory of a Contracting Party; and
- (ii) Any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors;
- (b) The continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); subparagraph (a);
- (c) An amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with those obligations;
- (d) The right of each Contracting Party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement. Annex to this Agreement.

### **Article V. Other Measures**

- (1)
- (a) A Contracting Party may not require that an enterprise of that Contracting Party, that is an investment under this Agreement, appoint to senior management positions individuals of any particular nationality.

(b) A Contracting Party may require that a majority of the board of directors, or any committee thereof, of an enterprise that is an investment under this Agreement be of a particular nationality, or resident in the territory of the Contracting Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

(2) Neither Contracting Party may impose any of the following requirements in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:

(a) To export a given level or percentage of goods;

(b) To achieve a given level or percentage of domestic content;

(c) To purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(e) To transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or acting in a manner not inconsistent with other provisions of this Agreement.

(3) Subject to its laws, regulations and policies relating to the entry of aliens, each Contracting Party shall grant temporary entry to citizens of the other Contracting Party employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge.

## **Article VI. Miscellaneous Exceptions**

(1)

(a) In respect of intellectual property rights, a Contracting Party may derogate from Articles III and IV in a manner that is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15th April, 1994. Articles III and IV in a manner that is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15th April, 1994.

(b) The provisions of Article VIII do not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15th April, 1994.

(2) The provisions of Articles II, III, IV and V of this Agreement do not apply to: Articles II, III, IV and V of this Agreement do not apply to:

(a) Procurement by a government or state enterprise;

(b) Subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance;

(c) Any measure denying investors of the other Contracting Party and their investments any rights or preferences provided to the aboriginal peoples of Canada; or

(d) Any current or future foreign aid program to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits;

(e) Special advantages accorded by a Contracting Party to development finance institutions with foreign participation and established for the exclusive purpose of development assistance through mainly non-profit activities.

(3) Investments in cultural industries are exempt from the provisions of this Agreement. "Cultural industries" means natural persons or enterprises engaged in any of the following activities:

(a) The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

(b) The production, distribution, sale or exhibition of film or video recordings;

- (c) The production, distribution, sale or exhibition of audio or video music recordings;
- (d) The publication, distribution, sale or exhibition of music in print or machine readable form; or
- (e) Radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

## **Article VII. Compensation for Losses**

Investors of one Contracting Party who suffer losses because their investments or returns on the territory of the other Contracting Party are affected by an armed conflict, a national emergency or a natural disaster on that territory, shall be accorded by such latter Contracting Party, in respect of restitution, indemnification, compensation or other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State.

## **Article VII. Expropriation**

(1) Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.

(2) The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment or returns in accordance with the principles set out in this Article.

## **Article IX. Transfer of Funds**

(1) Each Contracting Party shall guarantee to an investor of the other Contracting Party the unrestricted transfer of investments and returns. Without limiting the generality of the foregoing, each Contracting Party shall also guarantee to the investor the unrestricted transfer of:

- (a) Funds in repayment of loans related to an investment (it is noted that in the Republic of South Africa foreign currency loans must be approved in advance by the South African Reserve Bank);
- (b) The proceeds of the total or partial liquidation of any investment;
- (c) Wages and other remuneration accruing to a citizen of the other Contracting Party who was permitted to work in connection with an investment in the territory of the other Contracting Party;
- (d) Any compensation owed to an investor by virtue of Articles VII or VIII of the Agreement.

(2) Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the market rate of exchange applicable on the date of transfer.

(3) Notwithstanding paragraphs (1) and (2), a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) Bankruptcy, insolvency or the protection of the rights of creditors;
- (b) Issuing, trading or dealing in securities;
- (c) Criminal or penal offenses;
- (d) Reports of transfers of currency or other monetary instruments; or
- (e) Ensuring the satisfaction of judgments in adjudicatory proceedings.

(4) Neither Contracting Party may require its investors to transfer, or penalize its investors that fail to transfer, the returns attributable to investments in the territory of the other Contracting Party.

(5) Paragraph (4) shall not be construed to prevent a Contracting Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph (3).

(6) With regard to the Republic of South Africa the provisions concerning transfers under Article VIII and this Article do not apply to citizens of Canada — who have obtained permanent residence in the Republic of South Africa and —who, by completing the required Exchange Control Form, have decided to immigrate to the Republic of South Africa once a five year period from the date of immigration has elapsed. This provision shall terminate upon removal of the relevant Exchange Control limitations by the Republic of South Africa.

## **Article X. Subrogation**

(1) If a Contracting Party or any agency thereof makes a payment to any of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Contracting Party shall recognize the validity of the subrogation in favour of such Contracting Party or agency thereof to any light or title held by the investor.

(2) A Contracting Party or any agency thereof which is subrogated to the rights of an investor in accordance with paragraph (1) of this Article, shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment concerned and its related returns. Such rights may be exercised by the Contracting Party or any agency thereof or by the investor if the Contracting Party or any agency thereof so authorizes.

## **Article XI. Investment In Financial Services**

(1) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as:

(a) The protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

(b) The maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) Ensuring the integrity and stability of a Contracting Party's financial system.

(2) Notwithstanding paragraphs (1), (2) and (4) of Article IX, and without limiting the applicability of paragraph (3) of Article IX, a Contracting Party may prevent or limit transfers by a financial institution to, or for the benefit of, an affiliate of or person related to such institution or provider, through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions.

(3)

(a) Where an investor submits a claim to arbitration under Article XIII, and the disputing Contracting Party invokes paragraphs (1) or (2) above, the tribunal established pursuant to Article XIII shall, at the request of that Contracting Party, seek a report in writing from the Contracting Parties on the issue of whether and to what extent the said paragraphs are a valid defence to the claim of the investor. The tribunal may not proceed pending receipt of a report under this Article.

(b) Pursuant to a request received in accordance with subparagraph 3(a), the Contracting Parties shall proceed in accordance with Article XV, to prepare a written report, either on the basis of agreement following consultations, or by means of an arbitral panel. The consultations shall be between the financial services authorities of the Contracting Parties. The report shall be transmitted to the tribunal, and shall be binding on the tribunal.

(c) Where, within 60 days of the referral by the tribunal, no request for the establishment of a panel pursuant to subparagraph 3(b) has been made and no report has been received by the tribunal, the tribunal may proceed to decide the matter. subparagraph 3(b) has been made and no report has been received by the tribunal, the tribunal may proceed to decide the matter.

(4) Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute.

(5) Sub-paragraph 3(b) of Article II does not apply in respect of financial services. Sub-paragraph 3(b) of Article II does not apply in respect of financial services.

## **Article XII. Taxation Measures**

(1) Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

(2) Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention apply to the extent of the inconsistency.

(3) Subject to paragraph (2), a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor, jointly determine that the measure does not contravene such agreement.

(4) Article VIII may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation.

(5) If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs (3) and (4) within six months after being notified, the investor may submit its claim for resolution under Article XIII.

### **Article XIII. Settlement of Disputes between an Investor and the Host Contracting Party**

(1) Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.

(2) If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

(3) An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:

(a) The investor has consented in writing thereto;

(b) The investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;

(c) If the matter involves taxation, the conditions specified in paragraph 5 of Article XIII have been fulfilled; and paragraph 5 of Article XIII have been fulfilled; and

(d) Not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

(4) The dispute may, at the election of the investor concerned, be submitted to arbitration under:

(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or

(b) The Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

(c) An international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(5) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

(6)

(a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or the consents given under paragraph (12), shall satisfy the requirements for:

(i) Written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and

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

(b) Any arbitration under this Article shall be held in a State that is a party to the New York Convention, and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of that Convention. New York Convention, and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of that Convention.

(7) A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

(8) A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation.

(9) A tribunal may award, separately or in combination, only:

(a) Monetary damages and any applicable interest;

(b) Restitution of property, in which case the award shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

(10) An award of arbitration shall be final and binding and shall be enforceable in the territory of each of the Contracting Parties.

(11) Any proceedings under this Article are without prejudice to the rights of the Contracting Parties under Articles XIV and XV. Articles XIV and XV.

(12)

(a) A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case

(i) Any award shall be made to the affected enterprise;

(ii) The consent to arbitration of both the investor and the enterprise shall be required;

(iii) Both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind; and

(iv) The investor may not make a claim if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

(b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:

(i) A consent to arbitration by the enterprise under 12(a)(ii); and

(ii) A waiver from the enterprise under 12(a)(iii).

## **Article XIV. Consultations and Exchange of Information**



Either Contracting Party may request consultations on the interpretation or application of this Agreement. The other Contracting Party shall give sympathetic consideration to the request. Upon request by either Contracting Party, information shall be exchanged on the measures of the other Contracting Party that may have an impact on new investments, investments or returns covered by this Agreement.

## **Article XV. Disputes between the Contracting Parties**

(1) Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall, whenever possible, be settled amicably through consultations.

(2) If a dispute cannot be settled through consultations, it shall, at the request of either Contracting Party, be submitted to an arbitral panel for decision.

(3) An arbitral panel shall be constituted for each dispute. Within two months after receipt through diplomatic channels of the request for arbitration, each Contracting Party shall appoint one member to the arbitral panel. The two members shall then select a national of a third State who, upon approval by the two Contracting Parties, shall be appointed Chairman of the arbitral panel. The Chairman shall be appointed within two months from the date of appointment of the other two members of the arbitral panel.

(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 the necessary appointments. If the President is a national of either Contracting 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 Contracting Party or 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 arbitral panel shall determine its own procedure. The arbitral panel shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Unless otherwise agreed, the decision of the arbitral panel shall be rendered within six months of the appointment of the Chairman in accordance with paragraphs (3) or (4) of this Article.

(6) Each Contracting Party shall bear the costs of its own member of the panel and of its representation in the arbitral proceedings; the costs related to the Chairman and any remaining costs shall be borne equally by the Contracting Parties. The arbitral panel may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties.

(7) The Contracting Parties shall, within 60 days of the decision of a panel, reach agreement on the manner in which to resolve their dispute. Such agreement shall normally implement the decision of the panel. If the Contracting Parties fail to reach agreement, the Contracting Party bringing the dispute shall be entitled to compensation or to suspend benefits of equivalent value to those awarded by the panel.

## **Article XVI. Transparency**

(1) The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations in subparagraph (3)(a) of Article II, Article IV or paragraphs (1) and (2) of Article V.

(2) Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise be available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them.

## **Article XVII. Application and General Exceptions**

(1) This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement.

(2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

(3) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised

restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) Necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) Necessary to protect human, animal or plant life or health; or
- (c) Relating to the conservation of living or non-living exhaustible natural resources.

## **Article XVIII. Entry Into Force**

(1) Each Contracting Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications.

(2) This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVII inclusive of this Agreement shall remain in force for a period of fifteen years.

DONE in duplicate at Toronto, this 27th day of November, 1995, in the English and French language, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA

FOR THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

## **ANNEX**

(1) In accordance with Article IV, subparagraph 2(d), Canada reserves the right to make and maintain exceptions in the sectors or matters listed below:

- social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care);
- services in any other sector;
- government securities — as described in SIC 8152;
- residency requirements for ownership of oceanfront land;
- measures implementing the Northwest Territories and the Yukon Oil and Gas Accords.

(2) The national treatment exceptions of the Republic of South Africa shall be subject to mutual agreement prior to the entry into force of this Agreement.

(3) For the purpose of this Annex, "SIC" means, with respect to Canada, Standard Industrial Classification numbers as set out in Statistics Canada, Standard Industrial Classification, fourth edition, 1980.